

2013 IL App (2d) 130540-U
No. 2-13-0540
Order filed October 16, 2013

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
SECOND DISTRICT

<i>In re</i> MARRIAGE OF LIBERTAD CLABORN,)	Appeal from the Circuit Court of Lake County.
)	
Petitioner-Appellee,)	
)	
and)	No. 11-D-1153
)	
BOBBY CLABORN,)	Honorable
)	Veronica M. O'Malley,
Respondent-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Issues regarding the propriety of the default order and notice of prove-up are forfeited; the trial court did not abuse its discretion by not vacating the default judgment for dissolution of marriage; affirmed.

¶ 2 Respondent, Bobby Claborn, appeals from the trial court's default judgment for dissolution of his marriage to petitioner, Libertad Claborn (Libby). Bobby raises issues regarding the propriety of the October 9, 2012, default order, and the notice of the February 4, 2013, prove-up hearing. Bobby also contends that the trial court abused its discretion by not vacating the default judgment for dissolution of marriage. We affirm.

¶ 3

BACKGROUND

¶ 4 The parties were married on December 22, 1990, and have two children, Bobby Junior and Gabriella, both of whom are now over the age of 18. On May 25, 2011, Libby moved to the State of Illinois. Libby previously had resided with Bobby and their children in Chattanooga, Tennessee. She alleged that she and the children fled Tennessee for Lake County, Illinois, fearing for their safety, as respondent had been guilty of acts of extreme mental cruelty and physical abuse towards Libby and the children.

¶ 5 Libby filed a petition for divorce on June 8, 2011, following the court's entry of an emergency order of protection against Bobby. A two-year plenary order of protection was entered by the court after a hearing. Bobby was served, although he was not present at the hearing.

¶ 6 Bobby was personally served with the petition for dissolution of marriage on November 19, 2011. According to Bobby's counsel, Bobby filed a divorce action in Hamilton County, Tennessee, on October 26, 2011. On February 23, 2012, the Tennessee court ruled that there had been no valid service on Libby. Since then, Bobby's initial Tennessee counsel withdrew from representation and another attorney filed an appearance in Tennessee on behalf of Bobby. To date, there has been no valid service of Bobby's Tennessee petition on Libby, and on March 18, 2013, the Tennessee court dismissed Bobby's Tennessee divorce action.

¶ 7 On December 19, 2011, Bobby, through his Illinois counsel, filed a motion to dismiss Libby's Illinois petition for dissolution of marriage for lack of jurisdiction. On January 10, 2012, Libby filed a motion to consolidate the divorce action and the order of protection action. Libby notified Bobby that she would present this motion for hearing on January 20, 2012, by serving a copy

upon Bobby and his counsel by regular mail. The motion was heard and granted on January 20, 2012.

¶ 8 On January 25, 2012, the trial court participated in a telephone conference with the Tennessee judge presiding over Bobby's Tennessee complaint for dissolution of marriage. At that time, the Lake County court ruled that it had temporary emergency jurisdiction over Libby and the children, who were all protected parties under the order of protection. Bobby's Illinois' motion to dismiss for lack of jurisdiction was denied with prejudice. The trial court further noted that the order of protection was considered valid and Bobby was ordered not to violate it.

¶ 9 On May 31, 2012, following an evidentiary hearing on jurisdiction, and "violations of the Order of Protection between the parties," the trial court found that it did have personal jurisdiction over Bobby, and it ordered him to answer the petition for dissolution of marriage within 28 days.

¶ 10 Since then, Bobby's counsel in Illinois withdrew on July 16, 2012, and Bobby has failed to file a supplemental appearance or answer Libby's petition for dissolution. Instead, on July 5, 2012, Bobby filed a *pro se* petition for leave to appeal, challenging the trial court's order finding personal jurisdiction over Bobby. We denied the petition on September 10, 2012.

¶ 11 Thereafter, on September 28, 2012, Libby served Bobby a motion for default judgment by regular and certified mail, and by federal express delivery, notifying Bobby that she would present the motion for immediate hearing on October 9, 2012. On October 9, the motion was heard. Bobby failed to appear, and the court entered an order finding Bobby to be in default for his failure to appear. Libby served Bobby with a copy of the order via regular and certified mail on October 11, 2012.

¶ 12 On October 11, 2012, Bobby filed a *pro se* petition with the Illinois Supreme Court for leave to appeal this court's order denying Bobby leave to appeal the jurisdictional issue. The petition was denied by the supreme court on November 28, 2012.

¶ 13 On January 29, 2013, Libby served Bobby with her notice of prove-up pursuant to the finding of default against Bobby. The notice informed Bobby that Libby's prove-up would be presented on Monday, February 4, 2013.

¶ 14 On February 4, 2013, Libby appeared in court. Bobby failed to appear, either in person or through counsel. The trial court, after hearing testimony in support of the allegation contained in her petition, considering all of the evidence, and finding that Bobby had been personally served with the petition for dissolution of marriage on November 19, 2011, as well as that he had been served with the notice of prove-up by regular and certified mail on January 29, 2013, entered a final judgment for dissolution of marriage.

¶ 15 Libby served Bobby with a copy of the judgment by regular mail on February 5, 2013. Libby also recorded the judgment on February 12, 2013, with the Hamilton County Register of Deeds in Hamilton County, Tennessee.

¶ 16 On February 6, 2013, Libby filed with the circuit court of Lake County her certificate of service of the notice of prove-up for attorney fees to Bobby that she had served upon him by both regular and certified mail on January 29, 2013. Libby also filed her certificate of service of notice of entry of the judgment of dissolution that had been entered on February 4, 2013, which she had served upon Bobby by regular mail on February 5, 2013.

¶ 17 On February 19, 2013, instead of being in court pursuant to the date Bobby claimed he thought was the prove-up date, and in violation of the plenary order of protection, Bobby ordered

his son, Bobby Junior, to get into Bobby's car and gave him a letter and a letter for his sister, Gabriella, both of whom are protected persons under the order of protection. Bobby Junior told his father that he had to be in class. Bobby allowed Bobby Junior to drive to school but told him that he would be following him and watching him closely and would speak to him after class. Bobby was approached by two officers at the school campus, who were unaware of the order of protection at the time. Bobby refused to provide any identification to the officers when they asked him and he became loud and irate, causing a disturbance. As a result of the incident with Bobby Junior and the episode at the school campus, special police protection had to be provided for Libby and the children.

¶ 18 On March 4, 2013, almost five months after the judgment default order had been entered against Bobby, Bobby's counsel entered an appearance and filed a motion to vacate the judgment for dissolution of marriage pursuant to section 2-1301(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2012)). In the motion to vacate, Bobby admitted (1) knowing that an order of default had been entered against him on October 9, 2012; (2) that he was notified there would be a prove-up in this matter on February 19, 2013; and (3) that he was notified on February 6, 2013, that a judgment for dissolution of marriage was entered by Libby on February 4, 2013. The only reason given in support of his motion to vacate was his assertion that Libby proceeded to a prove-up hearing on February 4, 2013, without notifying him.

¶ 19 On April 26, 2013, the trial court held a hearing on Bobby's motion to vacate. There is no transcript of the hearing or a bystander's report in the record. However, the record does contain the order of the trial court denying Bobby's motion. It provides:

“(1) [Bobby]’s Motion to Vacate is denied pursuant to the Court finding that [Libby] had previously sent proper and timely notices pursuant to all relevant rules.

(2) The Court also noting that it had previously ruled and found to have personal and subject matter jurisdiction over [Bobby] and that the Default Motion and Default Order were properly noticed and entered.

(3) The Court further finding that [Bobby] failed to exercise due diligence[,] flagrantly disregarded court orders, and that the judgment for Dissolution is not unconscionable, and would cause undue hardship and mental anguish on [Libby] and both children.”

¶ 20

ANALYSIS

¶ 21 Bobby raises for the first time issues regarding the propriety of the October 9, 2012, default order, and notice of the February 4, 2013, prove-up hearing. Bobby’s arguments were never presented to the trial court. Accordingly, we find these arguments are forfeited. See *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85 (“[I]ssues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal.”).

¶ 22 The remaining issues raised by Bobby all stem from the trial court’s order denying his motion to vacate the judgment for dissolution of marriage. He contends that the trial court abused its discretion by not vacating the default judgment.

¶ 23 To determine whether or not to vacate a default judgment, just as in determining whether or not to enter a default order, the court’s overriding consideration should be whether substantial justice is being done. *Northern Trust Company v. American National Bank and Trust Company*, 265 Ill. App. 3d 406, 412 (1994). Whether substantial justice is being achieved is not subject to precise definition but relevant considerations include (1) the lack of diligence by the defaulter; (2) the

absence of a meritorious defense by the defaulter ; (3) the severity of the penalty resulting from the entry of a default order; and (4) the relative hardships on the parties arising from a grant or denial of default. *Id.* “The ‘doing of substantial justice must also respect the rights of the plaintiff and other litigants whose case has merited the attention of the court.’ ” *Id.* (quoting *Farm Credit Bank v. Schwarm*, 251 Ill. App. 3d 205, 211 (1993) (affirming foreclosure judgment against defendant)).

¶ 24 Bobby has not provided us with a sufficient transcript or bystander’s report of the April 26, 2013, hearing on Bobby’s motion to vacate to permit us to properly evaluate the merits of whether the trial court abused its discretion by not vacating the default judgment, much less deciding this issue in his favor. See *Foutch v. O’Bryant*, 99 Ill. 2d 389, 392 (1984). Our supreme court held in *Foutch* that an appellant has the burden to present a sufficiently complete record of the proceedings at the trial level to support a claim of error by the court. *Id.* Moreover, in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis, and any doubts which may arise from incompleteness of the record will be resolved against the appellant. *Id.* In that case, since the appellant did not provide a transcript or bystander’s report of the hearing on a motion to vacate, there was no basis for holding that the trial court committed an error in denying the motion. *Id.* Similarly, here, in the absence of a sufficient record on appeal, we must presume that the trial court’s order conformed to the law and had a sufficient factual basis and that there is no basis for holding that the trial court abused its discretion in denying the motion to vacate. See *Id.*

¶ 25 However, even without a transcript of the hearing itself, the record and the order denying the motion to vacate support a determination that the court did not abuse its discretion and substantial justice was done. See *Walker v. Iowa Marine Repair Corp.*, 132 Ill. App. 3d 621, 625 (1985)

(reviewing court properly reached the merits of the case in the absence of a transcript where it was clear from the circuit court's order that its ruling could only be based on the pleadings and affidavits in the record presented). The trial court found that Libby previously had sent proper and timely notices to Bobby pursuant to all relevant rules. The record also reflects that, despite being duly served with a motion for default, Bobby failed to appear, answer, or otherwise plead, and the trial court properly entered an order finding Bobby to be in default. Bobby failed to appear in court on either January 25, or on February 19, 2013, the date Bobby claimed he thought was the date for Libby's prove-up, and the same date when he ordered his son to get into his car and then followed him to school in violation of the order of protection. These facts clearly reflect a lack of due diligence and a "flagrant" disregard to follow court procedures and orders. Furthermore, Bobby's motion to vacate does not state a meritorious defense or set forth any extraordinary circumstances for his noncompliance that would warrant the vacatur of the default judgment. Finally, the trial court concluded that the judgment for dissolution of marriage was not unconscionable, and that it would cause undue hardship on Libby and the children if the default order was vacated. Again, the record supports the trial court's findings. Libby has already incurred a vast amount of debt in legal costs and expenses due, *inter alia*, to Bobby's meritless appeals, continued violations of the plenary order of protection, and court orders. We agree that to hold another prove-up hearing in this matter would not be substantially just or reasonable. See *People ex rel. Reid v. Adkins*, 48 Ill. 2d 402, 406 (1971) (the overriding considerations are whether substantial justice is being done and whether, under the circumstances, compelling the other party to proceed to trial on the merits would be reasonable).

¶ 27 For the preceding reasons, we affirm the judgment of the circuit court of Lake County in denying Bobby's motion to vacate the default judgment for dissolution.

¶ 28 Affirmed.