

No. 1-16-1653

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

SHAUNDRE PICKETT,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	Cook County
)	
v.)	
)	No. 14 M1 302591
DOMINIQUE PICKETT and MARK REYNOLDS,)	
)	Honorables
Defendants,)	Sheryl A. Pethers and
)	Jerry A. Esrig,
(Dominique Pickett, Defendant-Appellee).)	Judges, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The order of the trial court is affirmed where the record on appeal does not contain a transcript from the hearing on the plaintiff's motion to vacate the second dismissal of her action for want of prosecution, and based upon the record before this court, we are unable to find that the trial court abused its discretion in denying the motion.

¶ 2 The plaintiff, Shaundre Pickett, appeals from an order of the trial court that denied her motion to vacate the second dismissal of her personal injury action for want of prosecution. On

appeal, she contends that the trial court erred in denying her motion where, having previously refiled her action pursuant to section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 2014)), she is procedurally barred from filing her action again. For the reasons that follow, we affirm.

¶ 3 The following background is derived from the common law record and the parties' appellate briefs. The record on appeal does not contain a transcript of proceedings in the trial court.

¶ 4 On June 22, 2012, the plaintiff filed a personal injury action against the defendants, Dominique Pickett (Pickett) and Mark Reynolds (Reynolds) (collectively, the defendants).¹ In her complaint, the plaintiff alleged that she was a passenger in a vehicle operated by Pickett, which struck a vehicle driven by Reynolds, and as a result of the accident she sustained injuries. The trial court granted her motion to voluntarily dismiss her action on October 8, 2013, and she refiled it on October 7, 2014. The trial court initially set January 12, 2015, as the final date for service of summons on the defendants but extended the deadline twice. On June 19, 2015, the trial court dismissed the action for want of prosecution, apparently by reason of the fact that no one appeared on behalf of the plaintiff.

¶ 5 The plaintiff filed a motion to vacate the dismissal pursuant to section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2014)), claiming that her counsel did not appear in court on June 19, 2015, because he had "incorrectly diaried the *** case management date on the electronic office calendar[.]" The plaintiff also moved for an order of default against Pickett, alleging that he failed to enter an appearance. On August 4, 2015, the trial court granted the plaintiff's motion to vacate the dismissal, and entered and continued the motion for default

¹ Reynolds is not a party to this appeal.

pending "proof of service [on Pickett.]" On November 9, 2015, following three additional continuances, the trial court entered an order of default against Pickett. Pickett filed a motion to vacate the default, which the trial court granted on December 14, 2015. The trial court set March 11, 2016, as the final date for service of summons on Reynolds. It appears that no one appeared on behalf of the plaintiff on March 11, 2016, and the trial court for a second time dismissed the plaintiff's action for want of prosecution.

¶ 6 The plaintiff filed a motion to vacate the dismissal of March 11, claiming that her counsel did not appear in court on March 11, 2016, because he had "incorrectly diaried the *** case management date on the electronic office calendar[.]" The motion was signed by the plaintiff's attorney. The trial court denied the motion, stating in a written order that, although Pickett had entered an appearance, "Reynolds has not been served and [the plaintiff] has failed to diligently attempt service[.]" The plaintiff filed a motion to reconsider, arguing, *inter alia*, that her counsel did not appear in court on March 11, 2016, because "he had to take his wife to the doctor." That motion was also signed by the plaintiff's attorney. Additionally, the motion asserted that Reynolds was "not the responsible [d]efendant" and that Pickett "acknowledged liability and settled with the other passengers." The trial court denied the motion to reconsider.

¶ 7 On appeal, the plaintiff contends that the trial court erred in denying her motion to vacate the second dismissal of her action for want of prosecution where, pursuant to section 13-217 of the Code, she is procedurally barred from filing her action again. She submits that this result is unreasonable, as "less harsh" sanctions were available and her trial counsel demonstrated cause for missing the hearing that resulted in the dismissal. Additionally, she asserts that dismissal was improper where her motion to reconsider indicated that she had a meritorious claim against Pickett and was not pursuing her action against Reynolds.

¶ 8 Before reaching the merits of the plaintiff's argument, we have an independent duty to determine our jurisdiction. *LM Insurance Corp. v. B&R Insurance Partners, LLC*, 2016 IL App (1st) 151011, ¶ 14. Our jurisdiction is limited to final judgments, which "dispose*** of the rights of the parties, either upon the entire controversy or some definite and separate part of it." *Id.* Generally, dismissal for want of prosecution is not a final judgment because section 13-217 of the Code (735 ILCS 5/13-217 (West 2014)) affords plaintiffs a one-time right to refile an action within one year of dismissal or within the remaining period of limitations, whichever is greater. *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 254 (1991); *Klancir v. BNSF Ry. Co.*, 2015 IL App (1st) 143437, ¶ 16. An exception to this rule applies where a trial court dismisses an action for want of prosecution after a plaintiff has already exercised his or her right to refile. *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367, 376 (2001). In this situation—as in the case at bar—the trial court's denial of the plaintiff's motion to vacate the dismissal constitutes dismissal with prejudice and renders the judgment final and appealable. *Id.* Consequently, this court has jurisdiction over the instant appeal.

¶ 9 We observe that Pickett, in his appellate brief, maintains that the plaintiff exercised her right to refile after her voluntary dismissal and, therefore, the trial court erred in granting her motion to vacate the first dismissal for want of prosecution. The record does not indicate that Pickett raised this issue in the trial court; therefore, his argument in this regard is forfeited. *State ex rel. Pusateri v. Peoples Gas Light and Coke Co.*, 2014 IL 116844, ¶ 22.

¶ 10 Pursuant to section 2-1301(e) of the Code, a trial court "may on motion filed within 30 days after entry set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 2014). The movant has the burden of establishing sufficient grounds for vacating an order dismissing an action for want of prosecution. *Mann*, 324

Ill. App. 3d at 377. In ruling on a motion to vacate, the trial court's primary concern is "whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits." *In re Haley D.*, 2011 IL 110886, ¶ 69. Ultimately, "[w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome." (Internal quotation marks omitted.) *Mann*, 324 Ill. App. 3d at 377.

¶ 11 We review the denial of a section 2-1301(e) motion for an abuse of discretion. *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶ 26. "An abuse of discretion occurs when the trial court 'acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted.' " *Id.* (quoting *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 941 (1999)). Where reasonable persons could differ regarding the propriety of the trial court's actions, no abuse of discretion will be found. *Standard Bank and Trust Co. v. Madonia*, 2011 IL App (1st) 103516, ¶ 8.

¶ 12 Based upon the record before us, we are unable to conclude that the trial court in the case abused its discretion in denying the plaintiff's motion to vacate the second dismissal of her action for want of prosecution. The record does not contain a transcript of any proceedings in the trial court, including the proceedings at which the trial court dismissed the plaintiff's action for the second time or a transcript of the proceedings at which her motions to vacate and reconsider were denied. The plaintiff, as the appellant, had the burden of providing a sufficient record on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Absent a transcript of the relevant hearings, we must presume that the trial court's order had a sufficient factual basis and conformed to the law. *Id.* at 392 (finding "no basis for holding that the trial court abused its

discretion" in denying a section 2-1301(e) motion where the appellant did not provide a transcript of the hearing with the record on appeal).

¶ 13 The limited record before us reflects that in the motion to vacate the first dismissal of the plaintiff's action for want of prosecution which was entered on June 19, 2015, her attorney alleged that the matter had been misdiaried. After the second dismissal for want of prosecution on March 11, 2016, the plaintiff filed a motion to vacate in which her attorney again alleged that an incorrect date had been recorded on the office calendar. After the trial court denied the motion, the plaintiff filed a motion to reconsider in which her attorney alleged that he had to take his wife to the doctor.

¶ 14 In ruling on the plaintiff's second motion to vacate the dismissal of March 11, 2016, the trial court could properly consider the number of continuances which it granted due to the plaintiff's failure to diligently effectuate service of process on the defendants and the fact that it had already vacated an earlier dismissal for want of prosecution occasioned by her failure to appear on a regularly scheduled court date. See *Mann*, 324 Ill. App. 3d at 378 (holding that "numerous continuances and delays occasioned by plaintiff's conduct" supported the trial court's refusal to vacate its order dismissing an action for want of prosecution). To the extent the plaintiff alleges that her motion to reconsider raised additional issues that might favor vacating the dismissal, we observe that arguments raised for the first time in a motion to reconsider in the trial court are forfeited on appeal. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36.

¶ 15 In this case, where the trial court dismissed the plaintiff's action for want of prosecution on two occasions and the plaintiff did not provide a sufficient record to support her claim of an abuse of discretion, we must conclude that the trial court effected substantial justice in declining

to vacate the second dismissal. See *Lange v. City of Chicago*, 9 Ill. App. 3d 1082, 1084 (1973) (finding that the trial court properly declined to vacate a second dismissal for want of prosecution).

¶ 16 For the foregoing reasons, we affirm the order of the trial court denying the plaintiff's motion to vacate the second dismissal of her action for want of prosecution.

¶ 17 Affirmed.