

shares of L.A. Gear stock being held in his account. The day after plaintiff made the sell request, defendant advised him that his shares of L.A. Gear stock had not been sold. After plaintiff requested the shares sold, the stock decreased significantly in value.

¶ 5 On April 3, 2000, plaintiff filed a complaint in the circuit court of Madison County, alleging breach of written contract by defendant as follows:

"a. Failed to diligently sell the shares of stock as requested by [plaintiff];

b. Failed to apprise [plaintiff] of the necessity of depositing additional money in his account in case the Call Option was implemented so that the shares of stock could be sold;

c. Failed to adequately fulfill the terms and conditions of the written contract agreement;

d. Failed to maintain a proper fiduciary relationship by acting in good faith."

Plaintiff claimed that as a direct and proximate result of defendant's breach of the written contract and breach of fiduciary relationship, he lost his initial investment in the L.A. Gear shares and profits that he would have made if the shares had been sold as per his request. Plaintiff sought damages for the loss of his investment and profits. Plaintiff alleged a written contract with defendants, but no written contract was attached to the complaint. Instead, plaintiff's affidavit claimed that there was a written agreement, but he did not have it in his possession.

¶ 6 On September 11, 2000, defendant submitted an "Answer Via Special and Limited Entry of Appearance to Respond to the Complaint and Contest Jurisdiction" in which he alleged that the circuit court did not have jurisdiction to hear the matter because it was barred by *res judicata* as the matter had already been litigated in California and the statute of limitation had expired. Defendant's answer did not raise an argument regarding a requirement for arbitration nor any argument regarding the court's alleged lack of subject

matter jurisdiction. Defendant also filed a motion to dismiss, alleging *inter alia* that the parties had an agreement to submit any controversy between them to arbitration and that the three-year statute of limitations on arbitration had expired. Plaintiff's written response to defendant's motion to dismiss did not mention arbitration. The record is devoid of any ruling as to defendant's motion to dismiss plaintiff's complaint. After the initial pleadings were filed, written discovery was initiated by both plaintiff and defendant.

¶ 7 First Gateway did not respond to plaintiff's complaint, and the circuit court entered a default judgment against it. On January 5, 2001, the circuit court entered an order awarding damages in the amount of \$50,000 in favor of plaintiff and against First Gateway. On that same date, plaintiff and defendant agreed to continue the matter generally while plaintiff pursued First Gateway for satisfaction of the judgment. That order specifically provided that the case could be "reset upon the request of either party."

¶ 8 On August 1, 2002, an order was entered setting the cause for jury trial on March 17, 2003. On February 18, 2003, plaintiff moved to compel defendant to respond to discovery requests served prior to the agreed continuance. On that same date, defendant's attorney moved to withdraw as counsel on the basis that she "is unable to effectively communicate with her client." On March 14, 2003, plaintiff's motion to compel was granted, and the motion to withdraw was set for hearing.

¶ 9 On April 25, 2003, plaintiff moved to strike the pleadings for failure to respond to discovery and failure to appear for a scheduled deposition. On May 2, 2003, the circuit court entered an order allowing defense counsel to withdraw and ordered defendant to have another attorney enter an appearance on his behalf or enter a supplementary appearance "within 21 days stating an address at which notices may be mailed to him." On July 25, 2003, the circuit court entered an order in which it noted that no attorney had entered an appearance for defendant nor had defendant entered an appearance *pro se* within 21 days as

ordered. The circuit court then struck defendant's answer and set the cause for prove-up of damages and entry of judgment on August 22, 2003. On that date, the circuit court entered judgment for plaintiff and against defendant in the amount of \$50,000.

¶ 10 In August 2010, plaintiff filed a motion to revive the judgment. On August 2, 2011, new counsel entered his appearance on behalf of defendant and moved to continue a hearing that had been set for August 10, 2011, asserting "serious questions about the validity of the original judgment, representation of the Defendant in the Judgment of Default hearing and the jurisdiction of the court to hear this case." The circuit court granted the motion to continue. Thereafter, defendant, through his new attorney, filed a motion to vacate, set aside, or strike the judgment and asked the circuit court to deny plaintiff's motion to revive the judgment. In that motion, defendant alleged that general client-brokerage agreements, such as the one between plaintiff and First Gateway, provided for arbitration of disputes and that the instant dispute was subject to arbitration and not subject to any other jurisdiction. The motion further alleged that defendant did not have a copy of the written agreement between plaintiff and First Gateway because defendant quit working for that company. The motion alleged that plaintiff's default judgment against defendant was void.

¶ 11 Plaintiff's responses did not mention arbitration. Defendant replied to plaintiff's responses, alleging that arbitration clauses were "mandatory" in the securities industry. Plaintiff did not respond. Ultimately, the circuit court granted plaintiff's motion to revive the judgment. The circuit court specifically found it had personal and subject matter jurisdiction. Defendant filed a motion to reconsider, which the circuit court denied. Defendant now appeals.

¶ 12

ANALYSIS

¶ 13 In this appeal, defendant contends that the initial dispute was subject to arbitration, and, thus, the circuit court exceeded its jurisdiction in entering a default judgment. Before

we consider this issue, we must first address plaintiff's argument that we are without jurisdiction to hear this appeal because the appeal was not timely filed. Plaintiff argues it is too late for defendant to challenge the judgment as void. However, after careful review of the record, it is clear that we have jurisdiction to hear the appeal.

¶ 14 Supreme Court Rule 301 provides that every final judgment of a circuit court in a civil case is appealable as of right. Ill. S. Ct. R. 301 (eff. May 30, 2008). Rule 303(a)(1) provides that a notice of appeal must be filed within 30 days after the entry of the final judgment appealed from or, if a timely postjudgment motion directed against the judgment is filed, within 30 days after the entry of the order disposing of the last pending postjudgment motion. Ill. S. Ct. R. 303(a)(1) (eff. May 30, 2008). "A final judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit. A judgment is final if it determines the litigation on the merits so that, if affirmed, nothing remains for the trial court to do but to proceed with its execution." *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33, 840 N.E.2d 1174, 1181-82 (2005).

¶ 15 Even though defendant attempts to call into doubt the merits of the underlying judgment, it is clear that the instant case involves the appeal from the revival of judgment entered by the circuit court on December 9, 2011. If affirmed, nothing remains except execution of the judgment. Moreover, the notice of appeal was filed in a timely fashion. The record shows that on January 9, 2012, defendant filed a timely motion to reconsider. The trial court denied the motion to reconsider on March 16, 2012. On April 10, 2012, defendant filed a notice of appeal. Accordingly, we have jurisdiction to hear the instant appeal regarding the revival of judgment.

¶ 16 Turning back to the merits of the appeal, defendant argues that the underlying judgment is void because there was allegedly an arbitration clause in the initial contract

between plaintiff and defendant and defendant's employer, First Gateway. Defendant insists the sole jurisdiction of the circuit court was to order arbitration. We point out that no one has produced a copy of the contract containing the alleged arbitration clause and that while defendant mentioned an arbitration clause, he never pursued that theory. Defendant admits that he has no recourse unless the underlying judgment is declared void because the time for him to seek relief from the default judgment expired long ago. Unless he can show that the circuit court lacked subject matter jurisdiction to enter judgment, he is without a remedy.

¶ 17 While the parties argue vehemently about the purported arbitration clause, voidness, and preemption, it is clear from the record that the underlying judgment arose from a discovery sanction due to defendant's failure to respond and failure to participate in the litigation once personal jurisdiction was obtained. Supreme Court Rule 219(c) authorizes a trial court to impose a sanction, including the entry of a default judgment, on a party who unreasonably fails to comply with the court's discovery rules or orders. Ill. S. Ct. R. 219(c) (eff. July 1, 2002). The trial court's purpose in imposing sanctions is to coerce compliance with discovery rules and orders rather than to punish the dilatory party. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123, 692 N.E.2d 286, 291 (1998).

¶ 18 A sanction which results in a default judgment is a drastic sanction to be invoked only in those cases where the party's actions show a deliberate, contumacious, or unwarranted disregard of the court's authority and should be employed only as a last resort after the trial court's other enforcement powers have failed to advance the litigation. *Shimanovsky*, 181 Ill. 2d at 123, 692 N.E.2d at 291. The imposition of sanctions is a matter left largely to the discretion of the trial court and will not be disturbed on review unless the order constitutes an abuse of discretion, such as where the record indicates the party's conduct was not unreasonable or where the sanction is not just. *Buffington v. Yungen*, 322 Ill. App. 3d 152, 154, 748 N.E.2d 844, 847 (2001). Here, it is clear that defendant failed to timely comply

with the circuit court's discovery orders and exhibited deliberate or contumacious disregard for the circuit court's authority.

¶ 19 The record reflects that on September 11, 2000, defendant submitted an answer to plaintiff's complaint. Defendant styled it as an "Answer Via Special and Limited Entry of Appearance to Respond to the Complaint and Contest Jurisdiction" and alleged therein that the circuit court was without jurisdiction to hear the case because it was barred on the basis of *res judicata* and because the statute of limitation had expired. Defendant's answer failed to raise an argument regarding a requirement for arbitration. While defendant did file a motion to dismiss in which he alleged that the parties had an agreement to submit any controversy between them to arbitration, the record is void as to any ruling on defendant's motion to dismiss. Defendant did not pursue his motion.

¶ 20 In fact, defendant did not do much of anything. After the initial pleadings were filed, written discovery was initiated. When defendant's employer failed to respond to plaintiff's complaint, the circuit court entered a default judgment in favor of plaintiff and against First Gateway. Plaintiff and defendant then agreed to continue the matter generally while plaintiff pursued First Gateway for satisfaction of the judgment, along with the stipulation that the case could be "reset upon the request of either party." Prior to the agreed continuance, plaintiff moved to compel defendant to respond to discovery requests. Defendant's attorney filed a motion to withdraw on the basis that she was "unable to effectively communicate" with defendant. Ultimately, the motion to compel and the motion to withdraw were both granted. The circuit court ordered defendant to have another attorney enter an appearance within 21 days. Defendant ignored that order. The circuit court struck defendant's answer and set the cause for prove-up of damages. On August 22, 2003, the circuit court entered judgment for plaintiff and against defendant in the amount of \$50,000.

¶ 21 The case lingered for years until plaintiff filed the instant motion to revive judgment

on August 10, 2010. Defendant admits that unless we declare the underlying judgment as void, he is without recourse. While defendant insists there was a written contract which provided a nonwaivable arbitration clause and removed the circuit court's jurisdiction, he has still failed to produce such an agreement.

¶ 22 After careful consideration of all the circumstances in this case, we cannot say that the circuit court abused its discretion in striking defendant's answer and entering judgment in favor of plaintiff. We decline to allow defendant to raise arbitration in the underlying proceeding, then fail to pursue it below, and now raise it as a jurisdictional issue in response to a motion to revive judgment. We also refuse plaintiff's request to tax costs and award attorney fees.

¶ 23 For the foregoing reasons, we affirm the circuit court's order granting plaintiff's motion to revive the judgment.

¶ 24 Affirmed.

¶ 25 JUSTICE CATES specially concurs in the judgment.

¶ 26 JUSTICE WELCH, specially concurring:

¶ 27 I agree with the majority's conclusion. I write separately, however, to express my view that the defendant has been the victim of a judicial ambush, which I define as a situation where everyone, including the defendant's attorney, knows that the defendant is facing a default judgment, and knows that the defendant is unaware of the impending judgment, yet do nothing to advise the defendant of his peril.

¶ 28 The law governing petitions for revival of a judgment compels this court to affirm the circuit court's order. "[A] *** proceeding [to revive a judgment] does not determine the

obligations of the defendant to the plaintiff, as involved in the original controversy and which were disposed of by the former judgment, but merely seeks a revival of the former judgment in order to have execution on it." *Bank of Edwardsville v. Raffaele*, 381 Ill. 486, 489, 45 N.E.2d 651, 653 (1942). The only question in a proceeding to revive a judgment is whether the plaintiff has a right to have the judgment executed, and the only defenses to a petition for revival of judgment are that the judgment did not exist or that there has been a subsequent satisfaction and discharge thereof. *Foreman v. Illinois Hair & Feather Co.*, 337 Ill. App. 147, 153, 85 N.E.2d 353, 356 (1949). A defendant may also show that the judgment is void for want of jurisdiction if the lack of jurisdiction is apparent from the record; but he cannot attack it collaterally by contradicting the record. *Id.*

¶ 29 In the present case, the defendant does not argue that the judgment does not exist or that it has been satisfied. He acknowledges that he can prevail only if the judgment is void. He argues that the judgment is void because the written agreement upon which the plaintiff's action was based contained an agreement to arbitrate any disputes. However, the record does not contain the written agreement or any other evidence of an agreement to arbitrate. Because the alleged lack of jurisdiction is not apparent from the record, this court has no choice but to affirm the circuit court's order reviving the judgment. As the facts and procedural history of this case reveal, however, the defendant should never have found himself in this unfortunate position.

¶ 30 The plaintiff filed the underlying action against the defendant and codefendant First Gateway on April 3, 2000. At the time, the defendant lived in Deer Park, Texas. The defendant retained counsel to represent him. First Gateway did not appear, and on June 23, 2000, the circuit court entered a default judgment against it. On September 29, 2000, the plaintiff filed a motion to compel the defendant to interrogatories and request for production which had been propounded to him on June 26, 2000. Then on January 5, 2001, the circuit

court, pursuant to an agreement between the parties, continued the matter generally while plaintiff pursued First Gateway for satisfaction of the judgment. The order further provided that the cause would be reset at the request of either party. On January 15, 2001, the defendant moved to Kemah, Texas.

¶ 31 Nothing further happened until June 13, 2002, when the circuit court *sua sponte* scheduled a case management conference to dispose of certain inactive cases, including the present case. Following the conference, this cause was set for trial on March 17, 2003. On February 18, 2003, defendant's attorney filed a motion to withdraw as counsel, alleging that she was unable to effectively communicate with the defendant. A copy of the motion was mailed to the defendant's Deer Park, Texas, address. That same day, the plaintiff filed a new motion to compel the defendant to respond to the plaintiff's June 26, 2000, interrogatories. A copy of the motion was served on the defendant's attorney.

¶ 32 On March 14, 2003, the circuit court set counsel's motion to withdraw for a hearing and ordered the defendant to answer the plaintiff's interrogatories within 14 days of the entry of the order allowing counsel to withdraw. A copy of the order was sent to the defendant's attorney. On April 25, 2003, the plaintiff filed a motion to strike the defendant's answer or sanction him for failing to comply with the court's March 14, 2003, order. A copy of this motion was served on the defendant's attorney. On April 25, 2003, the plaintiff filed a notice that a hearing on his motion for sanctions would be held on May 2, 2003. A copy of this notice was served on the defendant's attorney.

¶ 33 On May 2, 2003, the circuit court entered an order allowing the defendant's attorney to withdraw and giving the defendant 21 days in which to have another attorney appear on his behalf or to provide the court with an address at which notices could be mailed to him. The order stated that the defendant had received notice of his attorney's motion to withdraw. A copy of the order was mailed to the defendant's Deer Park address, but was returned

marked "not delivered as address [sic] unable to forward."

¶ 34 On June 16, 2003, the plaintiff filed another motion to strike the defendant's answer or sanction him. A copy of the motion was mailed to the defendant's Deer Park, Texas, address, as was the notice that the hearing would be held on July 25, 2003. On July 25, 2003, the circuit court granted the plaintiff's motion, found the defendant in default, and scheduled the prove-up of damages for August 22, 2003. On that date, the circuit court entered a judgment against the defendant for \$50,000. Copies of the orders were mailed to the defendant's Deer Park address, but were returned marked "not delivered as address [sic] unable to forward."

¶ 35 As the foregoing makes clear, the defendant was unaware that the case against him, which had previously been continued, had again begun to proceed. He did not know that he had recently been ordered to comply with the discovery request the plaintiff had served on him almost three years earlier. He did not know that his attorney had withdrawn from the case, that the plaintiff was seeking sanctions against him, or that a finding of default was imminent. The last thing the defendant had been told was that the cause had been continued while the plaintiff pursued First Gateway, and he had every reason to believe that his attorney would advise him if the plaintiff requested the cause to be reset.

¶ 36 In his affidavit in support of his motion to dismiss the petition to revive judgment, the defendant states that when he last spoke with his attorney he was assured that the case against him was meritless and would be dismissed. He also stated that he contacted his attorney's office and advised her of his new addresses and phone numbers. The defendant further states that he informed the Securities and Exchange Commission and the National Association of Securities Dealers of his new addresses and phone numbers, as required by federal law. Locating the defendant to advise him that the long-dormant case against him was again proceeding should have been a simple matter. Instead, the defendant was abandoned by his

attorney, left unaware of his need to defend himself, and allowed to be defaulted. In my view, what has happened to the defendant can only be fairly characterized as a judicial ambush.