

No. 1-11-0723

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDMOND SHEHU,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 L 444
)	
DANIEL POPESCU, DANILA POPESCU, and)	
TRUCKS R US LLC,)	Honorable
)	William Taylor,
Defendants-Appellants.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment.

ORDER

Held: Appeal by defendant Daniel Popescu dismissed for lack of jurisdiction based on failure to file a timely notice of appeal; judgment affirmed as to remaining defendants where defendants failed to support their claims of error in violation of Supreme Court Rule 341 and failed to demonstrate that trial court abused its discretion by denying motion to vacate default.

¶ 1 Defendants Daniel and Danila Popescu and Trucks-R-Us LLC (LLC) appeal from the denial of their motion to vacate a monetary default judgment entered against them in favor of plaintiff Edmond Shehu in a consumer fraud and deceptive practices cause of action. Although

plaintiff has not filed a brief in response, we may consider this appeal pursuant to the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 2 On January 15, 2009, plaintiff filed a complaint against the LLC, Daniel Popescu, and "John Doe (Mr. Popescu, Father of Daniel)," for consumer fraud and deceptive practices related to the sale of a 2000 Volvo semi-truck. Plaintiff alleged that when defendants purchased the truck in August 2007, for \$15,200, it had 914,138 miles on it. On October 19, 2007, defendants advertised the truck as having 630,000 miles on it, and on October 25, 2007, plaintiff purchased the truck based on that mileage misrepresentation. The truck became inoperable in early 2008, at which time plaintiff learned that the odometer on the truck had been rolled back and that the truck actually had nearly a million miles on it. Plaintiff claimed that had he known the actual mileage, he would not have purchased the truck, and that he suffered emotional distress and monetary losses due to defendants' actions.

¶ 3 Plaintiff served the LLC on January 27, 2009, by leaving a copy of the summons and complaint with a registered agent. Plaintiff attempted service on Daniel and "John Doe" in February 2009, but was unsuccessful and a special process server was appointed. The affidavit of the special process server indicates that on May 8, 2009, he served the summons and complaint on "John Doe" Popescu and Daniel Popescu by leaving a copy at their usual place of abode with Jonathan Popescu, who was identified as the grandson and son of the named defendants.

¶ 4 On May 13, 2009, plaintiff filed a motion for a \$300,000 default judgment. The motion listed in its caption as defendants the LLC, Daniel, and "John Doe." Plaintiff alleged in this motion that defendants' attorney indicated that he would not be entering an appearance on behalf

of the LLC and that "defendant" had until February 2009 to enter an appearance but failed to do so.

¶ 5 On August 24, 2009, defendants filed a general appearance. On September 3, 2009, the LLC, Daniel, and Danila filed a motion to dismiss plaintiff's complaint alleging that plaintiff improperly "lump[ed]" them together and was required to state his causes of action separately against each defendant. Defendants complained that it was practically impossible to respond to plaintiff's complaint, and requested that the complaint be dismissed or be made more definite and certain.

¶ 6 On September 9, 2009, the parties appeared before the circuit court, which granted plaintiff's motion for default judgment. Defendants thereafter filed a motion to vacate the default judgment, to which plaintiff filed a response; copies of these pleadings have not been included in the record on appeal. Thereafter, defendants filed a reply, alleging that plaintiff could not move for a default judgment against or serve a defendant as a "John Doe." On April 13, 2010, the circuit court granted defendants' motion to vacate the default judgment, explaining that Illinois law does not allow the naming of a fictitious party, *i.e.*, "John Doe." The court struck plaintiff's complaint based on the naming of a fictitious party, "John Doe," and granted plaintiff leave to amend.

¶ 7 On April 29, 2010, plaintiff filed an amended complaint against the LLC, Daniel, and Danila Popescu, alleging that after defendants misrepresented to him on October 25, 2007, that the truck in question had 630,000 miles on it and was in perfect and well-maintained condition, he purchased it for \$26,000. Plaintiff alleged that he spent \$6,000 to repair the truck, and in January 2008, he learned that the truck had logged over 940,000 miles. When plaintiff informed defendants of this fact, they denied any knowledge that the truck had more than 630,000 miles on it. In February 2008, the truck became inoperable and plaintiff took it to Freightliner of

Kalamazzo (Freightliner) for repairs. Freightliner informed plaintiff that the odometer registered 659,623 miles, but that the actual mileage was 947,843 miles, and that it would cost \$28,000 to repair the truck, explaining that the engine was completely deteriorated and the bearings had been replaced so that the engine would not smoke. When plaintiff gave defendants this information, defendants told plaintiff that they would repair the truck for \$6,000. Plaintiff informed defendants that he did not trust them, and requested reimbursement for the cost to repair the truck. Defendants refused.

¶ 8 Plaintiff thus claimed that defendants engaged in unfair and deceptive practices by misrepresenting the condition of the truck and rolling back the odometer, and that had he known the actual mileage, he would not have bought the truck. Plaintiff also alleged that he has spent \$40,000 in repairs in addition to the purchase price of \$26,000 and has suffered monetary losses and emotional distress from "being cheated." Plaintiff further alleged that defendants' fraudulent misrepresentations were made wilfully, recklessly, maliciously and with the intent to defraud purchasers.

¶ 9 On May 12, 2010, defendants filed an answer to plaintiff's amended complaint denying his allegations regarding the rollback of the odometer and misrepresentations. Defendants alleged that they had purchased the truck at an auction in August 2007, where Danila only checked the condition because the mileage was "exempt" and "did not matter." Defendants explained that the word "exempt," as it applies to an odometer, means that a vehicle with a gross weight of more than 16,000 pounds is not required to have an odometer mileage reading on the title, and the truck in question had a gross weight of more than 16,000 pounds. Defendants further alleged that Danila always made sure that each customer was aware that the miles on the semi trucks are "exempt," and that they should completely inspect the truck before purchasing it.

¶ 10 Defendants alleged that when the truck was picked up from the auction it would not start. The truck was eventually brought to defendant LLC's yard, and when a new battery was installed there, the odometer showed 630,000 miles. Based on that reading, defendants advertised the vehicle as having 630,000 miles. Defendants sold the truck to plaintiff "as is" with no guarantees or warranty. Defendants noted that neither the sales receipt nor invoice listed any mileage for the sale and transfer of the truck. When plaintiff called defendants about the mechanical problems, defendants offered a different truck or a refund, but plaintiff refused, demanded \$25,000, and threatened to kill them if he did not receive that money. Defendants maintained that they never altered or changed the odometer, represented that the truck had mileage other than what was shown on the odometer, or knew that the truck had been driven in excess of 630,000 miles. Defendants also alleged that plaintiff's claims were barred by the doctrine of laches, and that plaintiff failed to mitigate the damages when he rejected replacing his vehicle or accepting a full refund.

¶ 11 On October 1, 2010, defendants' counsel filed a motion to withdraw citing an irretrievable breakdown in their relationship. When the motion was called on November 17, 2010, the circuit court noted that "due notice" had been given and granted the motion. The case was then continued to December 13, 2010.

¶ 12 On that date, defendants failed to appear, and the court entered the following written order:

- "1) The court is very familiar with this file through various motions, having been with the individual parties and their attorneys in settlement conferences etc.
- 2) Based upon the court's familiarity the court enters a default judgment against all defendants.

3) The court finds that compensatory damages of \$150,000 is appropriate considering all of out-of-pocket expenses associated with the fraud and deceit of the defendants.

4) The court finds that punitive damages of \$300,000 is appropriate based upon the fraud and deceit of the defendants and the reprehensibility of their actions."

The court also awarded attorney's fees totaling \$45,820, and \$806 in costs, then stated that the order was final and appealable, with no reason to delay its enforcement.

¶ 13 On January 11, 2011, defendants filed a general appearance in the case, and Danila filed a motion to vacate the default judgment. Danila alleged that there was a status date set for December 13, 2010, and that his failure to appear was inadvertent. He also maintained that he is a resident of California and believed that his son, Daniel, appeared but later learned that he failed to do so.

¶ 14 On that same date, the LLC filed a motion to vacate the default judgment through counsel. The LLC alleged that its failure to appear was inadvertent, and added that it was involuntarily dissolved on December 12, 2008. The LLC further alleged that because counsel for the other defendants was not obtained prior to the status date, there was no person available to appear on its behalf, and it was unaware that under Illinois law an attorney was required to appear on its behalf.

¶ 15 On February 9, 2011, the parties appeared before the court on the motions to vacate. In its written order, the court noted that it was "advised of the premises," and, after "reviewing the file and being familiar with the case, hearing oral argument," denied defendants' motions and ruled that the judgment against defendants and in favor of plaintiff "stands." This appeal follows.

¶ 16 As an initial matter, we address our jurisdiction to consider the appeal (*Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 251-52 (2010)), since this court does not have jurisdiction if the notice of appeal is untimely filed (*Lowenthal v. McDonald*, 367 Ill. App. 3d 919, 925 (2006)). A notice of appeal is timely if it is filed within 30 days of the entry of a final judgment, or the order disposing of the last pending postjudgment motion. *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 521 (2001); Ill. S. Ct. R. 303(a) (eff. June 4, 2008). An order is said to be final if it disposes of the rights of the parties, either upon the entire controversy or upon some definite separate part thereof such as a claim in a civil case. *State Farm Fire & Cas. Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 556 (2009).

¶ 17 Here, the circuit court added a Rule 304(a) finding to its December 13, 2010, default judgment order, specifically stating that it was final and appealable and there was no reason to delay its enforcement. Ill. S. Ct. R. 304(a). The parties thus had 30 days to file an appeal from that judgment, or to file a timely post-trial motion to toll the time for filing their appeal. Ill. S. Ct. Rs. 303, 304; see also *Greer v. Yellow Cab*, 221 Ill. App. 3d 908, 912-14 (1991). Although our supreme court has made it clear that its interpretations of Rule 304(a) have been governed by its policy disfavoring piecemeal appeals (*State Farm*, 394 Ill. App. 3d at 557 (see cases cited therein)), our examination of the record in this case shows that two of the defendants, the LLC and Danila, filed separate motions to vacate, but that defendant Daniel did not join in these motions or file his own. As a result, Daniel failed to toll the time for filing his appeal of the default order, and his notice of appeal filed on March 10, 2011, was untimely as more than 30 days had elapsed from entry of the default judgment on December 13, 2010. Ill. S. Ct. R. 303(a) (eff. June 4, 2008). We thus dismiss defendant Daniel's appeal for lack of jurisdiction. *Lowenthal*, 367 Ill. App. 3d at 925.

¶ 18 The notice of appeal from the remaining defendants, the LLC and Danila, was timely filed on March 11, 2011, *i.e.*, within 30 days of the denial of their motion to vacate on February 9, 2011 (Ill. S. Ct. R. 303(a)); however, they have failed to set forth a cogent argument in their brief as required by Supreme Court Rule 341 (eff. July 1, 2008). Defendants contend that the trial court erred in denying their motion to vacate the default judgment, claiming that it was a denial of substantial justice between the parties. In support, defendants briefly mention, *inter alia*, that it does not "appear" that there was proper service, that "all three defendants were defaulted, even though the pending motion was against the LLC alone," that there is nothing in the record showing that their former attorney complied with Supreme Court Rule 13 (eff. Feb. 16, 2011) in entering his motion to withdraw as counsel, and that, instead of entering a default judgment, the "court could have entered some sanction that was less drastic." Defendants further maintain that there is no reasonable relationship between the punitive and actual damages suffered by plaintiff, and that the punitive award given plaintiff does not do justice between the parties.

¶ 19 We observe that an issue that is merely listed or included in a vague allegation of error is not "argued" and will not satisfy the requirements of Rule 341(h)(7). *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010). Moreover, an argument that is developed beyond mere list or vague allegation may be insufficient if it does not include citations to authority. *Vancura*, 238 Ill. 2d at 370. Here, defendants cited three cases in their brief, but have not set forth or explained how these cases apply or support their allegations. It is not our task "to divine the truth from the interstices of the parties' filings or to sift through the record like a tealeaf reader conjuring up fortunes in order to gain a proper understanding of the case before us." *First Illinois Bank & Trust v. Galuska*, 255 Ill. App. 3d 86, 94 (1993).

¶ 20 In addition, we observe that defendants alleged in their written motions to vacate that their failure to appear was inadvertent, but they have not raised this argument on appeal. Instead, defendants have listed new issues. As indicated, points not raised in the trial court may not be argued on appeal. *Egidi v. Town of Libertyville*, 251 Ill. App. 3d 224, 235 (1993).

¶ 21 Furthermore, appellants have the responsibility of providing the reviewing court with a complete record on appeal, and any doubts arising from the incomplete record are resolved against the appellants and those issues which depend for resolution upon facts not in the record mandate affirmance. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In this case, only the common-law record was filed, and it does not reflect what evidence was presented to the court concerning the contentions raised. We thus presume that the trial court had ample grounds to support its judgment (*Rock Island County v. Boalbe*, 242 Ill. App. 3d 461, 462 (1993)), and assume that the circuit court acted in conformity with the law, particularly where the court was advised in the premises (*Foutch*, 99 Ill. 2d at 392).

¶ 22 Even if we were to overlook defendants' failure to properly preserve the issues on appeal, whether to grant a timely motion to vacate a default judgment is a decision that is committed to the sound discretion of the trial court (see 735 ILCS 5/2-1301(e) (West 2010)), and we will not reverse the trial court's decision absent an abuse of discretion (see *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548-49 (2008)). The trial court abuses its discretion only "where no reasonable person would take the position adopted by the trial court; that is, where the trial court acted arbitrarily or ignored recognized principles of law." *Jackson*, 384 Ill. App. 3d at 548-49. In the context of a motion to vacate a default judgment, "the 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 (2004). Relevant considerations to whether substantial justice is served 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*, 384 Ill. App. 3d at 549.

¶ 23 The trial court did not abuse its discretion in this case. The record demonstrates that the LLC had already been subjected to a default judgment once before due to its failure to appear in the case. In his motion to vacate the default judgment, Danila claimed that he lived in California and was unable to obtain an attorney in time. Danila assumed that his son Daniel would appear at the hearing in his stead, but Daniel did not appear. For its part, the LLC claimed that it too was unable to obtain an attorney in time. The LLC also claimed that it was unaware that it needed to be represented by an attorney in court, instead assuming that one of the individual defendants (presumably Daniel) would appear on its behalf.

¶ 24 Neither explanation is persuasive. While the fact that Danila lives in California might explain why he did not appear personally, it does not explain why he did not hire an attorney to appear on his behalf. Moreover, there is no indication in the record that Daniel is a licensed attorney, so even if Danila believed that Daniel would be present at the hearing there is no logical reason why Danila would think that Daniel could appear on his behalf. With respect to the LLC, its claim that it was unaware that it needed to be represented in court is unpersuasive, given that Illinois law mandates that a corporate entity be represented by an attorney at all times in court. See *Berg v. Mid-America Industries*, 293 Ill. App. 3d 731, 737 (1997). Indeed, the LLC had previously been represented by an attorney during this case, so it is hard to credit the LLC's assertion that it was unaware of the law on this point. Even giving the LLC the benefit of the doubt on its knowledge of the law, the LLC still offered no reason why it failed to obtain counsel and appear as required.

¶ 25 All of these points aside, the ultimate question for purposes of this appeal is only whether the trial court's decision to deny the motion to vacate the default judgement was unreasonable or arbitrary. Given the history of this case and the completeness of the record, as well as Danila and the LLC's failure to offer any persuasive reason why they failed to appear, we cannot say that the trial court abused its discretion. We therefore affirm the trial court's judgment with respect to the LLC and Danila.

¶ 26 Dismissed in part; affirmed in part.