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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
LAURA DICOSOLA,)	of Du Page County.
)	
Petitioner-Appellee,)	
)	
and)	No. 05—D—1371
)	
DONATO DICOSOLA,)	Honorable
)	James J. Konetski,
Respondent-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

Held: The trial court did not err when it entered a default against respondent, as it was not merely a penalty for his tardiness on one court date but rather reflected his lack of diligence on several occasions; respondent could not challenge the trial court's modification of the dissolution judgment because he did not show that he was adversely affected by the modification.

On April 29, 2008, the circuit court of Du Page County entered an order of default against respondent, Donato DiCosola, in the dissolution of his marriage to the petitioner, Laura DiCosola. The trial of the matter was already underway and the trial court had ordered the parties to appear on that date for the resumption of petitioner's examination of respondent under section 2—1102 of the

Code of Civil Procedure (735 ILCS 5/2—1102 (West 2008)). Respondent arrived at court approximately 10 to 20 minutes late, but the trial court had already granted petitioner's motion to default him. And by the time the trial court was made aware of respondent's arrival, petitioner had already left, so the trial could not proceed as scheduled. Respondent unsuccessfully moved to vacate the default, arguing, *inter alia*, that his tardiness was the unavoidable result of car trouble. The trial court conducted a prove-up on May 22, 2008, and on June 13, 2008, the trial court entered a judgment dissolving the parties' marriage. Petitioner filed a timely posttrial motion, and the trial court entered an order modifying the judgment. On appeal, respondent contends that the trial court erred in defaulting him and in modifying the judgment. We affirm.

Petitioner filed her petition to dissolve the parties' marriage in June 2005. Charter One Bank and the Village of Addison were granted leave to intervene to pursue claims relating to certain real property owned by the parties. During the period prior to entry of the judgment of dissolution, respondent was represented by a total of four attorneys. One of those attorneys, Maryellen Provenzale, was granted leave to withdraw for health reasons. The others, William G. Clark, Jr., John G. Provenzale, and David C. Goldstein, were granted leave to withdraw because of irreconcilable differences with respondent. During the course of the proceedings, respondent failed to appear for several court dates. On September 27, 2005, a hearing was scheduled on petitions filed by petitioner for temporary relief and the issuance of a rule to show cause against respondent (whose first attorney had withdrawn about a month earlier). Over petitioner's objection the trial court granted respondent's motion for a continuance to have an attorney present, and the hearing was rescheduled for October 5, 2005. Although the continuance was at respondent's request, he failed to appear either in person or through counsel. In an unsuccessful motion to vacate an order entered

in his absence, he claimed that his failure to appear was based on his good-faith belief that the October 5, 2005, hearing had been rescheduled. In May 2007, respondent filed several *pro se* motions. The motions were scheduled to be heard on May 15, 2007. On that date, the trial court entered an order reciting that respondent “has failed to timely appear to present his motions[,] the same having been set specially at [his] request.”

The matter proceeded to trial in mid-November 2007. On November 15, 2007, the trial court entered an order indicating that the trial was recessed due to respondent’s “failure to timely appear for trial.” On November 30, 2007, the trial court continued the trial to December 5, 2007, through December 7, 2007. On December 6, 2007, respondent failed to appear. His attorney advised the trial court that his absence was due to illness. On December 11, 2007, the trial court entered an order suspending the trial indefinitely. The trial court also took the unusual step of appointing an attorney, Kenneth Hubbard, to serve as guardian of respondent’s person for purposes of evaluating, *inter alia*, respondent’s ability to understand the dissolution proceedings, cooperate with counsel, and continue with trial. The record suggests that the evaluation was prolonged as a result of respondent’s failure to consistently attend appointments with the guardian and with a doctor selected to assist in the evaluation.

On April 8, 2008, the trial court discharged the guardian and ordered that the trial resume on April 16, 2008, “with the continued examination” of respondent “as an [adverse] party.” An order entered on that day indicates that respondent was absent and that the trial court had been advised that respondent was incarcerated in the Cook County jail. The order further states that petitioner’s “motion for default is denied at this time.” The case was continued to April 23, 2008. Respondent appeared in court that day and the trial was continued to April 29, 2008, at 1:30 p.m. for the

resumption of respondent's testimony. The trial court ordered the parties to appear on that date. The trial court had previously scheduled hearings on summary judgment motions filed by the intervenors for the same date and time. When the case was called on April 29, 2008, petitioner and her attorney were present, as were the intervenors' attorneys. Respondent's attorney was also present, but respondent was not. The trial court granted petitioner's oral motion for entry of an order of default against respondent and continued the matter to the following day for a prove-up. The court then took a short recess to enable the parties to confer about the intervenors' summary judgment motions. After the recess, respondent's attorney advised the trial court that respondent was present in court, having arrived about 15 minutes late due to car trouble. Petitioner was no longer present, although respondent's attorney advised the trial court that petitioner was aware of respondent's arrival before she departed. The trial court refused to vacate the default order.

Thereafter, respondent's attorney filed an emergency motion to withdraw and respondent filed a *pro se* emergency motion to vacate the default order, to which he attached an affidavit stating that, while driving to court, he experienced a problem with his vehicle's clutch and was forced to travel at a greatly reduced speed. He noted that his absence did not prevent the trial court from proceeding on the intervenors' summary judgment motions and that the trial could have proceeded when he arrived if petitioner had stayed at court when she was aware that respondent had arrived. He argued that the order of default was an overly severe penalty for his tardiness. On April 30, 2008, the trial court granted respondent's attorney's motion to withdraw. The trial court continued the prove-up to May 22, 2008. The trial court advised respondent that he would be permitted to present argument following the prove-up but would not be permitted to call any witnesses unless the order of default was vacated. The trial court subsequently denied the motion to vacate the default order.

On May 22, 2008, respondent requested that the trial court appoint a guardian for him. He stated that his ears were badly infected and that he could not hear anything. The trial court refused to appoint a guardian and respondent left the courtroom, indicating that he was going to the hospital. The prove-up proceeded in respondent's absence, and the judgment of dissolution was entered on June 13, 2008.

Marital property awarded to petitioner included, *inter alia*, the marital residence, the parties' interest in certain real property in Arizona, all bank accounts, retirement accounts, and pensions held in her name, and her clothing and personal effects. Marital property awarded to respondent included, *inter alia*, an automobile body repair business operated by respondent, the property where the business was located, interests in other commercial and residential real estate, several snowmobiles, boats, and personal water craft, all bank accounts, retirement accounts, and pensions held in his name, and his clothing and personal effects. Each party was awarded one-half of the remaining proceeds from the sale of certain vacation property. The trial court ordered all other personal property to be sold, and it awarded the parties equal shares of the proceeds. The personal property to be sold included furniture, furnishings, sports memorabilia, and collectible items, as well as numerous motor vehicles that were "used and possessed by" respondent during the course of the proceedings. The trial court subsequently modified the judgment to provide that the parties would "each retain as their separate property those items of personal property presently in their control and possession."

Initially, we note that, when a party has appeared in an action and has filed an answer to a plaintiff's complaint, a default judgment is generally not an appropriate sanction for the failure to appear at trial (*In re Marriage of Drewitch*, 263 Ill. App.3d 1088, 1094 (1994)), *unless* the party has

been served with a notice pursuant to Supreme Court Rule 237(b) (eff. July 1, 2005) (*Nasrallah v. Davilla*, 326 Ill. App. 3d 1036, 1045 (2001)). Although the record is not absolutely clear, such a notice may very well have been served on respondent. But even if that is not the case, respondent has raised no argument as to the necessity of a Rule 237(b) notice to sustain the default judgment, so we consider the matter no further.

Respondent contends that entry of the order of default was error, not because his answer and appearance were on file, but because his tardiness was excusable (inasmuch as it was the result of car trouble) and because the order of default was an overly severe penalty for being 10 minutes late to court. A default judgment is “a drastic measure, not to be encouraged and to be employed with great caution, only as a last resort.” *Biscan v. Village of Melrose Park Board of Fire & Police Commissioners*, 277 Ill. App. 3d 844, 848 (1996). In determining whether to enter or to vacate a default judgment, the overriding consideration is whether substantial justice is being done. *Id.* “Whether substantial justice is being achieved is not subject to precise definition, but relevant considerations include the lack of diligence by the defaulter, the absence of a meritorious defense by the defaulter, the severity of the penalty resulting from the entry of a default order, and the relative hardships on the parties arising from a grant or denial of default.” *In re Marriage of Ward*, 282 Ill. App. 3d 423, 433 (1996). These considerations support the trial court’s decision to impose a default order. Respondent’s lack of diligence is reflected not just in his tardiness when trial was scheduled to resume on April 29, 2008; on several prior occasions respondent failed to appear for trial or for other proceedings and he failed to attend scheduled sessions with a doctor selected to help evaluate his mental capacity. By doing so, respondent prolonged the litigation, subjected petitioner to needless expense and inconvenience, and wasted time that the trial court could have devoted to other

matters on its docket. The trial court could have reasonably concluded that entry of a default order was necessary to bring the litigation to a close and to avoid further hardship to petitioner. Moreover, the order of default does not appear to have resulted in an unduly severe penalty to respondent. Although respondent was not permitted to submit evidence bearing on the division of marital property, he was awarded a sizeable portion of the marital estate.

Respondent's attempt to blame his tardiness on car trouble is not persuasive. Given respondent's failure to appear for a scheduled trial date less than two weeks earlier, it was incumbent upon him to make sure that he had reliable transportation to court and some means of contacting the court in advance if unforeseen circumstances delayed his arrival. Respondent's attempt to shift responsibility for the delay in the resumption of trial to petitioner is similarly unconvincing. When petitioner left the courthouse on April 29, 2008, the trial court had already entered an order defaulting respondent and continuing the matter for final proofs. Even if petitioner was aware of respondent's late arrival when she left the courthouse, there is no reason to believe that she contemplated the possibility that the trial court would reconsider its order and proceed with trial on April 29, 2008. Thus, although respondent intimates that petitioner purposefully left the courthouse to prevent the matter from proceeding, this is nothing more than conjecture. Finally, respondent stresses that he was never specifically warned that he could be defaulted if he was late for court. However, because he cites no authority that such a warning is necessary, the point is forfeited. See *Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001) ("Mere contentions, without argument or citation of authority, do not merit consideration on appeal").

Respondent next contends that the trial court erred when it modified the judgment of dissolution to provide that each party would retain all items of personal property in his or her control

and possession. The argument fails because it is by no means clear that the order adversely affected respondent. The judgment of dissolution originally provided that the property in question would be sold and that petitioner and respondent would receive equal shares of the proceeds. Respondent acknowledges that the modified judgment allowed him to retain 22 motor vehicles that would have been sold under the terms of the original judgment. Respondent does not argue that the items of personal property in petitioner's possession and control are worth more than the motor vehicles. If the property in petitioner's possession and control was worth less than the motor vehicles, then the modification of the judgment would have worked to respondent's advantage. Because respondent has failed to show that he was adversely affected by the order modifying the judgment, he is not entitled to seek review of that order. See *Addis v. Exelon Generation Co., L.L.C.*, 378 Ill. App. 3d 781, 796 (2007) ("A party may not appeal from a final judgment that was in no way adverse to it").

For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

Affirmed.