



discretion by denying his motion to vacate default judgment. We disagree and affirm.

#### I. BACKGROUND

On April 9, 2010, Nelson *pro se* filed a small-claim complaint, alleging that in December 2009, Rossi's negligence in repairing his car caused approximately \$2,811 in damages. On April 21, 2010, Rossi was served a summons related to Nelson's complaint, which conveyed, in pertinent part, the following:

"YOU ARE SUMMONED and required to appear before this court \*\*\* at 1 o'clock p.m., on [May 4, 2010], to answer the complaint in this case, a copy of which is hereto attached. IF YOU FAIL TO DO SO, A JUDGMENT BY DEFAULT MAY BE TAKEN AGAINST YOU FOR THE RELIEF ASKED IN THE COMPLAINT."

At the May 4, 2010, hearing on Nelson's complaint, the trial court entered a \$2,811 default judgment in Nelson's favor based on Rossi's failure to appear at that hearing.

Rossi later timely filed a motion to vacate default judgment pursuant to section 2-1301(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2008)). In that motion, Rossi contended only that because the instant case involved a dispute about a car repair, Nelson would not experience any hardship if the matter proceeded to trial.

Subsequently, Nelson *pro se* filed an objection to Rossi's motion to vacate default judgment. Appended to that motion was Nelson's affidavit in which he made the following assertions regarding the hardship he would experience if the trial court granted Rossi's motion to vacate default judgment: (1) his round-trip travel time to and from work exceeded 2 1/2 hours; (2) court appearances required him to miss a day of work; (3) he had earned only 4 of 10 annual vacation days, one of which he used to appear at the May 4, 2010, hearing; (4) after the court entered the default judgment, he finalized plans to use his remaining vacation days; (5) his vacation plans caused him to expend "a considerable amount of money on non-refundable tickets"; and (6) based on the aforementioned, he would be unable to attend any court proceedings until he earned additional vacation days.

In addition to his affidavit, Nelson appended a February 2010 letter that he had received from attorney John D. Alleman. In that letter, Alleman stated that (1) he had been retained by Rossi to represent him regarding Nelson's claims of substandard workmanship, (2) he had instructed Rossi to discontinue further discussion with Nelson concerning the disputed car repair because they had become counterproductive, and (3) if Nelson believed Rossi caused damage to his car, Nelson should file suit and Alleman would represent Rossi's interests in the

matter.

After a May 21, 2010, hearing on Rossi's motion to vacate default judgment, the trial court entered the following docket entry:

"On review of motion to vacate [default judgment] and [Nelson's] response and objection, \*\*\* and on authority of this court's discretion to do substantial justice, court orders [Rossi] to supplement \*\*\* [his] motion to vacate, by affidavit, as to due diligence, meritorious defense, and a reasonable excuse as to failure to appear. Court will then rule on motion to vacate."

A week later, Rossi filed his affidavit, in which he asserted, in pertinent part, the following: (1) after receiving Nelson's complaint, he contacted Alleman to discuss small-claim procedures and "understood that a trial would not occur on [May 4, 2010]"; (2) he misunderstood that he was required to appear in court on May 4, 2010; (3) he promptly hired Alleman to represent him after receiving notice of the default judgment; and (4) his meritorious defense to Nelson's small-claim complaint was that Nelson's problem with his vehicle was caused by Nelson's lack of preventive maintenance, not his repair work.

In June 2010, the trial court entered the following

docket entry:

"Court has reviewed [Rossi's] affidavit --no excuse for failure to appear set forth. Motion to vacate denied. Summons has a notice on it that says 'default judgment may be taken' if [Rossi] does not appear for first appearance."

This appeal followed.

## II. THE TRIAL COURT'S DENIAL OF ROSSI'S MOTION TO VACATE DEFAULT JUDGMENT

Initially, we note that Nelson did not file a brief with this court. However, the issues are such that we can decide this appeal without the aid of Nelson's appellee brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493, 495 (1976) (noting that when "the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal").

Rossi argues that the trial court abused its discretion by denying his motion to vacate default judgment pursuant to section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2008)). Specifically, Rossi contends that the court's denial failed to accomplish "substantial justice" between the parties. We disagree.

### A. The Statute and the Standard of Review

Section 2-1301(e) of the Code provides as follows:

"The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 2008).

When ruling on a motion to vacate, the trial court's predominant concern is whether substantial justice is being done between the parties and whether it is reasonable under the circumstances to proceed to trial on the merits. *Larson v. Pedersen*, 349 Ill. App. 3d 203, 207-08, 811 N.E.2d 1204, 1208 (2004). "Whether substantial justice is being achieved by vacating a judgment or order is not subject to precise definition, but relevant considerations include diligence or the lack thereof, the existence of a meritorious defense, the severity of the penalty resulting from the order or judgment, and the relative hardships on the parties from granting or denying vacatur." *Jackson v. Bailey*, 384 Ill. App. 3d 546, 549, 893 N.E.2d 280, 283 (2008).

A trial court's determination to grant or deny a motion under section 2-1301(e) lies within its sound discretion and will not be disturbed on appeal absent an abuse of discretion or a

denial of substantial justice. *Jackson*, 384 Ill. App. 3d at 548, 893 N.E.2d at 283. A trial court abuses its discretion "'when it acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted.'" *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367, 377, 753 N.E.2d 452, 461 (2001) (quoting *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 941, 719 N.E.2d 117, 121 (1999)). "'If reasonable persons could differ as to the propriety of the trial court's actions, then the trial court cannot be said to have exceeded its discretion.'" *Mann*, 324 Ill. App. 3d at 377, 753 N.E.2d at 461 (quoting *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 930, 686 N.E.2d 1202, 1207 (1997)).

B. Rossi's Claim That the Trial Court Abused Its Discretion by Denying His Motion To Vacate Default Judgment

In support of his contention that the trial court's denial of his motion to vacate default judgment failed to accomplish substantial justice between the parties, Rossi asserts that "it is clear from the court's [June 2010] docket entry denying the motion to vacate that the court failed to consider all relevant factors in denying the motion." In particular, Rossi concentrates on the portion of the court's June 2010 docket entry that states, "Summons has a notice on it that says 'default judgment may be taken' if [Rossi] does not appear for first appearance." In this regard, Rossi claims that "by making the

above notation, and no other, such a notation implies that the court did not consider all relevant information and the standards pronounced by \*\*\* *Durham v. Rockford Mutual Insurance Co.*, 169 Ill. App. 3d 211[, 523 N.E.2d 670 (1988)]." However, the record belies Rossi's assertion.

In Rossi's May 2010 motion to vacate default judgment, he correctly states that some of the factors the trial court could have considered in granting a motion to vacate a default judgment under section 2-1301(e) of the Code include the following: (1) the state in which Nelson lived, (2) the severity of the penalty to Rossi as a result of the default judgment, and (3) the hardship Nelson would endure if he was required to proceed to trial on the merits. See *Durham*, 169 Ill. App. 3d at 213, 523 N.E.2d at 672 (explaining that in addition to the lack of a meritorious defense and reasonable excuse, a court may consider a plaintiff's residence, severity of the penalty, and the hardship on the plaintiff in granting a motion to vacate default judgment). However, the sole factor Rossi noted in support of his motion to vacate default judgment was his bald assertion that because Nelson's complaint involved an auto repair, it would not present him with a hardship to proceed to a trial on the merits--an assertion that Nelson refuted with specificity in his May 2010 affidavit in support of his objection to the motion to vacate default judgment.

Presented with only one factor to consider in determining whether to grant or deny Rossi's motion to vacate default judgment, the trial court entered its June 2010 docket entry "on authority of [the] court's discretion to do substantial justice," requiring Rossi to supplement his motion by affidavit, explaining other factors pertinent to the court's consideration. See *McGann v. Illinois Hospital Ass'n, Inc.*, 172 Ill. App. 3d 560, 566, 526 N.E.2d 902, 905 (1988) ("In a motion to vacate, the movant bears the burden of establishing sufficient grounds to vacate the order"). Namely, the court required Rossi to--at a minimum--address (1) his due diligence, (2) any potential meritorious defenses, and (3) his excuse for failing to appear at the May 4, 2010, hearing. After considering Rossi's affidavit as evidenced by the fact that the court noted Rossi's failure to address the reason why he failed to appear at the May 4, 2010, hearing, the court denied his motion to vacate default judgment. In this regard, the court's actions were entirely appropriate.

In this case, the record shows that the trial court considered the following factors in denying Rossi's motion to vacate default judgment: (1) the existence of a meritorious defense, (2) due diligence or lack thereof, (3) a reasonable excuse for failure to appear, and (4) the hardship that vacatur would impose. Given our deferential standard of review, we conclude that the court's denial of Rossi's motion to vacate

default judgment (1) was neither arbitrary nor exceeded the bounds of reason and (2) did not result in the denial of substantial justice. Accordingly, we reject Rossi's argument that the court failed to consider all relevant factors in denying his motion to vacate default judgment and conclude that the court did not abuse its discretion by denying Rossi's motion to vacate default judgment.

In closing, we note that as part of his argument to this court, Rossi argued, for the first time, that the trial court's default judgment constituted an excessive penalty. Because Rossi failed to raise this issue below, we refuse to entertain it. See *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 793, 776 N.E.2d 262, 292 (2002) ("We will not reverse the trial court's decision based on an argument the trial court never heard").

### III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.

JUSTICE TURNER, dissenting:

I respectfully dissent. I would reverse the trial court's judgment denying defendant's motion to vacate the default judgment.

"A default judgment has been recognized as a drastic action, and it should be used only as a last resort." *Bank & Trust Co. v. Line Pilot Bungee, Inc.*, 323 Ill. App. 3d 412, 414, 752 N.E.2d 650, 652 (2001) (citing *Widucus v. Southwestern Electric Cooperative, Inc.*, 26 Ill. App. 2d 102, 109, 167 N.E.2d 799, 803 (1960)-). "Illinois courts have a history of being liberal with respect to vacating default judgments under section 2-1301(e)." *Bank & Trust Co.*, 323 Ill. App. 3d at 414, 752 N.E.2d at 652. As the *Widucus* court noted:

"The question of whether or not a court should set aside a default should be so resolved as to do substantial justice between the parties and with the idea in mind of carrying out, insofar as it is possible, the determination of matters upon their merits. In resolving this problem, a court may well consider whether or not a defendant has a meritorious defense, and whether or not defendant's delay in responding to the court's command actually jeopardizes plaintiff's basic position. But this should not be the only, nor necessarily, the determining factors. It seems to us that the overriding reason should be whether or not justice is being done. Justice will not be done if hurried defaults are allowed any more than if continuing delays are permitted." *Widucus*, 26 Ill. App. 2d at 108-09,

167 N.E.2d at 803.

Here, it is my view the trial court unreasonably concluded it was doing substantial justice by denying defendant's motion to vacate. Plaintiff filed his complaint on April 9, 2010, and defendant was served with summons on April 21, 2010. The default judgment was entered on May 4, 2010. The motion to vacate was then filed on the fourth business day after the default was entered. Although defendant failed to appear at the time specified in the summons, it is noteworthy the motion to vacate was filed only 19 days after he was first served with process.

Plaintiff does not assert the delay prejudiced his ability to prove up his case. Instead, plaintiff's affidavit seems to suggest he booked a vacation upon entry of the default but before the filing of the motion to vacate. Plaintiff avers that in booking the vacation he used all of his then-accrued vacation days and would thus be unable to "attend further court proceedings in this matter until later in the year." However, plaintiff's affidavit also states vacation days are awarded "*pro rata* as they are earned throughout the year in monthly in one[-] day or one-half[-]day increments." Thus, plaintiff would have had an available vacation day to try his small-claims case in the month of June 2010. Accordingly, I utterly fail to see how the vacation-day issue presented any hardship to plaintiff's case.

Plaintiff's affidavit also states he was ready for trial on

May 4, 2010. However, this record does not suggest a trial would have been held on May 4 because even if defendant had appeared, his attorney was not present. Thus, the matter would have been set for trial at a later date. See 1st Judicial Cir. Ct. R. 3.1 (eff. July 1, 1995) (cited in plaintiff's objection to the motion to vacate default judgment). The rule requires the trial court to set a subsequent trial date unless all parties announce they are ready for immediate trial.

In any event, the trial court's docket entry does not indicate the court denied the motion to vacate based upon plaintiff's affidavit, but rather on defendant's affidavit. The docket entry reads:

"Court has reviewed affidavit--no excuse for failure to appear set forth. Motion to vacate denied. Summons has a notice on it that says '[d]efault [j]udgment may be taken' if [defendant] does not appear for first appearance."

Notwithstanding the court's docket entry, the majority states, "the record shows the trial court considered the following factors in denying Rossi's motion to vacate default judgment: (1) the existence of a meritorious defense, (2) due diligence or lack thereof, (3) a reasonable excuse for failure to appear, and (4) the hardship that vacatur would impose." Order at 9. This is pure conjecture, especially given defendant's affidavit wherein

he does state a defense and does offer an explanation why he failed to appear. Moreover, as has been shown, vacatur would have imposed no hardship to plaintiff's basic position.

In many respects, this case is similar to *Bank & Trust Co.* There, 10 days after entry of a default judgment, the defendants filed a motion to vacate, and the plaintiff filed a response. *Bank & Trust Co.*, 323 Ill. App. 3d at 414, 752 N.E.2d at 651. The trial court denied the motion to vacate and held the defendants failed to establish the existence of a meritorious defense and failed to provide a reasonable excuse for their failure to timely answer the complaint. *Bank & Trust Co.*, 323 Ill. App. 3d at 414, 752 N.E.2d at 651. In reversing and remanding, the Fifth District stated, "The docket sheet entry appears to examine only whether defendants presented a meritorious defense and offered a reasonable excuse for the delay in filing the answer or the motion to vacate." *Bank & Trust Co.*, 323 Ill. App. 3d at 415, 752 N.E.2d at 653. Thus, the trial court was directed on remand to apply the section 2-1301(e) standard and consider whether substantial justice had been done between the parties. *Bank & Trust Co.*, 323 Ill. App. 3d at 415, 752 N.E.2d at 653. Accordingly, based upon *Bank & Trust Co.*, the majority at minimum should have remanded this case for the trial court to consider the section 2-1301(e) standard.

The above notwithstanding, I find *Durham*, the case relied

upon by the trial court and cited by the majority, even more compelling. In my view, it warrants outright reversal. In *Durham*, 169 Ill. App. 3d at 213, 523 N.E.2d at 672, the court held as follows:

"A party wishing to vacate a default judgment need not allege the existence of a meritorious defense or assert a reasonable excuse for not timely asserting the defense. The overriding consideration now is whether or not substantial justice is being done between the litigants and whether it is reasonable under the circumstances to compel the other party to go to trial on the merits."

The court noted the defendant's affidavit did *not* set forth a meritorious defense, and further noted, the defendant had *not* set forth a reasonable excuse for its failure to timely answer the complaint. *Durham*, 169 Ill. App. 3d at 213, 523 N.E.2d at 672. Nonetheless, the court reversed the trial court's denial of vacatur, stating, "the record shows that the default was entered [4] days after the 30-day period had run, that the motion to vacate the default was timely filed [citation], and that plaintiffs are Illinois residents." *Durham*, 169 Ill. App. 3d at 213, 523 N.E.2d at 672. The court also stated the facts did not demonstrate any prejudice to the plaintiffs' case, and under the circumstances, it would not be unfair for the plaintiffs to

proceed to a trial on the merits. *Durham*, 169 Ill. App. 3d at 213-14, 523 N.E.2d at 672. The same rationale holds here, and I would reverse and remand with directions to set the matter for trial.