

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2011 IL App (4th) 100958-U

Filed 8/30/11

NO. 4-10-0958

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

I&R THREE STARS FAMILY RESTAURANT, INC.,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	DeWitt County
LUTFI SADIKU,)	No. 02LM46
Defendant-Appellee,)	
and)	Honorable
DIAMOND SEATING COMPANY,)	Chris E. Freese,
Defendant.)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

- ¶ 1 *Held:* Physical appearance of party in court after judgment is entered does not constitute a general appearance for purposes of obtaining personal jurisdiction. Such appearance does not validate default judgment entered without service on the party or validate consent-payment order based on void default judgment.
- ¶ 2 Plaintiff, I & R Three Stars Family Restaurant, Inc., appeals from the judgment of the trial court finding its default judgment and payment order entered by consent against defendant, Lutfi Sadiku (Sadiku), void due to lack of personal jurisdiction over defendant. Plaintiff contends, despite not having served Sadiku with process, Sadiku submitted to the jurisdiction of the court by physically appearing in court after entry of a default judgment, consenting to a payment order, and paying \$7,500 over five years pursuant to the order. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On August 5, 2002, plaintiff filed a single-count verified complaint in DeWitt County circuit court, against defendants, Diamond Seating Company (Diamond) and Lutfi Sadiku, et al., alleging breach of contract against Diamond and Sadiku. Plaintiff, located in Clinton, alleged it was a corporation doing business in Illinois, as was Diamond, located in Chicago. Plaintiff further alleged it entered into a written contract on March 16, 2002, with Diamond through Sadiku, who had authority to enter into contracts on behalf of Diamond. The contract was for remodeling work at plaintiff's place of business. Plaintiff paid Diamond \$7,500 as a down payment on the work. The check was cashed by Diamond but the work was never performed. Plaintiff alleged it asked for a return of its \$7,500 payment, which was refused by defendants.

¶ 5 Despite naming two defendants, plaintiff drafted and issued only one summons, naming Diamond, in care of Sadiku. On October 29, 2002, a woman named Mia Sadiku, apparently Sadiku's wife, was served at Diamond's business address as an agent of the corporation.

¶ 6 On November 20, 2002, the date of first appearance, no defendant appeared in the trial court, and plaintiff's counsel presented the returned summons to the court. The court entered a docket order stating, "No appearance by Defendant. Motion for default judgment. Motion allowed. Default judgment in favor of Plaintiff and against Defendant." The court issued a citation to discover assets.

¶ 7 On January 8, 2003, plaintiff's counsel appeared in court and stated no service of citation was obtained. An alias citation issued. On February 19, 2003, after the alias citation was

not served, the trial court authorized issuance of a second alias citation. The original citation and the first alias citation are not in the record. The second alias citation, prepared by plaintiff's counsel, is in the record. It was issued March 23, 2003, and stated a judgment had been entered against "Diamond Seating Company and Lutfi Sadiku" although it purported to command Diamond, in care of Sadiku, to appear in court. This was returned not served.

¶ 8 On May 8, 2003, plaintiff's counsel prepared and had issued by the trial court a third alias citation to discover assets to Diamond, in care of Sadiku. Again, it stated a judgment had been entered against *both* Diamond and Sadiku. On May 16, 2003, this citation was finally served on "Jane Doe" Sadiku. The citation commanded Diamond appear in court on June 27, 2003.

¶ 9 On June 27, 2003, Bledar Sadiku, son of Lutfi Sadiku, appeared at the citation hearing because his father had been in an automobile accident the day before. Plaintiff's counsel, from the same law firm but not the original attorney involved in the case from the beginning, advised the court the citation had been served by substitute service. Plaintiff's counsel stated he informed Bledar Sadiku he could not represent his father in court. Bledar presented the first page of a petition for bankruptcy filed on March 13, 2003. The record is not clear whether the petition was for Diamond or Sadiku personally. Plaintiff was not listed as a creditor. Plaintiff's counsel asked the court for time to investigate the bankruptcy and also asked the court find no appearance by defendant and issue a bench warrant to be stayed pending Sadiku's appearance at a later date. The court ordered a body attachment upon failure to appear on July 23, 2003.

¶ 10 Sadiku appeared in court on July 23, 2003. He indicated the bankruptcy petition had been amended to include plaintiff as a creditor. Again, it was not clear whether the bank-

ruptcy petition was for Diamond or Sadiku, but the trial court did refer to it at one point, while talking to Sadiku, as "your bankruptcy." The case was continued to August 27, 2003, to provide proof to plaintiff's counsel plaintiff's debt was listed on the petition. The court stated if Sadiku failed to appear, a warrant would be issued for his arrest. On August 8, 2003, the hearing set for the 27th was continued to September 17, 2003.

¶ 11 On September 17, 2003, Sadiku failed to appear, and no proof had been provided regarding the bankruptcy petition. A body attachment was issued. On November 26, 2003, Sadiku was arrested and bonded out with the requirement he appear in court on January 7, 2004. Sadiku did not appear that day. The trial court issued another body attachment for failure to appear. On March 31, 2004, Sadiku was arrested pursuant to the body attachment. He was released on bond with the requirement he appear in court on May 5, 2004.

¶ 12 On May 5, 2004, Sadiku appeared in court. The hearing was continued to May 19, 2004. On May 19, 2004, Sadiku appeared along with plaintiff's counsel who reported to the court a consent-payment order had been agreed to between plaintiff and Sadiku in regard to the default judgment previously entered. There is nothing in the record other than a docket entry representing this hearing. Counsel for plaintiff was to draft an order reflecting the agreement.

¶ 13 On May 26, 2004, the trial court entered the order prepared by plaintiff's counsel. The order refers to Diamond and Sadiku, et al. as being personally present in court and "defendant" as having been defaulted by "his" failure to appear on November 20, 2002, after having been given notice of hearing. The order states judgment was entered in favor of plaintiff and against "defendant" in the amount of \$7,500, and the parties have agreed to a payment order where "Defendant" Diamond and Sadiku, et al. will pay \$100 every month until the judgment

amount, plus court costs and interest are paid in full. The order states it was prepared by plaintiff's counsel and was signed by the court. Sadiku never entered a written appearance or filed any pleading on his own behalf, and he was not represented by counsel.

¶ 14 Sadiku apparently made the payments pursuant to the agreed-payment order for the next five years on a more or less regular basis and paid \$7,500 plaintiff.

¶ 15 On May 4, 2010, Sadiku, represented by counsel, filed a motion entitled "Motion to Quash Service of Process and Vacate Default Judgment and Payment Order." He argued the default judgment entered against him was void because (1) the complaint failed to state a cognizable cause of action against him, and (2) the trial court lacked jurisdiction over him. Sadiku further argued the resulting payment order, requiring him to make monthly payments to satisfy the default judgment, should also be vacated because it was based on a prior void order and was also voidable due to various defenses to contract formation.

¶ 16 On May 18, 2010, plaintiff filed a response to Sadiku's motion asserting its complaint alleged breach of contract. It also argued the payment order was a consent decree, and Sadiku's consent to the order subjected him to the jurisdiction of the court; thereby waiving any objection to the jurisdiction of the court to enter the default judgment against him.

¶ 17 On July 28, 2010, the trial court granted Sadiku's motion and found the default judgment previously entered void as applied to him and vacated and rescinded the payment order. The court ordered plaintiff to return to Sadiku all money collected from him pursuant to the payment order within 30 days. On August 6, 2010, plaintiff filed a motion to reconsider, which was denied on November 3, 2010. This appeal followed.

¶ 18

II. ANALYSIS

¶ 19 Plaintiff argues the trial court erred in finding it did not have jurisdiction over Sadiku. Plaintiff contends Sadiku voluntarily subjected himself to the court's jurisdiction by physically appearing in court and consenting to the payment order in satisfaction of the default judgment. Further, plaintiff contends the agreed-payment order created a contractual obligation between the parties, which the court had no power to vacate based on the facts presented.

¶ 20 An appellate court can affirm the holding of a trial court for any reason appearing in the record, regardless of whether the legal basis or findings provided by the lower court are correct. *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill. 2d 496, 502, 520 N.E.2d 37, 39 (1988). A void judgment may be attacked, directly or collaterally, at any time. *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 309, 489 N.E.2d 1360, 1363 (1986).

¶ 21 An appeal of the trial court's finding granting Sadiku's motion to quash service of process and vacate the default judgment and payment order is reviewed *de novo*. *Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 836, 823 N.E.2d 597, 602 (2005). Review of a trial court's denial of a motion to reconsider is reviewed for abuse of discretion. *Woolums v. Huss*, 323 Ill. App. 3d 628, 639, 752 N.E.2d 1219, 1229 (2001).

¶ 22 A. Default Judgment

¶ 23 The record does not show the trial court ever entered a default judgment against Sadiku. The return of service presented to the court at the November 20, 2002, hearing indicated it was issued for Diamond in care of Sadiku. The record indicates no summons was ever issued for Sadiku personally. On the date of the first appearance the court indicated the summons for Diamond was on file and asked if anyone was in court on behalf of either Diamond or Sadiku. The court then allowed the motion for default judgment and entered judgment in favor of

plaintiff and against "defendant."

¶ 24 Plaintiff admits on appeal a default judgment was never entered against Sadiku personally, as the only served defendant was Diamond; thus, there could have been no legal default judgment entered against Sadiku. However, the trial court's statement at the time it entered the agreed-payment order, "defendant" had been defaulted by "his" failure to appear on November 20, 2002, after having been given notice of hearing, indicated it apparently believed a default judgment existed against Sadiku. Further, the agreed-payment order itself referred to the defendant (singular) as "Diamond Seating Company and Lutfi Sadiku, et al." as having been defaulted by "his" failure to appear, and a default judgment was entered against "defendant," again singular.

¶ 25 A judgment is only valid if a court has jurisdiction over the parties. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308, 497 N.E.2d 1156, 1161 (1986). Without a general appearance, jurisdiction can only be acquired by proper service of process. *Id.* Where a party has not been served with process, a trial court has no jurisdiction to enter a judgment against him. *Janove v. Bacon*, 6 Ill. 2d 245, 249, 128 N.E.2d 706, 708 (1955). The court's finding any default judgment entered was void was not in error, because Sadiku was never served with summons.

¶ 26 Plaintiff argues Sadiku's actions in appearing personally in the trial court after the default judgment was entered, agreeing to a payment order based on that judgment, and making payments pursuant to the agreement for over five years constitute (1) a general appearance which confers retroactive jurisdiction and, (2) a waiver of any objections to jurisdiction on the part of Sadiku. See *GMB Financial Group, Inc., v. Marzano*, 385 Ill. App. 3d 978, 986-96, 899 N.E.2d 298, 305-313 (2008) (post-judgment general appearance can waive objections to personal

jurisdiction).

¶ 27 The question becomes what constitutes a general appearance. Physical appearance by a defendant may constitute a general appearance in the case of forcible detainer actions and small claims actions (see Illinois Supreme Court Rule 181(b)(2), (3) (eff. Feb. 10, 2006)) but otherwise a written instrument filed in the action is required to constitute a general appearance. Ill. S. Ct. Rule 181(b)(1) (eff. Feb. 10, 2006).

¶ 28 Plaintiff attempts to argue the written agreed-payment order is a written instrument filed in this case, which would somehow confer jurisdiction over Sadiku. However, Sadiku did not file that instrument; plaintiff did. Plaintiff's counsel drafted the instrument. Sadiku filed nothing in this case. Thus, he did not enter a general appearance by which he waived his right to attack the trial court's lack of personal jurisdiction over him.

¶ 29 B. Agreed Payment Order

¶ 30 Plaintiff admits Sadiku was never served with summons in this case, but argues Sadiku entered into a contractual obligation by acquiescing in the entry of the payment order against him, and the trial court should not have vacated the order.

¶ 31 Any purported default judgment against Sadiku was properly found to be void, or it never actually existed and was fictional from the start. A later order based on a void or fictional judgment is also void. See *Diaz v. Provena Hospitals*, 352 Ill. App. 3d 1165, 1173, 817 N.E.2d 206, 213 (2004).

¶ 32 Plaintiff argues the agreed-payment order was a consent decree governed by contract law; thus, it should only be vacated pursuant to contract law. As an agreement between the parties, it is not an adjudication of the parties' rights but simply a recordation of the agree-

ment reached. *In re Marriage of Purcell*, 355 Ill. App. 3d 851, 855, 825 N.E.2d 724, 728 (2005). Plaintiff contends the agreement was entered into voluntarily by Sadiku. However, the agreement is based on the assumption a default judgment existed against him. While it was Sadiku's own behavior in failing to appear that got him arrested, it was plaintiff that got the process started, caused the confusion, sought citations, and induced the court to issue body attachments on a defendant over whom the court had no jurisdiction. There was either a fraudulent representation made by plaintiff, a mutual mistake of fact, or coercion. Under contract law, the consent agreement was voidable by Sadiku. See *Jordan v. Knafel*, 378 Ill. App. 3d 219, 229, 234, 880 N.E.2d 1061, 1069, 1073 (2007) (discussing rescission of an agreement based on either fraudulent inducement or mutual mistake). The trial court did not err in voiding or rescinding the payment agreement entered into between plaintiff and Sadiku.

¶ 33 C. Motion to Reconsider

¶ 34 Plaintiff makes no argument specifically suggesting the trial court abused its discretion in denying its motion to reconsider. The court was correct as a matter of law in granting Sadiku's "Motion to Quash Service of Process and Vacate Default Judgment and Payment Order," so it did not abuse its discretion in denying plaintiff's motion to reconsider.

¶ 35 The trial court ordered plaintiff to return all payments to Sadiku. The result is harsh, but plaintiff never had a legal right to collect payments from Sadiku individually because plaintiff never obtained the trial court's jurisdiction.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the trial court's judgment. The clerk of the court is authorized to prepare the mandate.

¶ 38

Affirmed.