2012 IL App (1st) 113274-U

FIRST DIVISION
SEPTEMBER 17, 2012

1-11-3274

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

JEREMY HAMPEL, a/k/a JEREMY HAMPUL,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 L 4065
	)	(renumbered 09 L 14337)
ALPINE CORRUGATED MACHINERY,	)	Honorable
	)	Marcia Maras,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment granting the plaintiff's section 2-1401 petition is affirmed because the plaintiff presented a meritorious claim and exercised due diligence.

¶ 2 On April 17, 2006, plaintiff-appellee Jeremy Hampel (Hampel) filed a complaint in the circuit court of Cook County against defendant-appellant Alpine Corrugated Machinery (Alpine), a New Jersey corporation, seeking damages for personal injuries sustained as a result of an accident that occurred on September 24, 2004. On November 18, 2009, the trial court entered an order which removed the case from a dormant calendar, renumbered the case, and dismissed the case for want

of prosecution without notice to Hampel.

¶ 3 On August 2, 2011, Hampel filed a petition to vacate the November 18, 2009 dismissal order pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). On October 12, 2011, after being fully briefed by the parties, the trial court granted the petition, vacated the dismissal order and reinstated the case under case number 09 L 14337. On appeal, Alpine argues that the trial court's order granting the petition to vacate should be reversed. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 4 BACKGROUND

¶ 5 On April 17, 2006, Hampel filed a complaint against Alpine in the circuit court of Cook County seeking damages as a result of personal injuries that occurred on September 24, 2004. The complaint was docketed as case number 06 L 4045 by the clerk of the circuit court.

¶ 6 On September 29, 2008, the matter was set for trial on February 5, 2009. On February 5, 2009, the matter was placed on the law division insurance calendar because Alpine's insurance company claimed insolvency. On November 18, 2009, the trial court entered an order that: (1) removed the case from the insurance calendar; (2) renumbered the case to 09 L 14337; and (3) dismissed the case for want of prosecution. Both parties agreed in their briefs to this court that no notice of the November 18, 2009 proceedings was sent to the parties, nor did the matter appear in the *Chicago Daily Law Bulletin*. Additionally, there was no postcard or other notice sent from the clerk's office to inform the parties of the entry of the dismissal order, or that the case would appear on the trial court docket on the date it was dismissed.

¶ 7 Hampel's counsel ultimately discovered the renumbering and dismissal by reviewing the

clerk's unofficial electronic docket.[1] Hampel's counsel claims that he then relied on the unofficial electronic docket and diaried the one year re-filing deadline pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 2008)). On November 22, 2010, Hampel's counsel refiled the case under case number 10 L 13323. On May 31, 2011, Alpine filed a motion to dismiss case number 10 L 13323, claiming that the refiling exceeded the one year limitation period. That motion to dismiss is still pending.

¶ 8 Alpine's counsel states that he reviewed the court files for case number 06 L 4045 and found a copy of the November 18, 2009 dismissal order. After receiving Alpine's motion to dismiss case number 10 L 13323, Hampel's counsel reviewed the court files for both case numbers 06 L 4045 and 09 L 14337 and neither court file contained the November 18, 2009 order. In addition, Hampel's counsel requested the microfilm which could have shown that the matter was on the status call for November 18, 2009. He was advised by a representative of the clerk's office that there was no microfilm. Hampel then filed a section 2-1401 petition to vacate the November 18, 2009 dismissal order which dismissed the original case for want of prosecution. The petition was filed on August 2, 2011, 60 days after Hampel received Alpine's motion to dismiss case number 10 L 13323.

¶ 9 On October 12, 2011, the trial court granted the section 2-1401 petition and reinstated the original case. On October 28, 2011, Hampel filed a motion to convert the discovery deposition of Alpine's president to an evidence deposition due to the president's death. On November 2, 2011, the

---

[1] The date of the discovery of the dismissal for want of prosecution is not provided in the record on appeal.

original case was set for trial on January 19, 2012. On November 8, 2011, Hampel filed a motion to disclose a liability expert because an adverse examination of Alpine's president was no longer possible. Hampel's October 28, 2011 motion and November 8, 2011 motion are still pending in the trial court. Also on November 8, 2011, Alpine filed a timely notice of appeal of the trial court's order granting Hampel's section 2-1401 petition.

¶ 10 ANALYSIS

¶ 11 This court derives its jurisdiction in this case from Illinois Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010). Although there are claims that are still pending in the trial court, Rule 304 allows appeals to be taken from judgments that do not dispose of an entire proceeding. Rule 304 (b)(3) states that an appeal may be taken from "[a] judgment or order granting or denying any of the relief prayed in a petition under section 2-1401 of the Code of Civil Procedure." Section 2-1401 of the Code provides a statutory procedure by which a final order can be vacated when more than 30 days have passed since the date of the entry of the order. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220, 499 N.E.2d 1381, 1386 (1986); 735 ILCS 5/2-1401(a) (West 2008). The statute provides that petitions must be filed not later than two years after the entry of the order. 735 ILCS 5/2-1401(c) (West 2008).

¶ 12 In order to obtain relief under section 2-1401, the petitioner must show each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the trial court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *Airoom*, 114 Ill. 2d at 220-21, 499 N.E.2d at 1386.

¶ 13 The standard of review for a typical section 2-1401 analysis is two-tiered: (1) the issue of a

meritorious defense or claim is a question of law and subject to *de novo* review; and (2) if a meritorious defense or claim exists then the issue of due diligence is subject to abuse of discretion review. *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 327, 932 N.E.2d 1152, 1159 (2010). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). "An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 816, 886 N.E.2d 1182, 1187 (2008). Therefore, we apply the *de novo* standard in reviewing whether Hampel presented a meritorious claim in his section 2-1401 petition, and the abuse of discretion standard in reviewing whether he complied with the due diligence requirements of section 2-1401.

¶ 14 On appeal, Alpine claims that the trial court erred by granting Hampel's section 2-1401 petition because Hampel failed to exercise due diligence in discovering the dismissal, and in filing his section 2-1401 petition. Alpine raises arguments regarding only the due diligence requirements of section 2-1401, and effectively concedes that Hampel presented a meritorious claim.

¶ 15 We first examine Alpine's argument that Hampel has failed to establish the second element required for relief under section 2-1401: due diligence in the original action. Specifically, Alpine claims that Hampel has failed to prove by a preponderance of the evidence that he exercised due diligence in discovering the dismissal for want of prosecution.

¶ 16 "Due diligence requires the section 2-1401 petitioner to have a reasonable excuse for failing to act within the appropriate time." *Airoom*, 114 Ill. 2d at 222, 499 N.E.2d at 1386. A party relying on section 2-1401 is not entitled to relief unless he shows that, through no fault or negligence of his

own, the existence of a valid [claim] was not presented to the trial court. *Id.*, 499 N.E.2d at 1387 (citing *Brockmeyer v. Duncan*, 18 Ill. 2d 502, 505, 165 N.E.2d 294 (1960)). Specifically, Hampel must show that his failure to contest the matter was the result of an excusable mistake, and that under the circumstances he acted reasonably, not negligently. *Id*. In determining the reasonableness of the excuse, all of the circumstances attendant upon entry of the order, including the conduct of the litigants and their attorneys, must be considered. *Id*.

¶ 17 Alpine cites several cases from the Illinois Appellate Court for the First District that address the issue of due diligence in discovering dismissals for want of prosecution. In *LaSalle National Trust v. Lamet*, 328 Ill. App. 3d 729, 767 N.E.2d 464 (2002), the plaintiff filed a complaint for unpaid rent against the defendants. The trial court dismissed the complaint for want of prosecution. *Id.* at 729, 767 N.E.2d 464. The plaintiff waited 14 months to file a motion to quash the order of dismissal, claiming that the order was void for lack of notice to the parties. *Id*. at 731, 730 N.E.2d at 466. The record on appeal suggested that the parties *were* given notice to appear by court order. *Id.*, 767 N.E.2d at 466-67. This court held that the order was voidable, not void, and affirmed the trial court's finding that the plaintiff "did not meet the requirement of due diligence in filing a section 2-1401 petition and bringing it before the court." *Id*. at 734-35, 767 N.E.2d at 469-70.

¶ 18 In *LaSalle*, the trial court told the plaintiff specifically to file a section 2-1401 petition, which it never did. *Id.* at 734, 767 N.E.2d at 469. The plaintiff waited 10 months after that conversation to file its motion to quash. *Id.* The court in *LaSalle* treated the motion to quash as a section 2-1401 petition to vacate, and found that the requirements of due diligence were lacking. *Id.* In the case at bar, the trial court found that Hampel exercised due diligence based on the undisputed facts that the

parties were given no notice that the case was before the court on the day it was dismissed, and were given no notice of the dismissal. In addition, the case did not appear in the *Chicago Daily Law Bulletin*. Further, the matter was on a dormant calendar which made it difficult for Hampel's counsel to determine its status. The record shows that Hampel's counsel reviewed the court files and did not find the order of dismissal for want of prosecution, or microfilm containing notification of the order.

¶ 19 Alpine additionally cites *R.M. Lucas Co. v. People's Gas Light and Coke Co.*, 2011 IL App (1st) 102955, 963 N.E.2d 274. The present case is distinguishable from *Lucas* because the trial court in *Lucas* entered prior orders and placed the plaintiff on notice that his repeated failure to respond to court orders and discovery requests could result in a dismissal. *Id.* at ¶ 6, 963 N.E.2d at 276. In the instant case, there was no showing of negligence by Hampel who had no notice of the dismissal. Here, as noted, the trial court failed to notify both parties of the court proceeding which did not appear in the *Chicago Daily Law Bulletin*; the parties were not notified of the dismissal; and Hampel claims the court file did not contain the court order. Thus, *Lucas* is inapplicable to the instant case.

¶ 20 It is apparent from the record on appeal that Hampel was active in the pursuit and prosecution of his initial case against Alpine. Hampel issued multiple summons to effectuate out-of-state service, filed a motion for default against Alpine, filed multiple motions to compel discovery, and took the deposition of Alpine's president. Both parties stipulate that there was no notice whatsoever of the proceeding that dismissed this matter for want of prosecution. In fact, it was through the diligence of Hampel's counsel that the order of dismissal was discovered. Therefore, it is clear that Hampel was diligent in presenting his meritorious claim to the trial court.

¶ 21 Finally, Alpine argues that Hampel has failed to establish the third element required for relief

under section 2-1401: due diligence in filing the section 2-1401 petition for relief. Specifically, Alpine argues that Hampel's inaction between the entry of the dismissal order on November 18, 2009, and the filing of the section 2-1401 petition on August 2, 2011, shows a lack of due diligence.

¶ 22 "No bright-line rule exists for judging whether a petitioner has acted diligently. Rather, due diligence is judged by the reasonableness of the petitioner's conduct under all of the circumstances." *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 99-100, 858 N.E.2d 1, 10 (2006). "Thus, a [21-month] delay in requesting section 2-1401 relief does not, *ipso facto*, demonstrate an explicit lack of diligence." *Id*. at 100, 858 N.E.2d at 10. The appellate court considers not only the length of the delay in filing the petition for relief from judgment, but also the circumstances attendant to such delay. See *id*.; *Cooper v. United Development Co.*, 122 Ill. App. 3d 850, 857, 462 N.E.2d 629, 634 (1984).

¶ 23 Alpine relies on *Esczuk v. Chicago Transit Authority*, 39 Ill. 2d 464, 236 N.E.2d 719 (1968), to support its argument that Hampel failed to exercise due diligence in filing his section 2-1401 petition. In *Esczuk*, the supreme court rejected the plaintiff's argument that her section 2-1401 petition should have been granted where the plaintiff did not claim lack of notice of the dismissal of her complaint, nor did she deny that notice was published in the *Chicago Daily Law Bulletin*. *Esczuk*, 39 Ill. 2d at 467, 236 N.E.2d at 720-21. The supreme court found that a section 2-1401 petition "is not intended to relieve a party from the consequences of his own mistake or negligence." *Id*., 236 N.E.2d at 720. The case at bar is distinguishable from *Esczuk*. Unlike the negligent plaintiff who did not check for notice in *Esczuk*, Hampel was never provided notice of his court date or of his dismissal. Additionally, the court file did not provide Hampel with the necessary information.

¶ 24 An example of a lack of due diligence is provided in *Hogan & Farwell, Inc. v. Meitz*, 45 Ill. App. 3d 216, 359 N.E.2d 740 (1976). In *Meitz*, an order of default was entered against both defendants for failure to answer or otherwise plead. *Id.* at 218, 359 N.E.2d at 742. The defendants filed a petition to vacate the order pursuant to section 72 of the Civil Practice Act (Ill. Rev. Stat. 1981, ch. 110, par. 72) (currently section 2-1401 of the Code) about four months after receiving notice and six months after the order was entered. *Id.* at 218-20, 359 N.E.2d at 741-43. In *Meitz*, the appellate court affirmed the trial court's denial of the petition, holding that the defendants' default was the result of their own negligence and nonresponse. *Id.* at 222, 359 N.E.2d at 744.

¶ 25 In the case at bar, when Hampel received notice of the dismissal, he relied on refiling the action through section 13-217 of the Code (735 ILCS 5/13-217 (West 2008)). Hampel spent 19 months pursuing his refiled case until Alpine filed its motion to dismiss. During that 19 month period, Hampel relied on what he thought was a timely refiling. Upon realizing that Alpine was challenging the refiled action, Hampel filed his section 2-1401 petition 60 days later. Unlike *Meitz*, in the present case, Hampel was not sitting idly by. This is not a case in which the plaintiff simply waited until the two year limitation period under section 2-1401 was almost expired before beginning to contest his action. Rather, Hampel spent his time pursuing his refiled action. Thus, we cannot say that Hampel displayed the lack of diligence requisite to show that the trial court's ruling was arbitrary or unreasonable. We hold that the trial court did not abuse its discretion in granting Hampel's section 2-1401 petition.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.