

No. 1-12-0128

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**

EARNEST GIVENS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County, Illinois
)	
v.)	No. 11 M1 15465
)	
LEI KEOVAN, and NASSER ROSHANDEL,)	The Honorable
)	Pamela E. Hill Veal,
Defendants-Appellants.)	Judge Presiding

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Quinn and Simon concurred in the judgment.

ORDER

Held: The circuit court erred when it denied defendants' motion to vacate the default judgment entered against them pursuant to section 2-1301 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1301(e) (West 2010).

¶ 1 Plaintiff, Earnest Givens, filed a complaint against defendants, Lei Keovan and Nasser Roshandel, which, in its entirety, contained only the following allegations: "Theft;" "Property

Damage;" "Illegal Eviction;" and "Lock Out." After defendants had appeared, answered, and filed responsive pleadings, the circuit court entered a default judgment against defendants after defendants' attorney arrived 25 minutes late to a status call. At issue is whether the circuit court erred when it denied defendants' motion to vacate the default judgment entered against them pursuant to section 2-1301 of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-1301 (West 2010). We hold the circuit court erred when it denied defendants' motion to vacate because the court's decision failed to provide substantial justice between the parties. Furthermore, the default judgment entered by the circuit court cannot stand because plaintiff's complaint failed to allege any facts to support a cause of action.

¶ 2 JURISDICTION

¶ 3 On December 14, 2011, the circuit court denied defendants' motion to vacate. On January 11, 2012, defendants timely filed their notice of appeal. On January 17, 2012, defendants filed a motion to voluntarily dismiss all of their counterclaims pursuant to section 2-1009 of the Code. 735 ILCS 5/2-1009 (West 2010)), which the circuit court granted on February 3, 2012. On February 15, 2012, the circuit court certified a bystander's report pursuant to Illinois Supreme Court Rule 323(c). Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005). Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 4 BACKGROUND

¶ 5 On August 9, 2011, Givens, *pro se*, filed a complaint against Keovan and Roshandel, which, in its entirety, stated the following: "1. Theft 2. Property Damage 3. Illegal Eviction 4.

Lock Out[.]” In the heading of the form complaint, the "Amount Claimed" was listed as \$13,000.

¶ 6 On September 6, 2011, Keovan and Roshandel filed their appearance,¹ answer, and counterclaims with exhibits.²

¶ 7 On November 8, 2011, defendants informed the circuit court that plaintiff failed to file a timely answer to their counterclaim. Defendants presented an affirmative defense, claiming plaintiff failed to allege facts sufficient to state a cause of action and requested plaintiff's complaint be dismissed. The circuit court struck defendants' affirmative defense, finding the failure to allege facts sufficient to state a cause of action was not an affirmative defense and, therefore, was improperly raised. The circuit court entered the following order:

" 1. Defendants aff [*sic*] defense stricken [,] 2. Defendant's provided answer [and] counterclaim to plaintiff in open court[,], 3. Plaintiff to file response to Defendants' counterclaims within 14 days of [November 8,] 2011."

The circuit court additionally set a status date for November 30, 2011, at 9:30 a.m., in order to check on the status of plaintiff's response. Plaintiff never filed a response.

¶ 8 On November 30, 2011, defendants missed the status call. The circuit court entered an *ex*

¹ It appears Keovan is also an attorney, and represented himself and Roshandel in this matter.

² Defendants' answer and counterclaim is not in the record. However, the bystander's report entered by the circuit court on February 15, 2012, discussed defendants' counterclaim and affirmative defenses.

parte default judgment in plaintiff's favor for \$13,000. The circuit court also awarded plaintiff assessed costs.

¶ 9 On that same day, defendants filed a motion to vacate the *ex-parte* default judgment entered against them pursuant to section 2-1301 of the Code. 735 ILCS 5/2-1301 (West 2010). In their motion, defendants argued that they had been diligent in their defense of the case. They pointed out that on September 6, 2011, they filed their appearance, answer, and other responsive pleadings. Additionally, defendants had appeared at "the first trial call" on November 8, 2011. It was discovered on that date that plaintiff failed to respond to defendants' counterclaim so the circuit court allowed plaintiff leave to file proper pleadings by November 22, 2011; and set a status date for November 30, 2011, at 9:30 in the morning. Due to plaintiff's failure to file responsive pleadings, defendants prepared a motion to dismiss plaintiff's complaint, and a motion for summary judgment for its counterclaims which defendants alleged showed their diligence.

¶ 10 In their motion to vacate, defendants also described the events on November 30, 2011, that led to the *ex-parte* default judgment being entered against them. They alleged that the status call began at 9:30 a.m., with their "case being line 9 on the call." Defendants' attorney arrived at the status call at 9:55 a.m. and checked in with the court clerk, who informed him that the case had already been called and that a default judgment had been entered. Defendants' attorney alleged that he was late for the status call due to an unforeseen traffic accident, which, although he was not directly involved in, did delay his commute to the status call. Defendants' attorney stated that he made the same commute to the November 8, 2011, court date, in a timely manner; which, he alleged, showed that he "did not foresee or expect to arrive late." He described his

lateness as "a one time incident," and asserted that all prior "deadlines, appearances and court dates [had] been timely met."

¶ 11 Additionally, as further support for their motion to vacate, defendants alleged that plaintiff's complaint failed to state a valid cause of action. Specifically, plaintiff's complaint contained four listed items "with absolutely no facts or statements" and that "it is further ambiguous [as] to whether or not there exists four separate counts *** or if the four *** listed items constitute one cause of action." Defendants asserted that a complaint containing no facts cannot be considered a valid cause of action.

¶ 12 On December 14, 2011, the circuit court denied defendants' motion to vacate. On January 11, 2012, defendants timely filed their notice of appeal. On January 17, 2012, defendants filed a motion to voluntarily dismiss all of their counterclaims pursuant to section 2-1009 of the Code. 735 ILCS 5/2-1009 (West 2010). The circuit court granted the motion on February 3, 2012. On February 15, 2012, the circuit court certified a bystander's report pursuant to Illinois Supreme Court Rule 323(c). Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005).

¶ 13 ANALYSIS

¶ 14 Before this court, defendants argue the circuit court erred in failing to grant their motion to vacate the *ex parte* default judgment entered against them and that plaintiff's complaint is insufficient as a matter of law. Defendants ask this court to reverse the circuit court's order denying their motion, brought pursuant to section 2-1301 of the Code, seeking to vacate the default judgment entered against them. In response, plaintiff, *pro se*, argues that the circuit court properly denied defendants' section 2-1301 motion to vacate. Plaintiff also dedicated a portion of

his brief addressing defendants' section 2-615 motion, which the circuit court never ruled on.³

¶ 15 Section 2-1301(e) of the Code allows the circuit court to set aside a final order or judgment if filed within 30 days after judgment or final order. Section 2-1301(e) specifically provides:

"The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735 ILCS 5/2-1301(e) (West 2010).

¶ 16 Although there has been some confusion over the standard of review that should be applied to a 2-1301(e) motion (see *Venzor v. Carmen's Pizza Corp.*, 235 Ill. App. 3d 1053, 1056 (1992)), our supreme court recently clarified how section 2-1301(e) motions should be resolved. *In re Haley D.*, 2011 IL 110886. Our supreme court held:

"[S]ection 2-1301(e) provides that the decision as to whether the default should be set aside is discretionary. [Citation.] In exercising that discretion, courts must be mindful that entry of default is a drastic remedy that should only be used as a last resort. [Citation.] The law prefers that controversies be determined according to the substantive rights of the parties. [Citation.] The

³ Defendants had also filed, on November 30, 2011, a motion to dismiss plaintiff's complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2010). The circuit court never ruled on this motion.

provisions of the Code *** governing relief from defaults are to be liberally construed toward that end. [Citation.] When a court is presented with a request to set aside a default under section 2-1301(e), the overriding consideration *** is simply 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. [Citations.] In making this assessment, a court should consider all events leading up to the judgment." *Id.* at ¶ 69.

¶ 17 With those principles in mind, we hold the circuit court's decision in this case to deny defendants' motion to vacate the *ex parte* default judgment entered against them failed to provide substantial justice between the parties. Defendants were 25 minutes late for a status call. The purpose of the status call that day was to check on the status of plaintiff's responsive pleadings. Defendants' attorney was late due to an unforeseen traffic accident which delayed his commute. Defendants were present, timely, and actively participated in all other aspects of the case. They immediately filed their motion to vacate on the same day as the missed status hearing. Our supreme court has warned that "entry of default is a drastic remedy" and has called for the sections of the Code that govern relief from default judgments to be construed liberally. *Id.* Considering the facts of this case, we cannot allow the default judgment entered against defendants to stand. Therefore, we hold that the circuit court erred when it denied defendants' motion to vacate the default judgment entered against them.

¶ 18 We further note that although defendants "need not necessarily show the existence of a meritorious defense," to successfully set aside the default judgment entered against them, defendants in this case do have a meritorious defense. *Id.* at ¶57. Namely that plaintiff's complaint is clearly deficient, which is another reason why the default judgment entered against defendants cannot stand. See *People v. \$1,124,905 U.S. Currency and One 1988 Chevrolet Astro Van*, 177 Ill. 2d 314, 334 (1997) ("On review, a default judgment must be reversed where the complaint upon which that judgment is premised fails to allege facts sufficient to state a cause of action."). The complaint only contains seven words: "Theft;" "Property Damage;" "Illegal Eviction;" and "Lock Out." Notably absent are any facts supporting these allegations. *Id.* at 335 ("Illinois remains a fact-pleading state. [Citation.] Therefore, the allegations in a complaint must set forth facts that satisfy the elements necessary to support a cause of action."). Other considerations courts look at when determining whether to vacate a default also heavily favor defendants. These considerations include the defaulted party's diligence and the severity of the penalty resulting from the default judgment. *In re Marriage of Phyliss Ward*, 282 Ill. App. 3d 423, 433 (1996). As discussed above, with the exception of being 25 minutes late to a status call, defendants actively and diligently participated in all aspects of this case. They filed an answer, an appearance, and responsive pleadings. Allowing a \$13,000 default judgment to stand would be a severe penalty for being 25 minutes late to a status call.

¶ 19 After thorough review of the facts and circumstances of this case, we hold substantial justice requires the reversal of the circuit court's order denying defendants' motion to vacate the *ex parte* default judgment. On remand, we direct the circuit court to vacate the default judgment

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entered against defendants.

¶ 20

CONCLUSION

¶ 21 The judgment of the circuit court reversed and the cause is remanded.

¶ 22 Reversed and remanded.