

2016 IL App (1st) 133239-U

SIXTH DIVISION  
April 15, 2016

No. 1-13-3239

**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 DISTRICT

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STEVE ROGUS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07 CH 23938
	)	
WILLIAM LUEDI and MIDWEST AUTO	)	
SALES and SERVICE, INC., an Illinois	)	
Corporation,	)	
Defendants	)	Honorable
	)	Jean Prendergast Rooney,
(Hans Luedi,	)	Judge Presiding.
	)	
Defendant-Appellant).	)	

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JUSTICE HALL delivered the judgment of the court.

Justices Hoffman and Delort concurred in the judgment.

**O R D E R**

¶ 1 *Held:* This court vacated the circuit court's order denying the defendant's motion to default the plaintiff and striking the defendant's petition for relief under section 2-1401 of the Code of Civil Procedure. The defendant's petition was fact-dependent and required an evidentiary hearing.

¶ 2 The defendant, Hans Luedi, appeals from an order of the circuit court of Cook County denying his motion for a default judgment against the plaintiff, Steve Rogus, on the defendant's petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)) and striking and dismissing the petition. On appeal, the defendant contends that: the circuit court had jurisdiction to hear the section 2-1401 petition, the plaintiff's failure to appear or answer the petition within 30 days after he was served with the petition entitled the defendant to a default judgment against the plaintiff on the petition, and the court erred in striking and dismissing the defendant's section 2-1401 petition.

## 3 BACKGROUND

¶ 4 On August 30, 2007, the plaintiff filed a complaint for declaratory judgment against the defendant, William Luedi, Midwest Auto Sales and Service, Inc., and Hans Luedi (defendant).<sup>1</sup> The three defendants were represented by the same attorney, who filed an appearance and answer to the complaint on their behalf. During the circuit court proceedings, the defendants' original attorney withdrew and a second attorney began representing the defendants until January 7, 2010, when the second attorney was given leave to withdraw. On May 13, 2010, attorney Andjelko Galic was granted leave to file his appearance *instantly* on behalf of the defendants.

<sup>1</sup> Defendants William Luedi and Midwest Auto Sales and Service, Inc. are not parties to this appeal. The term "defendant" singular shall refer only to Hans Luedi.

¶ 5 Attorney Galic filed a motion for leave to withdraw as counsel for William Luedi.<sup>2</sup> According to the motion, the notice of withdrawal was sent to William Luedi and the plaintiff's attorney. On September 20, 2010, attorney Galic was granted leave to withdraw as counsel for "William Luedi." The order provided that "William Luedi" was required to retain other counsel by October 11, 2010. The order further provided that the case was set for status on October 20, 2010, and that the failure to file an appearance either by the party or new counsel would result in an order of default or dismissal for want of prosecution. On October 20, 2010, the circuit court struck the defendants' answer to the second amended complaint and found the "defendant" in default. On December 1, 2010, the court conducted a prove-up and entered a judgment in favor of the plaintiff in the amount of \$117,185.06 and against the defendant, "Hans Luedi."

¶ 6 An appeal to this court was filed on behalf of all three defendants. On June 8, 2011, this court dismissed the appeal for want of prosecution. The defendant retained new counsel to investigate the circumstances of the entry of the judgment against him and if there was a basis for the vacation of the judgment. The defendant filed a motion to vacate the dismissal of the appeal, which was denied on July 26, 2011. A petition for leave to appeal to the supreme court was denied on November 30, 2011.

¶ 7 On July 12, 2012, the defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code. According to the allegations in the petition, the defendant had been represented by counsel throughout the circuit court proceedings. He was not given notice of counsel's motion to withdraw or notice that the court had granted the motion and had no notice of the further proceedings in the case including the entry of the default

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<sup>2</sup> The filing date on the motion to withdraw is not legible.

judgment against him. He first received notice of the default judgment against him when a co-defendant gave him copies in connection with the appeal to this court. The defendant claimed that had he received notice of counsel's withdrawal, he could have obtained new counsel to present his valid defenses to the complaint, including that he was not legally responsible for the plaintiff's claim against him. The petition was supported with the defendant's affidavit attesting to the truth and accuracy of the contents of the petition.

¶ 8 On September 28, 2012, the plaintiff's attorney was served with summons and a copy of the petition. On January 14, 2013, the defendant filed a motion for default judgment against the plaintiff's attorney. On January 24, 2013, the plaintiff's attorney filed a motion to strike the defendant's motion for default and his section 2-1401 petition. The attorney acknowledged that he had been served with summons and a copy of the petition, but there was no notice of a hearing date. The attorney further stated that the motion for default sought relief against him, not the plaintiff. The attorney stated that a section 2-1401 petition must be served on the party, not his attorney, but that the defendant had not served or attempted to serve the plaintiff. The motion further stated that the section 2-1401 petition should be stricken for failure to comply with Rule 2.3 of the Rules of the Circuit Court of Cook County (IL R. Cook Cty. Cir. Rule 2.3 (eff. May 1, 2015)), because the petition had not been motioned up within 90 days of its filing as set forth in the rule.

¶ 9 On January 31, 2013, an order was entered in which the defendant agreed to withdraw his motion for default on his section 2-1401 petition, and the section 2-1401 petition was stricken from the court call.

¶ 10 On March 21, 2013, the circuit court granted the defendant's motion for an appointment of a special process server to serve the plaintiff. An alias summons was issued on May 22,

2013 and the plaintiff was served with alias summons and a copy of the petition on May 23, 2013.

¶ 11 On August 28, 2013, the defendant filed a motion for default judgment, alleging that more than 30 days had passed since the plaintiff was served with the alias summons, and he failed to appear or otherwise plead to the petition.

¶ 12 On September 12, 2013, the plaintiff filed his motion to strike the defendant's motion for default judgment and the section 2-1401 petition for relief. In the motion, the plaintiff stated the motion for default should be stricken because the defendant failed to serve the plaintiff with a notice of motion setting a hearing date on the petition. The motion further stated that the section 2-1401 petition should be stricken for lack of jurisdiction and for the defendant's failure to comply with Circuit Court Rule 2.3 requiring motions to be noticed up before the circuit court within 90 days of filing.

¶ 13 On September 12, 2013, the circuit court entered an order denying the defendant's request to respond to the plaintiff's motion to strike the motion for default judgment and section 2-1401 petition. The court denied the defendant's motion for default judgment and granted the plaintiff's motion. The defendant's petition for section 2-1401 relief was stricken and dismissed.

¶ 14 On October 11, 2013, the defendant filed a notice of appeal from the circuit court's order of September 12, 2013.

## ¶ 15 ANALYSIS

### ¶ 16 I. Standard of Review

¶ 17 Where a section 2-1401 petition raises a fact-dependent challenge, a reviewing court will reverse the circuit court's decision to grant or deny relief only if it constitutes an abuse of

discretion. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783,

¶ 37. An abuse of discretion will be found only if the circuit court's ruling was arbitrary, unreasonable, ignored recognized principles of law, or if no other reasonable person would take the position adopted by the court. *Schmitz v. Binette*, 368 Ill. App. 3d 447, 452 (2006).

¶ 18

## II. Discussion

¶ 19

### A. Circuit Court's Jurisdiction of the Section 2-1401 Petition

¶ 20

As a basis for striking the defendant's motion for default, the plaintiff alleged in the circuit court and now on appeal that the circuit court lacked jurisdiction over the section 2-1401 petition because the defendant failed to serve the plaintiff with a notice setting the petition for hearing. The plaintiff's jurisdiction contention is unsupported by our supreme court rules and the case law on which he relies.

¶ 21

Contrary to the plaintiff's argument, service of the petition on a party does not require service of a notice setting the petition for hearing. Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985) provides that the notice of the filing of a petition under section 2-1401 "shall be given by the same methods provided in Rule 105 for the giving of notice of additional relief to parties in default." Illinois Supreme Court Rule 105 (b) (eff. Jan. 1, 1989) provides that the notice may be served by "any method provided by law for service of summons, either with or without this State \*\*\*by an officer or by any person over 18 years of age not a party to the action \*\*\*proof of service shall be made by affidavit of the server, stating the time, manner, and place of service." Rule 105(a) provides the notice to be served on the party "shall state that a pleading seeking new or additional relief against him has been filed and that a judgment by default may be taken against him for the new or additional relief unless he

files an answer or otherwise files an appearance in the office of the clerk of the court within 30 days after service." Ill. S. Ct. R. 105(a) (eff. Jan. 1, 1989).

¶ 22 There is no dispute that after a series of missteps by the defendant, the plaintiff was served by alias summons and a copy of the section 2-1401 petition in accordance with Rules 105 and 106. The plaintiff was required to respond to the petition within 30 days of service or be subject to an order of default entered against him. Neither the cases relied on by the plaintiff nor the service requirements of Rules 105 and 106 require that the service of the petition be accompanied by notice of a hearing date in order to convey jurisdiction on the circuit court.

¶ 23 B. Circuit Court Rule 2.3

¶ 24 As another basis for striking the defendant's section 2-1401 petition, the plaintiff alleged that the defendant failed to comply with Rule 2.3 by failing to call his petition to hearing within 90 days of the date it was filed. We agree with the defendant that Rule 2.3 has no application in this case.

¶ 25 Rule 2.3 refers to motions, not pleadings. A motion is an application for a ruling or order in a pending case, while a pleading consists of a party's formal allegation of claims or defenses. *In re Marriage of Sutherland*, 251 Ill. App. 3d 411, 413(1993). A petition qualifies as a pleading where, as in this case, the petition was served in accordance with a procedure consistent with the filing of a pleading and where the petition is designated a new proceeding. *Sutherland*, 251 Ill. App. 3d at 413-14. In this case, a section 2-1401 petition is a new proceeding rather than the continuation of the original case, and the petition was

served by summons in accordance with Rule 105. Therefore, Rule 2.3 does not provide a basis for dismissal of the defendant's 2-1401 petition.<sup>3</sup>

¶ 26 C. Did the Circuit Court Err in Dismissing the Section 2-1401 Petition?

¶ 27 The defendant contends that the circuit court erred in dismissing his section 2-1401 petition where he sufficiently alleged all of the necessary elements entitling him to relief.

¶ 28 In order to be entitled to relief from a final judgment order, a section 2-1401 petition for relief must set forth specific factual allegations supporting each of the following elements: "(1) the existence of a meritorious defense; (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." *Warren County*, 2015 IL 117783, ¶ 37. The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence, and the decision to grant or deny relief lies within the discretion of the circuit court, depending on the facts and equities presented. *Warren County*, 2015 IL 117783, ¶ 37.

¶ 29 In his motion to strike, the plaintiff did not address whether the defendant had a meritorious defense. He challenged the factual basis for the defendant's claims of due diligence in seeking relief. The plaintiff claimed that the defendant had notice of the withdrawal of attorney Galic. However, the record in this case indicates that notice of the attorney Galic's motion to withdraw was sent only to "William Luedi" and the order provided that the attorney Galic withdrew from representing "William Luedi." The plaintiff claimed that the defendant was aware of the judgment against him because his name and signature appear on the notice of appeal, which was filed in January 2011, and knew that the attorney

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<sup>3</sup>In his appellee's brief, the plaintiff misquotes Rule 2.3 as stating "the court may enter an order overruling or denying the Petition by reason of the delay." The rule makes no reference to petitions but provides that the circuit court "may enter an order overruling or denying the *motion* by reason of the delay." (Emphasis ours.) IL R. Cook Cty. Cir. Rule 2.3.



had withdrawn because the notice referred to the withdrawal of the "replacement attorney."

However, there is no reference to the judgment entered against the defendant in the notice of appeal; the notice only refers to December 1, 2010, as the date of the last court action.

¶ 30 Where the facts supporting the section 2-1401 petition are challenged by opposing party, a full and fair evidentiary hearing should be held. *Warren County*, 2015 IL 117783, ¶ 51. In this case, there are factual disputes which bear on whether the defendant acted with due diligence in seeking relief from the December 1, 2010, judgment against him.

¶ 31 We bear in mind that as the appellant, it was the defendant's duty to provide a transcript or bystander's report of the proceedings on September 12, 2013 which resulted in the striking and dismissing of the defendant's section 2-1401 petition. *Robinson v. Point One Toyota*, 2012 IL App (1st) 111889, ¶ 58 (the appellant must provide a sufficient record for review of the claim of error). In the absence of a report of those proceedings, we must assume that the circuit court's decision was proper under the law and the facts. *Robinson*, 2012 IL App (1st) 111889, ¶ 59. However, the circuit court's order does not indicate that a hearing was held. The court's order provided only that it reviewed both "motions," prior to its ruling striking and dismissing the section 2-1401 petition. Moreover, nothing in the record demonstrates that the court exercised discretion in its ruling. The court did not grant or deny the relief requested in the petition, but ordered it stricken and dismissed.

¶ 32 Based on the record and the circumstances of this case, we vacate the order denying the defendant's motion for a default judgment against the plaintiff on the section 2-1401 petition and striking and dismissing the defendant's section 2-1401 petition. The case is remanded for further proceedings, which should include an opportunity for the defendant to respond to the plaintiff's motion to strike both the motion for default against the plaintiff and the section 2-

1401 petition. In the event that the defendant's motion to default the plaintiff is denied, and his section 2-1401 petition survives the motion to strike, the court shall conduct an evidentiary hearing on the section 2-1401 petition.

¶ 33

#### CONCLUSION

¶ 34

The judgment of the circuit court is vacated, and the cause is remanded for further proceedings.

¶ 35

Vacated and remanded.