

NOTICE

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2016 IL App (4th) 150524-U

NO. 4-15-0524

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 25, 2016

Carla Bender

4th District Appellate
Court, IL

MARVIN C. WEAVER and JANET E. WEAVER,)	Appeal from
Plaintiffs-Appellants,)	Circuit Court of
v.)	Woodford County
BRUCE ARTIS, a/k/a BRUCE KAYLAUSKAS,)	No. 14L17
d/b/a HANDYMAN SERVICES,)	
Defendant-Appellee.)	Honorable
)	Charles M. Feeney III,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's decision to vacate a default judgment, concluding plaintiffs, as appellants, presented an insufficient record on appeal to support their claims of error.

¶ 2 In November 2014, plaintiffs, Marvin C. Weaver and Janet E. Weaver, sued defendant, Bruce Artis, a/k/a Bruce Kaylauskas d/b/a Handyman Services, alleging breach of contract and fraud. In February 2015, the trial court found defendant in default for failing to answer plaintiffs' complaint. The court entered judgment in plaintiffs' favor. In June 2015, following a hearing, the court granted defendant's motion to vacate the default judgment.

¶ 3 Plaintiffs appeal, arguing the trial court erred by vacating the default judgment because defendant failed to satisfy the requirements under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). For the reasons that follow, we affirm.

¶ 4

I. BACKGROUND

¶ 5

On November 4, 2014, plaintiffs filed a complaint against defendant, alleging he "walked off the job" of their home repair and remodeling project after only "minimally, partially, and defectively" performing. Plaintiffs had paid defendant \$9,400 for incomplete repairs. The plaintiffs' verified complaint contained four counts: (1) breach of contract (count I); (2) common-law fraud (count II); (3) violation of the Home Repair and Remodeling Act (815 ILCS 513/1 to 999) (West 2012)) (count III); and (4) violation of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 to 12 (West 2012)) (count IV). Plaintiffs sought actual damages in excess of \$50,000 for each count, and punitive damages in excess of \$300,000 for counts II, III, and IV. The day of filing, the Woodford County sheriff's office served defendant by abode service, leaving a copy of the summons and complaint with defendant's wife, age 58, at their home in El Paso, Illinois. According to the certificate of service, the deputy also mailed a copy of the summons to defendant at his home address.

¶ 6

Having received no answer or appearance from defendant, on December 19, 2014, plaintiffs filed a motion for default judgment. According to the attached certificate of service, plaintiffs mailed a copy of the motion and the notice of hearing to defendant's home address.

¶ 7

On February 10, 2015, the trial court held a hearing on plaintiffs' motion for default judgment. The court's docket entry indicates defendant failed to appear. The court entered a written default judgment in the amount of \$50,000 in compensatory damages and \$50,000 in punitive damages plus costs of suit. Plaintiffs mailed a copy of the default judgment to defendant at his home address.

¶ 8

On March 9, 2015, plaintiffs caused to be served upon defendant a citation notice and a citation to discover assets. The process server indicated in his affidavit of service that he

served defendant by substitute service, leaving a copy of the documents with John Folkers, a "co-resident" at defendant's business address in Bloomington, Illinois. The process server also mailed the documents, presumably to the same Bloomington address.

¶ 9 On March 18, 2015, defendant's counsel entered his appearance and filed a motion to vacate default judgment, claiming the judgment entered was "roughly ten times the value of the work to be performed." Defendant claimed he was caring for his ill spouse, and the "ends of justice and truth would be served if defendant were allowed his day in court to defend against the complaint."

¶ 10 On March 25, 2015, pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)), plaintiffs filed a motion to strike and dismiss defendant's motion to vacate default judgment, alleging it was untimely. Plaintiffs claim defendant's posttrial motion should have been filed within 30 days pursuant to section 2-1203(a) of the Code (735 ILCS 5/2-1203(a) (West 2014)), causing the judgment entered on February 10, 2015, to be a final judgment. Plaintiffs also claimed defendant's motion to vacate cannot be considered a valid motion for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)) because it was (1) not verified, (2) not supported by affidavit, and (3) insufficient to demonstrate the existence of a meritorious defense and defendant's due diligence in bringing the motion. Plaintiffs further claimed section 2-605 of the Code (735 ILCS 5/2-605(a) (West 2014)) caused defendant's pleading to be a nullity since the same was not verified after plaintiffs' pleadings had been verified.

¶ 11 On April 7, 2015, defendant filed a subsequent motion to vacate default judgment, this time pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)). In this motion, defendant admitted his wife was served with the summons and complaint on November

4, 2014. However, he alleged his wife was "suffering from serious physical ailment." She placed the summons and complaint on top of the refrigerator, but she failed to inform defendant she had accepted service of the documents. Defendant claimed he did not learn of the lawsuit until the citation of assets was served on Folkers. At that point, defendant hired counsel and sought to present a valid defense to the action. Defendant's motion was verified.

¶ 12 On April 15, 2015, plaintiffs filed a section 2-619 motion to dismiss defendant's motion to vacate default judgment, claiming defendant had failed to produce an affidavit from his wife indicating what she had done with the summons and complaint. Plaintiffs also claimed defendant failed to indicate why he did not appear in the lawsuit earlier despite having received the notices and motions forwarded to him through the mail. Plaintiffs also contended defendant's subsequent motion to vacate the default judgment, filed pursuant to section 2-1401, was filed without first withdrawing his initial motion, or without obtaining leave of court to file his subsequent motion. Finally, plaintiffs contended defendant failed to state a meritorious defense.

¶ 13 On June 15, 2015, defendant filed a response to plaintiffs' motion to dismiss with an attached affidavit from defendant's wife, which indicated (1) she was served with summons and complaint on November 4, 2014; (2) at the time of service, defendant was not home; (3) she never told defendant about the summons and complaint; (4) she "placed the papers in the kitchen among many other papers and forgot about them"; and (5) on March 9, 2015, defendant asked her if she had been served, at which time she told him she had.

¶ 14 On June 18, 2015, following a hearing on the pending motions, the trial court entered the following order by way of docket entry:

"[Plaintiffs] app by Atty Vieley. [Defendant] app by Atty
J. Pioletti. Cause comes on for hrg on [defendant's] petition and

[plaintiffs'] motion to dismiss. Argument is rec'd. The [March 18, 2015,] motion to vacate default judgment is dismissed as untimely. The defendant's [April 7, 2015,] motion to vacate pursuant to [section 2-]1401 is granted. Default judgment is vacated. Order is entered."

The court entered the following written order: "Defendant's [section] 2-1401 petition filed [April 7, 2015,] is granted, default judgment is vacated." No transcript of that hearing appears in the record on appeal. In fact, the entire record on appeal consists of only one common-law volume.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 Plaintiffs appeal, alleging the trial court erred in granting defendant's motion for relief from judgment and, accordingly, vacating the default judgment. We note defendant has not filed an appellee's brief in this court.

¶ 18 Defendant's initial motion to vacate judgment, filed March 18, 2015, cited no statutory authority. However, we presume this motion was filed under section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2012)), as that section governs setting aside default judgments within 30 days of entry. Because that motion was not filed within the required 30-day time frame, the trial court dismissed that motion as untimely. We find no error in the court's dismissal.

¶ 19 Defendant then filed a motion to vacate default judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)), which provides for relief from final orders and judgments after 30 days. We find the court did not err in allowing defendant to proceed with a section 2-1401 motion after his initial motion to vacate default judgment was filed more than

30 days after the default judgment was entered. See *Gruss v. Beverley*, 201 Ill. App. 3d 502, 507 (1990) (the trial court did not err in considering the defendant's amended motion to vacate as a section 2-1401 petition when the motion was filed more than 30 days after the entry of the default judgment).

¶ 20 We must now determine whether the trial court erred, as argued by plaintiffs, in allowing defendant's section 2-1401 motion to vacate default judgment. "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). However, in this case, we are unable to evaluate what "proof," if any, defendant presented to the trial court. Because the record before us is devoid of any testimony, argument, or reasoning for the court's decision, we are unable to determine whether defendant sufficiently carried his burden under section 2-1401 or whether the court had sufficient factual and legal bases for its decision.

¶ 21 Our supreme court has long held that to support a claim of error on appeal, the appellant has the burden to present a sufficiently complete record. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In fact, "[f]rom the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Foutch*, 99 Ill. 2d at 391. Where the issue on appeal relates to the conduct of a hearing or proceeding, the issue is not subject to review absent a report or record of the proceeding. Instead, absent a record, "it [is] presumed that the order entered by the trial court [is] in conformity with law and had a sufficient factual basis." *Foutch*, 99 Ill. 2d at 392; see also *Webster v. Hartman*, 195 Ill. 2d 426, 433-34 (2001) (where the supreme court reaffirmed its holding in *Foutch*).

¶ 22 In this case, plaintiffs, as the appellants, have failed to present a sufficiently complete record of the proceedings to support their claim of error. The record before us contains no transcript of the June 18, 2015, hearing on defendant's section 2-1401 motion, no report of proceedings, no bystander's report, and no agreed statement of facts. Ill. S. Ct. Rs. 323(c), (d) (eff. Dec. 13, 2005). In addition, the trial court's written order and the docket entries do not state the specific grounds for the court's decision. With regard to the hearing, we know only that counsel for both parties were present, the cause was called for hearing on the pending motions, and argument was received. We do not know whether any evidence was presented or what arguments were considered at the hearing, nor do we know the basis for the court's decision.

¶ 23 Because plaintiffs have failed to provide a sufficient report of proceedings, we are unable to determine whether the "proof" submitted to the trial court was sufficient to support its decision. Therefore, we must presume the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 391-92. Accordingly, we find the court did not err by vacating the default judgment.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the trial court's judgment.

¶ 26 Affirmed.