

No. 1-14-0602

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

ANNABEL MELONGO,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 13 M1 129712
)	
NORTHWEST RECOVERY (NRI, LLC), and)	
ACTION IRON & METAL, INC.,)	Honorable
)	Allan W. Masters,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court erred in granting defendants' petitions to vacate judgment where the petitions failed to show due diligence in the original court proceedings and did not present extraordinary circumstances meriting a relaxation of the requirement.

¶ 2 Following a default judgment in favor of plaintiff Annabel Melongo, defendants Northwest Recovery ("Northwest") and Action Iron and Metal, Inc., ("Action Iron") petitioned the court for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). The trial court granted both defendants' petitions. On appeal,

plaintiff contends, *pro se*, that defendants' petitions did not meet the requirements of section 2-1401 and thus the trial court erred in vacating the judgments against them. We reverse.

¶ 3 Plaintiff filed a complaint on May 14, 2013, alleging that a towing company, Northwest, and a scrap processor, Action Iron, had fraudulently obtained and disposed of plaintiff's car in "May-June 2010" contrary to the Illinois Vehicle Code (625 ILCS 5/1-100 *et seq.* (West 2012)). Summonses were served by certified mail. The record contains no answers.

¶ 4 On July 23, 2013, a default judgment was entered against Northwest and Action Iron in the amount of \$10,287.

¶ 5 On September 6, 2013, Northwest filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). The petition alleged that Northwest had been unable to procure representation before the default judgment and that it had a meritorious defense to plaintiff's claim because it had exercised statutory rights in disposing of plaintiff's car.

¶ 6 Northwest filed an amended petition on October 13, 2013. The amended petition further alleged that Northwest had been diligent in seeking to engage counsel and that plaintiff could not pursue a private right of action under the statutes cited in the complaint. Northwest's amended petition included the affidavit of Warren Crum, the president of Northwest. Crum averred that upon receiving notice of plaintiff's lawsuit, he diligently sought counsel. His counsel of choice was unable to represent the company because the attorney could not take on more clients at that time. Crum then sought out two additional attorneys, but each indicated they were unfamiliar with Northwest's type of business and Crum "did not feel comfortable" hiring either attorney.

After further searching, he was unable to find counsel familiar "with the specialized nature of this matter," and he "chose to await the availability of [his] desired counsel."

¶ 7 On the same day, Action Iron filed a petition under section 2-1401. Action Iron's petition alleged that it had diligently appeared in court and been involved in the litigation of the case, although it was not present for the default order. Action Iron further argued that it possessed meritorious defenses to plaintiff's claim, including that it was a bona fide purchaser of the vehicle in question and that the Illinois Secretary of State Police investigated Action Iron's actions and found no misconduct.

¶ 8 Action Iron's petition included the affidavit of Patricia Mucerino, the manager of Action Iron. Mucerino averred that she received notice of plaintiff's lawsuit and filed an appearance on behalf of the company. She attempted to resolve the matter in mediation with plaintiff, but the mediation was unsuccessful. She did not appear in court as she "hoped" to reach an agreement with plaintiff without "incurring additional expenses to retain legal counsel."

¶ 9 The trial court granted both defendants' petitions in an order on December 6, 2013. The order states, "The petitions are granted on the merits after considering the pleadings [and] oral arguments with the court finding Defendants have established the elements for relief."

¶ 10 On December 18, 2013, plaintiff filed a motion to reconsider the vacatur, arguing that both defendants' petitions had failed to show a meritorious defense or due diligence. The trial court denied plaintiff's motion on February 25, 2014. Plaintiff appeals.

¶ 11 On appeal, plaintiff contends that the trial court erred in vacating the default judgment against defendants, because the petitions by both Northwest and Action Iron failed to present

meritorious claims or show diligence in the initial action and in filing the petition, as required by section 2-1401.

¶ 12 We note initially that we have jurisdiction to hear plaintiff's appeal under Illinois Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010), which allows "[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" to be appealed immediately. See *S. C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 496 (1998).

¶ 13 We also note that the defendants filed no briefs in this court responding to plaintiff's arguments. Under *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128 (1976), we may consider the merits of an appeal despite the absence of an appellee's brief if "the court can easily decide them without the aid of an appellee's brief." *Id.* at 133.

¶ 14 Additionally, the order filed by the trial court and drafted by defendants' counsel indicates that the court made its decision "after considering the pleadings [and] oral arguments." Where an evidentiary hearing is not held, as in this case, we look only to the pleadings, affidavits and other attached evidence in reviewing the trial court's judgment. See *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 223 (1986).

¶ 15 Section 2-1401 requires a petitioner to affirmatively set forth the following elements: "(1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *In re Marriage of Harnack & Fanady*, 2014 IL App (1st) 121424, ¶ 52, quoting *Smith*, 114 Ill. 2d at 220-21. The standard of review is two-tiered; a reviewing court determines whether a meritorious claim exists under *de novo* review, then it considers whether

the petitioner showed diligence under an abuse of discretion standard. *Id.* ¶ 53, distinguishing *People v. Vincent*, 226 Ill. 2d 1, 14 (2007).

¶ 16 Due diligence requires the petitioner to set forth a reasonable excuse for his or her failure to act within the appropriate time. *Smith*, 114 Ill. 2d at 222; *West Bend Mutual Insurance Co. v. 3RC Mechanical and Contracting Services, LLC*, 2014 IL App (1st) 123213, ¶ 14. Section 2-1401 does not relieve petitioners of the consequences of their own mistakes. *Smith*, 114 Ill. 2d at 222; *West Bend Mutual Insurance Co.*, 2014 IL App (1st) 123213, ¶ 14. The petitioner must show that under the circumstances, he acted "reasonably, and not negligently." *West Bend Mutual Insurance Co.*, 2014 IL App (1st) 123213, ¶ 14. Participation in settlement negotiations will not excuse a petitioner's disregard of court proceedings "on the gamble that better results can be obtained through other procedures or at a cheaper cost." *Id.*, quoting *Abbell v. Munfield*, 76 Ill. App. 3d 384, 388 (1979). The due diligence requirement may be relaxed only under extraordinary circumstances, for example, where the non-petitioning party commits fraud or fundamentally unfair acts or extraordinary circumstances existed outside the petitioner's control. *In re Marriage of Harnack*, 2014 IL App (1st) 121424, ¶ 60.

¶ 17 We first consider Action Iron's petition. In its petition, Action Iron states that it received notice on May 22, 2013. It filed an appearance and attended a court hearing on June 18, 2013, where the trial court informed it that it must appear by and through legal counsel. Action Iron participated in mediation, but failed to appear in court because "it was hopeful the matter would be settled and resolved without the additional expense of paying for legal representation." In its petition, Action Iron asserts that its appearance in court and attempts to settle show diligence in the original action. Action Iron's excuse for failing to appear in court is that it hoped to avoid

legal fees through settlement. This is not a valid excuse for a disregard of court proceedings. See *Abbell*, 76 Ill. App. 3d at 388. Furthermore, Action Iron's singular appearance in court does not excuse its later absence. The trial court informed Action Iron that it required legal counsel to proceed, yet it ignored this information in the hope of avoiding legal fees. The failure to obtain counsel and further participate in the court proceedings was unreasonable. Therefore, in reviewing Action Iron's petition and the attached affidavits, it is clear that the company did not act with due diligence in the original court proceedings.

¶ 18 Turning to Northwest, its petition states that the company received service on May 22, 2013. Upon receiving notice, it contacted legal counsel who frequently represented similar clients and litigated similar matters; however, that legal counsel was unable to accept any more clients for the necessary period of time. The petition also states that Northwest diligently sought other counsel, but "chose to await the availability of its desired counsel." In an attached affidavit, the president of Northwest averred that he spoke with two additional attorneys, but could find no attorneys "familiar with the specialized nature of this matter." Thus, the only excuse put forth by Northwest's petition is that it could not find counsel it desired. Northwest's failure to participate in court proceedings was unreasonable. Despite receiving service, no Northwest representative attended any court proceedings. No Northwest representative ever approached the court to ask for more time to seek counsel or for a continuance until its preferred counsel was available. Given Northwest's choice not to participate in the proceedings at all, it has failed to show due diligence.

¶ 19 Additionally, neither Action Iron's nor Northwest's petition presented any extraordinary circumstances that would require a relaxation of the due diligence element. Neither petition

alleges misconduct by the plaintiff or circumstances that were outside of either party's control.

Both Action Iron and Northwest chose not to participate in the original proceedings. Action Iron chose to avoid court in the hope that the matter would be settled. Northwest chose to wait for its preferred counsel to be available without requesting the time to do so from the trial court.

Because the circumstances of the default judgment against both defendants were solely in each defendant's control, a relaxation of the due diligence requirement is not warranted.

¶ 20 As we find defendants' petitions failed to sufficiently allege that they had acted with due diligence, we need not determine whether the defenses presented were meritorious. See *In re Marriage of Harnack*, 2014 IL App (1st) 121424, ¶ 56. Similarly, we need not address whether defendants were diligent in filing their petitions. See *id.*

¶ 21 It is evident from both petitions that defendants did not exercise due diligence in presenting their claims to the trial court during the original proceedings and that no extraordinary circumstances existed to justify relaxation of the diligence requirement. Therefore, we find the trial court erred in granting defendants' petitions under section 2-1401. Accordingly, the judgment of the circuit court of Cook County is reversed, and the original judgment entered is reinstated.

¶ 22 Reversed.