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2018 IL App (3d) 170835-U

Order filed October 17, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2018

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| CITY OF KANKAKEE, an Illinois Municipal Corporation, | ) | Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois. |
| Plaintiff-Appellee,                                  | ) |  |
| v.   | ) | Appeal No. 3-17-0835   |
|  | ) | Circuit No. 17-MR-478  |
| ROBERT ELLINGTON-SNIPES,                             | ) |  |
| Defendant-Appellant.                                 | ) | The Honorable Susan Sumner-Tungate Judge, Presiding.                                   |

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Holdridge and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial court properly denied defendant property owner's post-judgment motions seeking to vacate injunction entered against him where he did not show due diligence in defending action. Trial court's monetary penalty of \$49,500 against defendant for violating ordinance reduced on appeal because it was excessive and not supported by the evidence.

¶ 2 Plaintiff City of Kankakee filed a complaint for injunctive relief and monetary fines against defendant Robert Ellington-Snipes, who owns property in Kankakee. The complaint alleged that a tent on defendant's property violated a city zoning ordinance. When defendant did

not answer the complaint or appear in court, plaintiff filed a motion for default judgment, which the trial court granted. The trial court entered an Order of Mandatory Injunction and Judgment Order, requiring defendant to remove the tent from his property and pay a monetary fine of \$49,500. More than 30 days later, defendant filed an emergency motion to vacate the trial court's order and dismiss plaintiff's complaint, as well as a motion to stay and vacate the trial court's order. The trial court denied defendant's motions. Defendant appeals, arguing that the trial court erred in (1) granting plaintiff injunctive relief, and (2) ordering him to pay \$49,500 in fines. We affirm the trial court's decision to grant plaintiff injunctive relief but reduce the fines imposed against defendant to \$20,500.

¶ 3

### FACTS

¶ 4

Defendant Robert Ellington-Snipes owns real property in Kankakee. On April 20, 2016, Plaintiff City of Kankakee issued a "Notice of Violation" to defendant for conditions on his property that allegedly violated the city code. The "Violation/Deficiencies Report" attached to the notice stated that defendant had to remedy the following "code deficiencies" by April 25, 2016:

"KLIB 308.1

All exterior property and premises, and the interior of every structure, shall be free from any accumulation of rubbish or garbage.

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08-17 Chapt. 8 Art. V Sec. 8-17 Sub. 302.50

The outdoor storage of equipment, materials or furnishings, including, but not limited to, indoor furniture, household appliances, auto parts or building materials

on all residential property and premises is prohibited. The use of exterior stairways, decks, porches and balconies for outdoor storage shall be prohibited.”

¶ 5 After defendant failed to correct the conditions on his property, plaintiff issued defendant a “Notice of Violation Ticket” on May 9, 2016, listing the same violations as those contained in the Violation/Deficiencies Report. On September 8, 2016, plaintiff voluntarily dismissed defendant’s violation ticket without prejudice.

¶ 6 Nearly 10 months later, on July 6, 2017, plaintiff filed a two-count complaint against defendant, alleging that “[o]n or about June 2016,” defendant erected and used a tent on his property in violation of Chapter 4 of the city’s zoning ordinance. The complaint sought injunctive relief, as well as monetary penalties “not exceeding \$500.00 per day” against defendant. An “Affidavit of Process Server” filed on July 26, 2017, stated that the process server personally delivered copies of the summons and complaint to defendant at his home on July 20, 2017. The summons notified defendant that he was required to answer or otherwise appear within 30 days and that “a judgment or decree by default may be taken against you for the relief asked in the complaint” if he failed to do so.

¶ 7 Defendant did not answer or otherwise respond to the complaint within 30 days. On September 1, 2017, plaintiff filed a motion for default, which the trial court granted on September 14, 2017. On that same date, the trial court entered an “Order of Mandatory Injunction and Judgment Order,” ordering defendant to immediately cure the violations on his property and assessing damages of \$49,500, which “represents a fine of \$500 per day for a period of 499 days (April 20, 2016 thru August 30, 2017).”

¶ 8 On October 23, 2017, defendant filed an “emergency motion” seeking to vacate the trial court’s order and dismiss plaintiff’s complaint with prejudice. In his motion, defendant asserted

that the trial court lacked jurisdiction over him. He admitted that he has two 10' x 15' tents joined together on his property to make one large 20' x 30' tent. On November 2, 2017, defendant filed a motion to stay and vacate the "Order of Mandatory Injunction and Judgment Order" and set it for hearing. That motion contained the same assertions as his previously-filed "emergency motion."

¶ 9 On December 7, 2017, the trial court held a hearing on defendant's motions. The court then entered an order denying the motions.

¶ 10 ANALYSIS

¶ 11 "[A] default judgment comprises two factors: (1) a finding of the issues for the plaintiff; and (2) an assessment of damages." *Wilson TelOptic Cable Construction Co.*, 314 Ill. App. 3d 107, 112 (2000). Defendant's post-judgment motions challenged both portions of the trial court's order.

¶ 12 Section 2-1401 of the Code of Civil Procedure provides a mechanism for obtaining relief from final orders, judgments and decrees after more than 30 days have passed from the date of entry thereof. See 735 ILCS 5/2-1401 (West 2016). A motion to vacate a default judgment pursuant to section 2-1401 invokes the equitable powers of the court to prevent the enforcement of a default judgment obtained by unfair, unjust or unconscionable circumstances. *Falcon Manufacturing Co. v. Nationwide Brokers, Inc.*, 123 Ill. App. 3d 496, 498 (1984) (citing *Elfman v. Evanston Bus Co.*, 27 Ill.2d 609 (1963)).

¶ 13 To warrant relief pursuant to section 2-1401, the petitioner must demonstrate (1) a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the trial court in the original action; and (3) due diligence in filing the petition for relief. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). It is essential that both a meritorious defense and due

diligence be shown since the purpose of a section 2-1401 proceeding is to bring facts not appearing of record to the attention of the trial court, which, if known to the court at the time judgment was entered, would have prevented its entry. *Falcon Manufacturing Co.*, 123 Ill. App. 3d at 498. A section 2-1401 petition must show, by adequate allegations, that the petitioner is entitled to the relief sought. *Id.* Facts showing due diligence and a meritorious defense must be proved by a preponderance of the evidence. *County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 51. A trial court’s ultimate decision on the petition is reviewed for an abuse of discretion. *Id.*

¶ 14 I. Injunction

¶ 15 Defendant first argues that the trial court erred in denying his section 2-1401 petition, which requested the trial court to set aside its grant of injunctive relief to plaintiff.

¶ 16 To effectively state a cause of action warranting relief under section 2-1401, a petitioner must show that his failure to defend against the lawsuit was the result of an excusable mistake. *Falcon Manufacturing Co.*, 123 Ill. App. 3d at 499. It is the duty of every litigant to follow the progress of his case. *Id.* Section 2-1401 does not relieve a litigant of the consequences of his own mistakes or negligence. *Id.* If the petition fails to allege facts that demonstrate due diligence, relief will not be granted. *Id.*; see *Smith*, 114 Ill. 2d at 227-28.

¶ 17 Here, the record shows that defendant was personally served with a summons and copy of plaintiff’s complaint on July 20, 2017. The summons advised defendant that he was required to answer or otherwise appear within 30 days and that “a judgment or decree by default may be taken against you for the relief asked in the complaint” if he failed to do so. Nevertheless, defendant failed to respond to the complaint. As a result, plaintiff sought a default judgment against defendant, which the trial court granted.

¶ 18 Defendant had ample opportunity to avoid the default judgment by timely filing his answer or appearance. However, he failed to do so and failed to allege a reasonable excuse for not timely responding to the complaint. Defendant failed to exercise due diligence in defending against plaintiff's claim. Thus, the trial court did not err in dismissing defendant's 2-1401 petition seeking to set aside the trial court's grant of injunctive relief to plaintiff. See *Smith*, 114 Ill. 2d at 227-28; *Falcon Manufacturing Co.*, 123 Ill. App. 3d at 499.

¶ 19 II. Damages

¶ 20 Defendant also contends that the trial court's award of \$49,500 to plaintiff is excessive and not supported by the evidence.

¶ 21 A defendant who is defaulted admits the material allegations of the complaint but does not admit that the plaintiff is entitled to the amount of damages claimed. *Smith v. Dunaway*, 77 Ill. App. 2d 1, 6 (1966); *Straus v. Biesen*, 242 Ill. App. 370, 373 (1926). An appellate court can review a defaulted defendant's claim that the damage award is excessive. See *Smith v. Airoom*, 114 Ill. 2d at 229; *City of Joliet v. Szayna*, 2016 IL App (3d) 150092, ¶ 53. A fine is excessive if there is no evidence supporting it. See *Szayna*, 2016 IL App (3d) 150092, ¶¶ 53-54.

¶ 22 "On a default, a party is not entitled to relief outside the original complaint." *Id.* ¶ 55. A plaintiff can only seek damages for the violations alleged in its complaint. *Id.* ¶ 58.

¶ 23 Here, the trial court ordered defendant to pay a total of \$49,500 in fines, purportedly representing "a fine of \$500 per day for a period of 499 days" beginning on April 20, 2016, and ending on August 30, 2017. However, the court's calculation was incorrect. If the trial court had assessed a fine of \$500 per day for 499 days, defendant would have owed a total of \$249,500 in fines, instead of \$49,500. Assessing a penalty of \$49,500 for a 499-day violation represents a fine of \$99.20 per day. Nevertheless, the fine is not supported by the evidence.

¶ 24 In its complaint, plaintiff alleged that the tent on defendant's property violated the city's zoning ordinance. Plaintiff did not allege that any other condition on defendant's property violated any other city ordinance or rule. According to the complaint, defendant's tent was erected in June 2016, two months after plaintiff issued defendant a notice for conditions on his property that violated local ordinances. Additionally, the notice plaintiff issued on April 20, 2016, made no mention of a tent nor did it reference the city's zoning ordinance. Rather, the April 20, 2016 notice listed entirely different local ordinances and rules that were allegedly violated by other conditions on defendant's property.

¶ 25 Because plaintiff did not allege any conditions on defendant's property that violated city rules or ordinances other than the tent, plaintiff could not seek damages for any of defendant's other violations, including those contained in the April 20, 2016 notice. See *Szayna*, 2016 IL App (3d) 150092, ¶ 58. Plaintiff did not notify defendant that the tent on his property violated a city ordinance until plaintiff served its complaint on defendant on July 20, 2017. Therefore, the trial court should have calculated defendant's fine to begin no earlier than July 20, 2017. Using the proper start date of July 20, 2017, and the trial court's end date of August 30, 2017, defendant's fine should have spanned no more than 41 days. If the trial court had assessed a 41-day fine of \$500 per day, defendant's fine would be \$20,500. Thus, pursuant to our appellate powers, we vacate defendant's \$49,500 fine and reduce it to \$20,500. Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994).

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Kankakee County is affirmed in part, vacated in part, and modified in part.

¶ 28 Affirmed in part; vacated in part; modified in part.