

No. 1-11-3386

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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JANE DOE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois.
	)	
v.	)	No. 09 L 6114
	)	
FRANK CANNATELLO,	)	Honorable
	)	William Maddux,
Defendant-Appellee.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Justice Howse and Justice Palmer concurred in the judgment.

ORDER

*HELD:* Trial court did not abuse its discretion in granting defendant’s section 2-1401 petition to vacate default judgment against him where (1) defendant presented both factual and legal defenses to the action, (2) defendant raised significant questions as to whether he was ever properly served with process in the original action, and (3) defendant alleged conduct by plaintiff’s attorneys that was designed to keep him from becoming aware of the default.

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¶ 1 Plaintiff Jane Doe appeals from the trial court's order granting defendant Frank Cannatello's motion under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) to vacate a default judgment against him.

¶ 2 On January 24, 2009, the plaintiff was raped in a common area of an apartment building owned by the defendant. She subsequently brought suit against the defendant for willful and wanton misconduct, alleging that he failed to provide reasonable security measures for invitees and guests such as herself. Defendant failed to file an appearance, and a default judgment was entered against him in the amount of \$1,154,605.50.

¶ 3 Three months later, defendant filed a motion to vacate the default judgment pursuant to section 2-1401. Defendant claimed that he was never served with a copy of the complaint or a summons, and he did not have knowledge of any orders being entered in the case until nearly a month after the default judgment was entered. He further contended substantively that he did not owe a duty of care to plaintiff and had not been aware of any violent criminal activity on the property prior to plaintiff's assault.

¶ 4 The trial court granted defendant's section 2-1401 motion and vacated the default judgment. Plaintiff now appeals. For the reasons that follow, we find that the trial court did not abuse its discretion in granting defendant's motion.

#### ¶ 5 I. BACKGROUND

¶ 6 In her amended complaint, plaintiff alleges the following facts. On the night of January 24, 2009, plaintiff, who was then 17 years old, was an invitee or guest at an apartment building owned by the defendant when she was tied up and raped by tenants or other persons in a common

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area of that building. (We shall refer to this building as “the property.”) Plaintiff alleges that the defendant was aware of gang activity and criminal activity on the property, including drug trafficking, assault, sexual assault, and armed robbery. Plaintiff further alleges, without elaboration, that the defendant “owed a duty to provide reasonable security measures to invitees/guests upon his property.” Nevertheless, according to the complaint, the defendant willfully and wantonly allowed known criminals to lease the property, failed to evict tenants when it was reasonably foreseeable that they would commit criminal acts on invitees, failed to prevent known criminals and gang members from socializing on the property, and failed to provide security guards or cameras in common areas. Thus, plaintiff seeks compensation for the injuries she incurred as a result of defendant’s alleged willful and wanton misconduct.<sup>1</sup>

¶ 7 The procedural history leading to the entry of a default judgment against the defendant is as follows. Plaintiff filed her original complaint on May 22, 2009. The Cook County sheriff attempted to serve the defendant with the summons and complaint at 2847 S. Halsted, but was unable to effect service due to “no such address.” On June 30, 2009, the court entered an order appointing one Paul Rutherford as a special process server. Plaintiff subsequently filed an affidavit from Rutherford in which he averred that, on July 16, 2009, he served the summons and complaint on the defendant by leaving a copy at his usual place of abode with a man named Kenny Kolerich, whom he identified as defendant’s cousin. Rutherford listed defendant’s usual place of abode as 3728 S. Parnell.

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<sup>1</sup> Plaintiff’s amended complaint also contained a count seeking damages for negligence. However, that count was subsequently dismissed and is not at issue in this appeal.

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¶ 8 Plaintiff subsequently amended her complaint on November 13, 2009. With regard to service of the amended complaint, the trial court issued an order on February 22, 2010 stating: “This matter coming before the Court for Status of Service, due notice having been given, the Court fully advised: IT IS HEREBY ORDERED Upon Plaintiff’s Motion for Comparable Method of Service, Service is to be made on Defendant via Regular US Mail.” The motion upon which this order was premised is not filed in the record.

¶ 9 On March 9, 2010, the court held a case management conference at which defendant physically appeared. (Although there is no transcript of the proceedings at this conference, defendant admits in his appellate brief that he did in fact appear in court on this date.) The defendant requested that the court give him time to obtain counsel. Accordingly, the court entered an order stating that defendant had until April 6, 2010, to file an appearance.

¶ 10 By April 14, 2010, defendant had not filed an appearance, and the trial court entered an order of default against him. Following a prove-up, the court entered a default judgment of \$1,154,605.50 against him on December 20, 2010.

¶ 11 Approximately three months later, on March 15, 2011, defendant filed a motion to quash service and vacate the default judgment. In support, the defendant argued that the court never acquired personal jurisdiction over him, since he was never served with a copy of the complaint and summons as required by section 2-203 of the Code of Civil Procedure (735 ILCS 5/2-203 (West 2010)). In the alternative, the defendant petitioned the court to vacate the default judgment under section 2-1401. Defendant contended that he had a meritorious defense to plaintiff’s claim, since he did not owe the plaintiff a duty to protect her from the criminal acts of

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third parties, and he did not act willfully and wantonly with regard to security measures on the property. Defendant further contended that the plaintiff's failure to serve him in accordance with the Code of Civil Procedure explained and justified his failure to file an appearance. Finally, defendant contended that he demonstrated due diligence in filing his section 2-1401 petition once he became aware of the default judgment against him.

¶ 12 In support of these contentions, defendant attached his own affidavit. In his affidavit, defendant stated that he resided at 2947 S. Halsted and had resided there for approximately four years. He averred that he had never been served with a copy of plaintiff's complaint or a summons. Defendant further stated that he had never resided at 3728 S. Parnell, the address at which plaintiff's special process server had purportedly effected service. He said that Kenny Kolerich was not his cousin, nor any relation to him, but was merely a tenant who lived at that address.

¶ 13 Defendant further stated in his affidavit that he was not aware of any orders that were entered in the case until after January 20, 2011, when he received a letter from plaintiff's counsel dated January 18, 2011, with a copy of the default judgment that had been entered against him on December 20, 2010. The letter was addressed to 2935 S. Halsted, at which address the defendant had allegedly never resided. Defendant stated that the letter indicated that an additional copy had been sent to his home address at 2947 S. Halsted. However, he claimed that the letter was the first correspondence from the plaintiff or her counsel that he recalled receiving at that address.

¶ 14 Defendant stated that after receiving notice of the judgment, he contacted an attorney on or about January 23, 2011. He also contacted his insurance company to request representation.

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His insurance company informed him that the insurance on the property had lapsed and that he was not insured at the time of plaintiff's injury. Within 30 days of receiving that notification, defendant filed his section 2-1401 petition. He stated that he would have filed his petition earlier if he had known earlier that his insurance had lapsed.

¶ 15 Finally, with regard to the merits of plaintiff's complaint, defendant averred that he had no knowledge of any violent criminal activity occurring on the property prior to the time that plaintiff was allegedly attacked. He stated that he had no knowledge of gang members socializing or engaging in criminal activity on the property, and he did not knowingly permit known criminals to lease the property.

¶ 16 Plaintiff filed a response to defendant's section 2-1401 petition in which she contended that the defendant had been properly served pursuant to section 2-203.1 of the Code of Civil Procedure (735 ILCS 5/2-203.1 (West 2010)), governing comparable methods of service, as evidenced by the fact that the defendant appeared in court on March 9, 2010, and acknowledged that he was in receipt of the complaint. In support, she attached the affidavit of her former attorney, Matthew Sims. Sims averred that on February 22, 2010, he appeared before Judge Maddux and presented a motion for comparable method of service. Although the motion was not filed, Judge Maddux reviewed and granted the motion. On that same date, Sims stated, he personally mailed a copy of the summons and complaint to three addresses: 3728 S. Parnell, 2935 S. Halsted, and 2947 S. Halsted. (As noted, 2947 S. Halsted is the address that the defendant listed as his residence in his affidavit.)

¶ 17 Sims further averred that, when he appeared for the next scheduled court date of March 9,

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2010, the defendant personally appeared in court. According to Sims, the defendant acknowledged that he had received the amended complaint but said that he had not yet retained an attorney. The judge granted him an extension of time until April 6, 2010, to file an appearance. However, the defendant did not file an appearance within that time, and on April 14, 2010, the court entered an order of default against him. Sims testified that on that date, he personally mailed a copy of the order of default, as well as a notice of the date of the prove-up hearing, to all three addresses listed above.

¶ 18 On October 19, 2011, after hearing the arguments of counsel, the trial court, per Judge Maddux, granted defendant's section 2-1401 petition to vacate the default judgment. The court gave its reasons for granting the petition as follows:

“THE COURT: The law does not favor defaults. \*\*\* It doesn't favor people who avoid process, either. So I'm inclined to vacate it on the condition that [defendant] files a general appearance.

COUNSEL FOR DEFENDANT: And I'll represent to the Court that we will.

\* \* \*

THE COURT: And you'll get a chance to prove your case. If it's worth a million-some dollars and property has to be confiscated, so be it; but it shouldn't be by default.”

Because the court vacated the default judgment under section 2-1401, it did not rule upon defendant's alternative contention that the default judgment should be vacated due to a lack of personal jurisdiction over defendant.

¶ 19 Plaintiff now appeals.

¶ 20 II. ANALYSIS

¶ 21 On appeal, plaintiff contends that the trial court abused its discretion in granting defendant's section 2-1401 petition and vacating the default judgment against him. Defendant disputes this contention and further contends, as an alternative ground for affirming the trial court's ruling, that the trial court lacked jurisdiction over him at the time the default judgment was entered.

¶ 22 Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) provides a statutory procedure by which final judgments may be vacated more than 30 days after their entry. The decision of whether to grant a section 2-1401 petition lies within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of that discretion. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986). An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court. *People v. Ramsey*, 239 Ill. 2d 342, 429 (2010) (defining abuse of discretion).

¶ 23 In order to obtain relief under section 2-1401, a defendant must set forth specific factual allegations to show (1) the existence of a meritorious defense and (2) due diligence in presenting the defense to the circuit court in the original action and in filing the section 2-1401 petition. *Airoom*, 114 Ill. 2d at 220-21. The defendant bears the burden of establishing these elements by a preponderance of the evidence. *Id.* at 223. Plaintiff argues that defendant has failed to establish both of these elements, which we shall examine in turn.

¶ 24 A. Existence of a Meritorious Defense

¶ 25 Plaintiff's first contention is that defendant has failed to meet his burden of showing that

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he has a meritorious defense to her action. Defendant, on the other hand, contends that he has properly asserted both factual and legal defenses. With regard to the facts of the case, defendant points to his affidavit accompanying his section 2-1401 petition, in which he averred that he had no knowledge of violent criminal activity occurring on the property prior to the attack on the plaintiff. With regard to the legal merits of plaintiff's case, defendant argues that, under Illinois law, a landlord owes no duty to protect invitees such as plaintiff from criminal acts of third parties, except in specific circumstances are not applicable here. We find that these assertions are sufficient to constitute a meritorious defense for purposes of a section 2-1401 petition.

¶ 26 When seeking recovery for willful and wanton conduct, a plaintiff must establish the basic elements of a negligence claim – the existence of a duty, a breach of that duty, and an injury proximately caused by that breach – plus the additional element that the defendant acted with “an utter indifference to or conscious disregard for the welfare of the plaintiff.” *Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 28 (2004); see *Burke v. 12 Rothschild's Liquor Mart, Inc.*, 148 Ill. 2d 429, 449 (1992) (quoting Restatement (Second) of Torts § 500, Comment g, at 590 (1965)) (willful and wanton conduct involves more than “ ‘mere inadvertence, incompetence, unskillfulness, or a failure to take precautions’ ” but instead requires “ ‘a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man’ ”).

¶ 27 Defendant contends that the allegations in his affidavit, if true, would establish that he did not act willfully and wantonly toward the plaintiff. In particular, defendant alleged that he had

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no knowledge of violent criminal activity on the property, no knowledge of gang members socializing or engaging in criminal activity on the property, and no knowledge of criminals leasing his property. We agree that such averrals, if true, would preclude plaintiff from recovering on a willful and wanton theory. Under such facts, defendant's conduct in the instant case would arguably still involve " 'inadvertence, incompetence, unskillfulness, or a failure to take precautions,' " but such conduct is insufficient to meet the willful and wanton standard. *Burke*, 148 Ill. 2d at 449 (quoting Restatement (Second) of Torts § 500, Comment g, at 590 (1965)); see *Stribling v. Chicago Housing Authority*, 34 Ill. App. 3d 551, 556 (1975) (even where landlord could be held liable for negligence leading to burglaries on the property, landlord's conduct was not willful and wanton).

¶ 28 Plaintiff argues that defendant's assertions in this regard are controverted by evidence that was presented to the trial court during the prove-up hearing. Specifically, she states that she presented testimony of independent witnesses who stated that defendant had admitted knowledge of criminal activity on the property prior to the assault on plaintiff. However, plaintiff does not present any case law in support of the proposition that controverted assertions of fact are insufficient to support a section 2-1401 petition. On the contrary, a section 2-1401 petitioner does not bear the burden of proving the facts underlying his defense but, rather, only needs to show that he can reasonably allege facts to support his claim that he has a defense. *Gonzalez v. Profile Sanding Equipment*, 333 Ill. App. 3d 680, 691 (2002); *Kulikowski v. Larson*, 305 Ill. App. 3d 110 (1999).

¶ 29 Nor would defendant's purported admissions to third parties necessarily preclude him

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from presenting contrary testimony at trial. Such admissions would merely be evidentiary admissions, which may be controverted or explained at trial. See *Green by Fritz v. Jackson*, 289 Ill. App. 3d 1001, 1008 (1997) (defendant properly allowed to claim at trial that he acted in self-defense even where such claim was inconsistent with prior evidentiary admission on his part); *International Harvester Co. v. Industrial Com'n*, 169 Ill. App. 3d 809, 814 (1988). It would be the province of the finder of fact to weigh defendant's assertions regarding his lack of knowledge against any evidence to the contrary. *Id.* at 814.

¶ 30 Since defendant has met his burden of showing that he can reasonably allege facts to support his claim of a factual defense, we need not consider the merits of defendant's legal defense in this decision.<sup>2</sup> Accordingly, we find that the trial court did not abuse its discretion in

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<sup>2</sup> While we will leave the validity of his defense to the trial court, we note that defendant has case law in support of the proposition that a landlord has no general duty to protect people on his property from criminal acts by third parties. See *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 216 (1988) (declining to impose on a landlord a general duty to protect tenants and those on the premises with the tenant's consent from foreseeable criminal activity on the premises); *Pippin v. Chicago Housing Authority*, 78 Ill. 2d 204, 208 (1979) (at common law, a landlord does not owe a tenant or social guest a duty to protect her from criminal acts of third parties).

In response, plaintiff cites cases for the proposition that there are exceptions to this general rule. However, she does not discuss these exceptions or even assert that any of them would apply under the facts of this case. In any event, the first three cases cited by plaintiff deal solely with situations where a landlord voluntarily undertook to provide security measures for his

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finding that defendant set forth sufficient allegations to show the existence of a meritorious defense.

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property, which the instant plaintiff has not alleged in her complaint. *Phillips v. Chicago Housing Authority*, 89 Ill. 2d 122, 126 (1982) (landlord has no general duty to protect tenants from criminal acts; however, where landlord voluntarily undertakes to provide security measures but performs that undertaking negligently, he may be held liable for injuries); *Cross v. Wells Fargo Alarm Services*, 82 Ill. 2d 313, 317-18 (1980) (although there is no general duty to protect tenants or social guests from criminal acts of third parties, a landlord who voluntarily assumes such duties must perform them with due care); *Krautstrunk v. Chicago Housing Authority*, 95 Ill. App. 3d 529, 531 (1981) (where a landlord voluntarily undertakes to provide security services on his property, his liability is limited by the extent of his undertaking). Furthermore, the next two cases cited by plaintiff deal solely with injuries that are facilitated by a dangerous condition of the premises that was caused by the landlord's negligence. *Duncavage v. Allen*, 147 Ill. App. 3d 88, 96 (1986) (wrongful death suit brought by estate of deceased tenant against landlord stated a cause of action for negligence where the fatal assault was allegedly facilitated by burned-out lights, weeds high enough to conceal trespassers, and the landlord's storage of a ladder in a nearby place accessible to burglars); *Whalen v. Lang*, 71 Ill. App. 3d 83, 86 (1979) (tenant failed to state a cause of action against his landlord where he was assaulted by a trespasser on the premises but did not allege that the assault was a result of a dangerous condition of the premises; the mere existence of a trespasser did not constitute a dangerous condition even where the landlord had notice of prior trespassers committing criminal acts against tenants).

¶ 31 B. Due Diligence

¶ 32 Plaintiff next contends that the trial court abused its discretion in granting defendant's section 2-1401 petition because defendant failed to exercise due diligence in bringing his claims before the trial court. In making this contention, plaintiff focuses upon defendant's failure to present his current defenses – or, in fact, any defenses – in the original action. Defendant argues that the trial court would not have abused its discretion in finding due diligence on his part, because a reasonable defendant in his shoes could have believed that any judgment issued against him would be void due to lack of personal jurisdiction. Alternately, he contends that, even to the extent that he may have lacked due diligence, equitable factors justify the granting of his petition.

¶ 33 The requirement of due diligence has been explained as follows:

“Due diligence requires the section 2-1401 petitioner to have a reasonable excuse for failing to act within the appropriate time. [Citations.] Since section 2-1401 does not afford a litigant a remedy whereby he may be relieved of the consequences of his own mistake or negligence [citations], 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 error of fact or the existence of a valid defense was not made to appear to the trial court.’ [Citation.] Specifically, the petitioner must show that his failure to defend against the lawsuit was the result of an excusable mistake and that under the circumstances he acted reasonably, and not negligently, when he failed to initially resist the judgment.” *Airoom*, 114 Ill. 2d at 222 (quoting *Brockmeyer v. Duncan*, 18 Ill.2d 502, 505 (1960)).

In determining whether a petitioner has exercised due diligence, courts consider all the

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circumstances attendant upon entry of the judgment, including the conduct of the litigants and their attorneys. *Airoom*, 114 Ill. 2d at 222; *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 101 (2006).

¶ 34 However, one of the guiding principles in adjudicating section 2-1401 petitions is that such petitions invoke the equitable powers of the court. *Paul*, 223 Ill. 2d at 95. As our supreme court has stated, “[t]he power to set aside a default and permit a defendant to have his day in court is based upon substantial principles of right and wrong and is to be exercised for the prevention of injury and [for the] furtherance of justice.’ ” *Airoom*, 114 Ill. 2d at 225 (quoting *Diner’s Club, Inc. v. Gronwald*, 43 Ill. App. 3d 164, 168 (1976); *Spencer v. American United Cab Association*, 59 Ill. App. 2d 165, 172 (1965)); see *People v. Lawton*, 212 Ill. 2d 285, 298 (2004) (stating that “[r]elief should be granted under section 2-1401 when necessary to achieve justice”). Accordingly, courts have not considered themselves strictly bound by precedent in administering section 2-1401 relief, and where justice and good conscience may require it, a judgment may be vacated even though the petitioner has not met the requirement of due diligence. *Airoom*, 114 Ill. 2d at 115.

¶ 35 Defendant initially contends that he acted with due diligence because a reasonable person in his position could have believed that the trial court never acquired personal jurisdiction over him, thus relieving him of the need to respond to the proceedings in a timely fashion. Plaintiff contends that this argument is disingenuous. According to her, the defendant did not actually base his decision not to respond to plaintiff’s suit upon any supposed lack of personal jurisdiction, but merely fabricated this excuse after the judgment in an attempt to justify his

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inaction. We note that the trial court did not make any explicit finding as to defendant's due diligence or lack thereof, instead apparently basing its decision upon equitable factors.

¶ 36 It is well established that if a party is not properly served with summons, then the court lacks personal jurisdiction against him and any judgment against him is void. *Mugavero v. Kenzler*, 317 Ill. App. 3d 162, 164 (2000) (vacating default judgment against defendant where service was never properly obtained upon defendant); *J.C. Penney Co., Inc. v. West*, 114 Ill. App. 3d 644, 646 (1983) (stating that "service of summons upon a defendant is essential to create personal jurisdiction of the court"); see also *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989) ("A judgment rendered by a court which fails to acquire jurisdiction over the parties is void and may be attacked and vacated at any time, either directly or collaterally"). Plaintiff argues that defendant waived this jurisdictional argument by appearing in court on March 9, 2010, and thus acknowledging that he was aware that the case was pending. However, a defendant's actual knowledge of proceedings against him does not constitute a waiver of any objection to personal jurisdiction. *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986) (judgment rendered without service of process is void regardless of defendant's actual knowledge of the proceedings); see also *Mugavero*, 317 Ill. App. 3d at 166 (stating that where a judgment is void for lack of personal jurisdiction, "[t]he waiver rule does not apply" to challenges to that judgment). The case of *Washington v. Clayter*, 91 Ill. App. 3d 489, 491 (1980), cited by plaintiff on this point, is distinguishable, because in that case, defendant raised an objection to personal jurisdiction prior to the entry of judgment but then abandoned that

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objection. No such abandonment appears in the instant case.<sup>3</sup>

¶ 37 Furthermore, we agree with defendant that it was, at the very least, highly questionable whether the trial court acquired personal jurisdiction over him in the original action. Section 2-203 of the Code of Civil Procedure, which governs the service of summons upon an individual defendant, states:

“Except as otherwise expressly provided, service of summons upon an individual defendant shall be made (1) by leaving a copy of the summons with the defendant personally, (2) by leaving a copy at the defendant’s usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode \*\*\*.”

735 ILCS 5/2-203 (West 2010).

Section 2-203.1 provides that, in cases where it is impractical to serve a defendant in accordance with the terms of section 2-203(1) and (2), the plaintiff may move to have the court enter an

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<sup>3</sup> We additionally note that defendant’s October 19, 2011, agreement to file a general appearance would not retroactively validate any prior judgments or orders by the court that were made without personal jurisdiction. *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622 (2008) (stating that “ ‘where a judgment is void when entered, it remains void notwithstanding subsequent general appearances and, that a general appearance does not serve to validate retroactively a judgment void when entered’ ”) (quoting *West*, 114 Ill. App. 3d at 646).

order directing a comparable method of service. That section further provides:

“The motion shall be accompanied with an affidavit stating the nature and extent of the investigation made to determine the whereabouts of the defendant and the reasons why service is impractical under items (1) and (2) of subsection (a) of Section 2-203, including a specific statement showing that a diligent inquiry as to the location of the individual defendant was made and reasonable efforts to make service have been unsuccessful.” 735 ILCS 5/2-203.1 (West 2010).

¶ 38 Defendant contends that plaintiff did not properly serve him pursuant to either of these sections. According to the allegations in defendant’s affidavit, plaintiff never obtained service upon him at his residence at 2947 S. Halsted. Plaintiff strongly implies in her brief that defendant was lying when he claimed not to reside at 3728 S. Parnell, the address at which plaintiff attempted to obtain abode service on him. In support, plaintiff cites multiple contemporaneous Internet searches that show several addresses, including the 3728 S. Parnell address, that are allegedly “associated with his name.” However, at best, plaintiff’s evidence raises questions of credibility that would be inappropriate for us to resolve for the first time on appeal. See *520 South Michigan Avenue Associates v. Department of Employment Security*, 404 Ill. App. 3d 304, 317 (2010) (assessment of candor is particularly within the province of the finder of fact).

¶ 39 Moreover, with regard to comparable service under section 2-203.1, it is clear from the record that plaintiff never filed her motion for comparable method of service, nor did she file any accompanying affidavit describing her investigation of defendant’s whereabouts and the reasons

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why conventional service was impractical. Thus, it would appear that plaintiff failed to strictly comply with the terms of section 2-203.1. Although plaintiff's former counsel averred that he presented such a motion and affidavit before the trial court, a search of the court file prior to judgment would not have uncovered any such documents.

¶ 40 Based upon the foregoing, defendant argues that it would have been reasonable for a person in his position to believe that the trial court lacked jurisdiction over him based upon the lack of traditional service and the lack of a motion for comparable method of service in the court record. However, such a hypothetical is insufficient by itself to show that defendant acted with due diligence. The question is not whether a reasonable person in the defendant's position might have taken similar actions and yet remained diligent; the question is whether this defendant was in fact diligent. Defendant has not presented any evidence to show that his failure to defend himself after having actual notice of the plaintiff's action against him was premised upon his beliefs about the trial court's jurisdiction or lack thereof. Most notably, his affidavit accompanying his section 2-1401 petition is devoid of any such allegations. Accordingly, defendant has not met his burden of showing by a preponderance of the evidence that he acted with due diligence in presenting his defense in the original action.

¶ 41 Nevertheless, defendant argues that the questionable nature of the trial court's jurisdiction is one factor that may be taken into account in weighing the equities of the case to determine whether the due diligence standard should be relaxed in this case. We turn now to that analysis.

¶ 42 Both the defendant and the plaintiff contend that they are favored by the equities in this case. Defendant argues that on multiple occasions, plaintiff and her counsel took actions

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designed to keep him from being appraised of the status of the case. He contends that these actions, when combined with the size of the judgment and the tenuous nature of his liability, weigh in favor of vacatur. Plaintiff, on the other hand, argues that defendant's ignorance as to the status of his case was his own fault, and he ought not be rewarded for his failure in that regard.

¶ 43 We begin by considering defendant's arguments. Defendant cites three instances in which plaintiff's counsel supposedly acted to keep him in the dark about the progress of the case. First, plaintiff's counsel waited 29 days after the judgment to send defendant notice of the default judgment, thus ensuring that defendant would not be able to file a motion to vacate under the more lenient standards of section 2-1301. That section provides that in the 30-day period after final judgment, the trial court may set the judgment aside "upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301 (West 2010). Although a plaintiff's delay in providing notice of a default judgment will not by itself justify relaxation of the due diligence standard, it is one factor that a court may consider in weighing the equities of the case. *Kulikowski*, 305 Ill. App. 3d at 117.

¶ 44 Second, it appears from the record that plaintiff violated the Motion Judges Rules for the Law Division of the Circuit Court of Cook County by failing to give defendant proper notice of her motion for default. Motions for default are governed by Rule 4.2, which provides, in pertinent part, "All parties who have been served shall be given notice, whether or not an appearance was filed." However, the record does not reflect that plaintiff provided the defendant with such notice.

¶ 45 Third, if the allegations in defendant's affidavit are true, then plaintiff's special process server Rutherford filed a false affidavit before the court with regards to service of process on the defendant. In that affidavit, Rutherford averred that he left a copy of the summons and complaint at 3728 S. Parnell, which he stated was defendant's usual place of abode, with a man named Kolerich, which he stated was defendant's cousin. However, in his affidavit, defendant denied ever residing at that address and further denied that Kolerich was any relation of his. As noted, plaintiff disputes the veracity of defendant's assertions, a dispute which we are not equipped to settle on appeal, insofar as it turns upon determinations of credibility. However, in any event, it is clear that someone was not telling the truth, whether it was the defendant, the plaintiff's special process server, Kolerich himself, or some combination of the three.

¶ 46 In addition to pointing out the foregoing conduct of plaintiff and her counsel, defendant urges that setting aside the default is particularly appropriate in this case because of the tenuous nature of his liability and the size of the judgment against him. As has been discussed, there are serious questions as to whether defendant owed any legal duty to plaintiff and, if so, whether he had the requisite knowledge to sustain a finding of willful and wanton conduct. Moreover, there are also serious questions as to whether the trial court properly acquired jurisdiction over the defendant. Under such circumstances, defendant argues that it would be unconscionable to allow a default judgment of \$1.154 million to stand against him. The severity of the penalty is one factor that courts consider in determining whether to grant a motion to vacate. See *Merchants Bank v. Roberts*, 292 Ill. App. 3d 925, 930-31 (1997) (trial court abused its discretion in failing to grant section 2-1301 motion to vacate where, among other things, the trial court failed to

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consider the severity of the penalty upon the defendants). In this regard, defendant points out that, although plaintiff could have recovered under a theory of negligence, plaintiff instead chose to proceed under a theory of willful and wanton conduct. Defendant asserts that this was a deliberate attempt to prevent him from obtaining a discharge of the debt in the event that he filed for bankruptcy. See *Kearns v. Industrial Commission*, 312 Ill. App. 3d 257, 263-64 (2000) (a tort creditor may be excepted from a bankruptcy discharge if her injuries resulted from willful and malicious injury). Defendant states that if the judgment were not vacated, he would be, in his words, financially destroyed.

¶ 47 In counterpoint to all of these arguments by defendant, plaintiff argues that fairness militates against granting the petition, because of defendant's own carelessness in following his own case. She points out that defendant was apparently well-informed enough to show up in court on March 9, 2010, but did not appear again until approximately a year later, when he filed his section 2-1401 petition. She argues that this factor is by itself sufficient to outweigh all the factors raised by defendant to such a degree that no reasonable judge would have chosen to vacate the default judgment.

¶ 48 We disagree. Upon review of the parties' arguments and the record in this case, it is apparent that neither party appears before this court with entirely clean hands. Defendant may have been absent without leave, so to speak, but plaintiff's counsel took affirmative steps to help ensure that he remained that way. Given that there are multiple factors weighing both for and against vacatur, and keeping in mind that defaults are not favored in the law, it was not an abuse of discretion to relax the due diligence standard and allow defendant to have his day in court.

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See *Merchants Bank*, 292 Ill. App. 3d at 932 (entering of default is a drastic action that should only be employed as a last resort); see also *Lawton*, 212 Ill. 2d at 298 (section 2-1401 relief should be granted when necessary to achieve justice); *Airoom*, 114 Ill. 2d at 115 (judgment may be vacated in the interests of justice in good conscience even where the petitioner has not met the requirement of due diligence). In rendering this decision, we do not thereby condone the months of inactivity during which defendant failed to keep himself informed as to the status of his case. Nor do we express any opinion as to how this court would have ruled if it were called upon to make this decision in the first instance. However, in light of the numerous factors weighing in favor of setting aside the default, we are unable to say that no reasonable court would have ruled as the circuit court did in this case.

¶ 49 The case of *Ameritech Publishing of Illinois, Inc. v. Hadyeh*, 362 Ill. App. 3d 56 (2005), cited by plaintiff on this point, is distinguishable. The *Ameritech* court found that the trial court abused its discretion in relaxing the due diligence standard and granting defendant's section 2-1401 petition where there were no equitable factors favoring vacatur of the judgment. *Id.* at 61. Indeed, it appears that the defendant in that case did not attempt to raise equitable factors beyond a suggestion in his petition that his counsel did not file an answer and did not inform him as to the entry of a judgment. *Id.* at 59. Furthermore, the *Ameritech* court noted that, even if defendant had set forth circumstances which would excuse his lack of due diligence, he failed to set forth a meritorious defense in his petition. *Id.* at 62. Although he claimed to have a defense, he did not include any attachments or affidavits which would provide a factual basis for that defense. *Id.* By contrast, in the instant case, defendant has set forth numerous equitable factors

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that favor the relaxation of the due diligence standard, as well as presenting both factual and legal defenses to plaintiff's claim, the former of which are supported by affidavit. The holding of *Ameritech* is therefore not applicable here.

¶ 50 Plaintiff also cites a number of cases where, on appeal, the court upheld the trial court's decision to deny relief under section 2-1401, notwithstanding the petitioner's claim that principles of equity and fairness would require a different outcome. *Airoom*, 114 Ill. 2d at 228-29; *Johnson v. Wal-Mart Stores, Inc.*, 324 Ill. App. 3d 543, 549 (2001); *Kaput v. Hoey*, 124 Ill. 2d 370, 383-85 (1988); *Elder v. Bryant*, 324 Ill. App. 3d 526, 531 (2001); *Gold v. Rader*, 201 Ill. App. 3d 775, 784-85 (1990). However, these cases are distinguishable because, in all of these cases, the court's review on appeal was limited to the question of whether the trial court abused its discretion in denying a section 2-1401 petition. A holding that a trial court could have exercised its discretion to deny a petition is a far cry from a holding that the court lacked discretion to grant it. *Johnson*, *Kaput* and *Elder* are further distinguishable in that the defendants in those cases did not establish the existence of a meritorious defense to the underlying action. *Johnson*, 324 Ill. App. 3d at 548 (petition made conclusory claim of a meritorious defense but lacked specific allegations or supporting documentation); *Kaput*, 124 Ill. 2d at 385 (defendant's factual assertions not supported by affidavit); *Elder*, 324 Ill. App. 3d at 531 ("Defendants make no claim of a defense, much less a meritorious defense. In fact, defendants admitted liability in their section 2-1401 petition."). Accordingly, these cases do not support reversal of the trial court's judgment.

¶ 51 Therefore, for the foregoing reasons, we affirm the judgment of the trial court.

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¶ 52 Affirmed.