

No. 1-15-1544

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 DISTRICT

PUSHPIN HOLDINGS, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 13 M1 129604
)	
FRED GARCIA a/k/a Joseph F. Garcia,)	Honorable
)	John M. Allegretti,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's order denying the defendant's section 2-1401 petition for failure to exercise diligence in defending the underlying action and in filing his petition is affirmed.

¶ 2 The defendant, Fred Garcia a/k/a Joseph F. Garcia, appeals from an order of the circuit court, denying his petition for relief from a default judgment brought pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The plaintiff, Pushpin Holdings, LLC (Pushpin), filed a two-count complaint against Garcia, seeking to recover upon a personal guaranty contained within an equipment finance lease agreement entered into on March 5, 2003, by and between Global Tech Leasing, Inc. as the lessor and Colorado Mountain Greenery as the lessee (hereinafter referred to as the Agreement). Pushpin alleged that, by assignment, it acquired all rights, title, and interest of the lessor, or its assignee to the Agreement, and Garcia's guaranty. According to the complaint, Colorado Mountain Greenery defaulted on the Agreement by failing to make the required payments due thereunder, and as a consequence, recovery was sought against Garcia upon his guaranty.

¶ 4 Garcia was served with a summons and a copy of Pushpin's complaint. Thereafter, he filed *pro se* a verified answer to the complaint, asserting that commencement of the action in the circuit court violated an arbitration clause contained within the Agreement and that Colorado's six-year statute of limitations is applicable to the action. In addition, the answer alleged that the equipment which was the subject of the Agreement was not complete when received and had been returned to the vendor.

¶ 5 The case was set for an initial status hearing on July 10, 2013. Garcia failed to appear in court on that date, and as a consequence, the circuit court entered a default judgment against Garcia in the sum of \$3,325.80. On that same day, Pushpin's attorney mailed a notice to Garcia advising him of the entry of the judgment and attaching a copy of the judgment order to the notice. A copy of the notice and attached certificate of service is contained within the record.

¶ 6 On November 19, 2014, Garcia, acting through counsel, filed a petition pursuant to section 2-1401 of the Code to vacate the default judgment of July 10, 2013. The petition asserted that Garcia did not travel to Chicago from his home in Tahuya, Washington to attend the trial "because the cost of traveling to and from Chicago to defend the case, 4,244 miles round

trip, and the cost of defense were greater than the amount claimed." The petition also asserted that Garcia had meritorious defenses to Pushpin's complaint—namely that: the Agreement contained an arbitration clause; Colorado Mountain Greenery had been dissolved since June 1, 2004; any claim against Colorado Mountain Greenery on the Agreement is barred by the four-year statute of limitations on the sale of goods, and the claim against him as a guarantor is, therefore, also barred; Pushpin lacked standing to bring the suit; and Pushpin violated the Collection Agency Act (225 ILCS 425/1 *et seq.* (West 2002)). The petition was supported by Garcia's affidavit which, in addition to certain assertions made upon his best knowledge, information and belief, attested to the fact that Colorado Mountain Greenery had been dissolved more than 8 years prior to the filing of Pushpin's complaint.

¶ 7 Pushpin filed a response to Garcia's section 2-1401 petition, addressing the affirmative defenses asserted therein and arguing that the petition should be denied by reason of Garcia's failure to diligently: defend the underlying action, present his affirmative defenses, and file his section 2-1401 petition. Pushpin's response was supported by an affidavit addressed to several of Garcia's defenses. In reply, Garcia asserted additional defenses of *res judicata* and collateral estoppel.

¶ 8 The matter came on for hearing on March 18, 2015, before Judge Bridget A. Mitchell. The record reflects that the attorneys for the parties presented arguments based upon the pleadings and affidavits which had been filed, but no witnesses were called to testify. At the conclusion of that hearing, Judge Mitchell inquired as to the date upon which Garcia became aware of the judgment which had been entered against him. Garcia's attorney requested leave of court to file an affidavit from Garcia supplying that information. Leave was granted, and Pushpin was granted leave to file a response. The matter was continued to May 18, 2015.

¶ 9 On March 26, 2015, Garcia filed an affidavit asserting that he and his wife are retired and living on a gross income of \$3,352 per month. He stated that, upon receipt of Pushpin's complaint, he determined that the cost of hiring an attorney and defending the lawsuit would be greater than the amount claimed. In that affidavit, Garcia also stated that he did not attend the initial hearing on July 10, 2013, because he believed that his answer to the complaint which raised the Agreement's arbitration clause "required Pushpin to honor the arbitration clause." He also averred that he had exchanged correspondence with Pushpin from March 6, 2013, through November 6, 2014, in an effort to settle the matter and attached copies of that correspondence to his affidavit. Contained within that correspondence is a letter addressed to Garcia from Pushpin dated July 22, 2013, advising Garcia that a judgment in the sum of \$3,325.80 had been entered against him on July 10, 2013.

¶ 10 Also on March 26, 2015, and seemingly without leave of court, Garcia filed a "Supplement" to his section 2-1401 petition, which is nothing more than a legal memorandum discussing the merits of his petition and outlining other litigation in which Pushpin had been involved. Pushpin responded, moving to strike Garcia's supplement to the petition and providing affidavits which, in the main, attest to nothing more than the procedural chronology of the case and the multitude of notices that were sent to Garcia advising him of the entry of the judgment.

¶ 11 On May 18, 2015, Garcia's section 2-1401 petition again came before the circuit court. However, Judge Mitchell was not the presiding judge on that date; rather, Judge John M. Allegretti was presiding. The record reflects that Judge Allegretti advised the parties' attorneys that he had read their briefs and supplemental documentation, and he inquired as to whether either counsel wanted to argue anything further. Garcia's attorney responded, saying: "I have nothing to add to the written motion, briefs, supplemental brief and response to the motion to

strike." Pushpin's attorney stated: "I'll rest on my briefs as well, your Honor." Nevertheless, the attorneys did engage in abbreviated argument thereafter. In his oral pronouncements, Judge Alegretti observed that: Garcia "made the decision not to defend the case. Not only did he make the decision not to defend the case, then he waits *** for almost two years to then come in and file a motion." Following the hearing, Judge Allegretti entered an order denying Garcia's section 2-1401 petition, and this appeal followed.

¶ 12 Before addressing the issues presented by this appeal, we comment briefly on our standard of review. In *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986), the supreme court found that a reviewing court is justified in disturbing a circuit court's ruling on a section 2-1401 petition only if it finds that the court abused its discretion. However, in *People v. Vincent*, 226 Ill. 2d 1, 18 (2007), the supreme court applied a *de novo* standard of review. In *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶¶ 47-51, the supreme court reconciled the two cases, holding that, when a section 2-1401 petition involves purely legal questions, a *de novo* standard of review is to be employed, and when the petition involves a fact-dependent challenge to a final judgment, abuse of discretion is the appropriate standard of review. As the instant case involves a fact-dependent challenge to a final judgment and since the procedural posture of this case is similar to *Smith*, we apply the abuse-of-discretion standard.

¶ 13 In his brief on appeal, Garcia devoted the majority of his argument to the defenses to Pushpin's underlying claim which he set forth in his section 2-1401 petition. He devoted a mere 4½ pages of a 28-page brief to his diligence in defending the underlying action and in bringing his section 2-1401 petition; the very grounds upon which his petition was denied. As we believe it to be the dispositive issue, we will address the issue of diligence first.

¶ 14 Section 2-1401 of the Code provides a comprehensive statutory procedure pursuant to which a circuit court may vacate or modify a final order or judgment after 30 days from its entry. 735 ILCS 5/2-1401 (West 2012); *Paul v. Gerald Adelman & Associates*, 223 Ill. 2d 85, 94 (2006). A section 2-1401 petition can be employed to present either a factual or legal challenge to a final judgment or order. *Warren County Soil & Water Conservation District*, 2015 IL 117783, ¶ 31.

¶ 15 In order to be entitled to relief under section 2-1401, "the petitioner must affirmatively set forth specific factual allegations supporting each of 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." *Smith*, 114 Ill. 2d at 220-21. The petitioner must establish his right to relief by a preponderance of the evidence.

¶ 16 In this case, the circuit court denied Garcia's petition to vacate the default judgment of July 10, 2013, based upon his lack of diligence in both defending against Pushpin's underlying action and in filing his section 2-1401 petition. Our inquiry on review is, therefore, directed to the issue of Garcia's diligence and whether the circuit court erred in finding that Garcia's conduct did not constitute due diligence.

¶ 17 "Due diligence requires the section 2-1401 petitioner to have a reasonable excuse for failing to act within the appropriate time." *Smith*, 114 Ill. 2d at 222. "[S]ection 2-1401 does not afford a litigant a remedy whereby he may be relieved of the consequences of his own mistake or negligence ***." *Id.* "[T]he 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." *Id.*

¶ 18 When, as in this case, the respondent to a section 2-1401 petition answers the petition raising the issue of the petitioner's diligence, the petitioner has the burden of proving, at a full and fair evidentiary hearing, his entitlement to relief. *Id.* at 223. Garcia, however, presented no witnesses in support of his petition, and the record fails to reflect that he was prevented from doing so. Consequently, as in *Smith*, the circuit court decided the matter based upon the pleadings, affidavits and arguments of the attorneys. See *id.*

¶ 19 In both his section 2-1401 petition and in the affidavits he submitted in support thereof, Garcia admits that he did not appear in court to defend the underlying suit because the expense of travel and the cost of defense were greater than the amount claimed. Even after being advised of the entry of the judgment by both Pushpin and its attorney well within the 30 days following its entry, Garcia never moved to vacate the judgment. Rather, he waited 16 months to file a section 2-1401 petition. In his affidavit filed March 26, 2015, Garcia states that, for financial reasons, he would not have been able to file a petition to vacate the judgment had he not located his present attorney who was representing him without charge.

¶ 20 The affidavits on file in this case reveal that Garcia's failure to appear in court on July 10, 2013, which led to the entry of the default judgment against him and the 16 month delay in filing his section 2-1401 petition were not the product of some excusable mistake; rather they were a conscious choice. Nevertheless, Garcia argues that equitable considerations require a relaxation of the diligence requirements in this case. We disagree.

¶ 21 In ruling upon a fact-based challenge to a default judgment presented in a section 2-1401 petition, a circuit court may, under appropriate circumstances, take equitable considerations into account and relax the due diligence required of the petitioner. *Warren County Soil & Water Conservation District*, 2015 IL 117783, ¶ 51; *Smith*, 114 Ill. 2d at 225. Where justice and good

conscious require, a default judgment may be vacated even though the requirement of due diligence has not been satisfied. *Smith*, 114 Ill. 2d at 225. However, in the cases where the requirement of diligence was relaxed, there was evidence of fraudulent conduct on the part of the plaintiff in procuring or concealing the judgment or other unusual circumstances which made enforcement of the judgment unjust. *European Tanspa, Inc. v. Shrader*, 242 Ill. App. 3d 103, 108 (1993).

¶ 22 In this case, Garcia has not alleged that Pushpin or its attorney engaged in any fraudulent conduct in procuring or concealing the default judgment. The record reflects that immediately upon entry of the default judgment, Pushpin's attorney sent Garcia a notice reflecting both the amount of the judgment and the date of its entry. Garcia has not alleged that either Pushpin or its attorney agreed to forego any legal right or remedy while negotiating a settlement of the judgment. And, there is no evidence that Pushpin or its attorney hindered or prevented Garcia from presenting a defense to the underlying action. As a consequence, we find nothing in the record before us which would, on equitable grounds, justify relaxing the diligence required of Garcia as a section 2-1401 petitioner.

¶ 23 Based upon the foregoing analysis, we find no abuse of discretion in the circuit court's denial of Garcia's section 2-1401 petition based upon his lack of diligence in both defending the underlying action and in filing his section 2-1401 petition and, therefore, affirm its judgment.

¶ 24 Affirmed.