

NOTICE
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2017 IL App (5th) 160133-U

NO. 5-16-0133

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

SHARON S. NOLTE,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Franklin County.
)	
v.)	No. 15-L-38
)	
REND LAKE RESORT, INC.,)	Honorable
)	Eric J. Dirnbeck,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Moore and Justice Goldenhersh concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court's denial of the defendant's section 2-1401 petition for relief from a default judgment is affirmed where there was no unfair surprise to the defendant regarding the amount of damages being requested and the defendant failed to demonstrate due diligence in presenting its defense.

- ¶ 2 The defendant, Rend Lake Resort, Inc. (Rend Lake), appeals from the order of the circuit court of Franklin County denying its petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). For the reasons that follow, we affirm.

¶ 3 Rend Lake owned and operated a resort in Franklin County. The plaintiff, Sharon Nolte, was a guest at the resort on July 14, 2014, when she was injured as a result of a fall on the premises. Nolte had slipped on an accumulation of dead bugs and dead bug guts that covered the steps outside of her room. In September 2014, Rend Lake's accountant, Robert Davey, received a letter from Nolte's attorney concerning the incident. After receipt of the letter, Davey reported the incident to Rend Lake's insurance company. On October 6, 2014, Davey was advised that the insurance company was investigating the matter.

¶ 4 On July 7, 2015, a summons and complaint were served on Rend Lake through its registered agent, John Riley. Thereafter, Riley forwarded the summons and complaint to Davey. Davey did not do anything with the documents because he had assumed that the insurance company had also received a copy and that it would take the necessary steps to respond. There is no indication in the record as to whether Riley had given Davey any instructions in regard to the documents.

¶ 5 Because no answer was filed on Rend Lake's behalf within the requisite time period, Nolte filed a motion for default judgment against Rend Lake on September 17, 2015. A copy of the motion was mailed to Riley. Rend Lake did not file a response to the motion for default judgment. On November 3, 2015, a notice of hearing for the motion for default judgment was mailed to Riley. On November 16, 2015, a hearing was held on the motion, and Rend Lake did not appear. The trial court found Rend Lake in default and held a hearing to determine the extent of Nolte's damages. Nolte asked the court to award \$400,000 in damages. Following that hearing, the court entered a default

judgment against Rend Lake in the amount of \$300,000. On December 15, 2015, Nolte's attorney mailed a copy of the default judgment to Rend Lake. Davey received the order on or about December 22 and immediately forwarded it to Rend Lake's insurance agent.

¶ 6 On December 30, 2015, Davey received a letter from Rend Lake's insurance company, informing him that an attorney had been retained to represent Rend Lake in this action and to attempt to get the default judgment vacated. On January 15, 2016, Rend Lake's counsel filed a petition to vacate the default judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)). In the petition, Rend Lake asserted that the default judgment was void because the judgment amount substantially exceeded the amount requested in the *ad damnum* of the complaint and that Nolte had not provided any notice to Rend Lake of her intention to request damages in an amount that was eight times the amount stated in the complaint.

¶ 7 Alternatively, Rend Lake argued that the default judgment should be set aside because it had a meritorious defense to the complaint and it had exercised due diligence in presenting its defense to the court. Specifically, Rend Lake argued that it had evidence that contradicted Nolte's allegation that the cause of her fall was the accumulation of dead bugs on the stairs. Rend Lake also contended that any accumulation of dead bugs on the steps would have been open and obvious and that it had no duty to protect against or to warn of open and obvious defects. In support, Rend Lake attached an affidavit of Charles Baxter, Rend Lake's maintenance manager, who was present at the scene shortly after Nolte fell. According to Baxter, there were several other adults accompanying Nolte, and neither Nolte nor her companions mentioned that there was an accumulation of dead bugs

or other debris on the steps where Nolte fell. Baxter further stated that Nolte's accident had occurred during the daylight hours when the steps were in plain sight.

¶ 8 As for due diligence, Rend Lake argued that its failure to answer the complaint was an excusable mistake as its accountant had assumed that the insurance company had received a copy of the complaint and would be handling the defense. Moreover, Rend Lake contended that it was diligent in filing the section 2-1401 petition in that it had sought to vacate the default judgment immediately after it was given notice of the judgment.

¶ 9 On February 29, 2016, a hearing was held on Rend Lake's section 2-1401 petition. On March 8, 2016, the trial court entered an order via docket entry, denying the petition. Rend Lake appeals.

¶ 10 Section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)) establishes a comprehensive, statutory procedure that allows for the vacatur or modification of final orders and judgments more than 30 days after their entry. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). To obtain relief under section 2-1401, a party must show (1) the existence of a meritorious claim or defense to the judgment; (2) due diligence in presenting the claim or defense to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition. *Id.* The party seeking relief pursuant to section 2-1401 must affirmatively set forth specific factual allegations supporting each of the requisite elements. *OneWest Bank, FSB v. Hawthorne*, 2013 IL App (5th) 110475, ¶ 21. An exception to the requirements that the party seeking relief

must demonstrate a meritorious claim or defense and due diligence exists when the order or judgment at issue is attacked as void. *In re Haley D.*, 2011 IL 110886, ¶ 58.

¶ 11 Here, Rend Lake argues that the default judgment is void because Nolte failed to comply with the requirements of section 2-604 of the Code (735 ILCS 5/2-604 (West 2014)) and Illinois Supreme Court Rule 105(a) (eff. Jan. 1, 1989) by not giving proper notice that she would be seeking a judgment in an amount that substantially exceeded the amount stated in the complaint. As the issue of whether the default judgment is void is a question of law, our review is *de novo*. *Jayko v. Fraczek*, 2012 IL App (1st) 103665, ¶ 3.

¶ 12 Section 2-604 of the Code instructs as follows regarding the prayer for relief in a complaint:

"Every count in every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself or herself entitled except that in actions for injury to the person, no ad damnum may be pleaded except to the minimum extent necessary to comply with the circuit rules of assignment where the claim is filed. *** In actions for injury to the person, any complaint filed which contains an ad damnum, except to the minimum extent necessary to comply with the circuit rules of assignment where the claim is filed, shall, on motion of a defendant or on the court's own motion, be dismissed without prejudice. Except in case of default, the prayer for relief does not limit the relief obtainable, but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise. In case of default, if relief is sought, whether by amendment, counterclaim, or otherwise,

beyond that prayed in the pleading to which the party is in default, notice shall be given the defaulted party as provided by rule." 735 ILCS 5/2-604 (West 2014).

¶ 13 Additionally, Supreme Court Rule 105(a) requires that notice be given to a defaulted party if new or additional relief, whether by amendment, counterclaim, or otherwise, is sought. Ill. S. Ct. R. 105(a) (eff. Jan. 1, 1989).

¶ 14 In support of its argument that section 2-604 and Rule 105(a) serve to limit the amount of recovery upon default in the absence of notice, Rend Lakes cites *Dils v. City of Chicago*, 62 Ill. App. 3d 474 (1978), and *Kaput v. Hoey*, 124 Ill. 2d 370 (1988). In *Dils*, the City of Chicago petitioned for relief from a default judgment in the amount of \$246,524 entered in a personal injury action, arguing that judgment was limited by the \$50,000 *ad damnum* in the complaint. 62 Ill. App. 3d at 481-82. The court found the award of damages in excess of the *ad damnum* improper under section 34 of the Civil Practice Act (Ill. Rev. Stat. 1975, ch. 110, ¶ 34), which is now section 2-604 of the Code. *Id.* The court reasoned that the city was prejudiced by reason of surprise where it had no notice that the requested damages in the complaint were substantially different from what plaintiff was ultimately awarded. *Id.* at 482.

¶ 15 Rend Lake recognizes that the version of section 34 relied on by the court in *Dils* did not contain the personal-injury exception to the prayer for relief, which prohibits a plaintiff from requesting a specific amount in the complaint except to the extent necessary to comply with the circuit rules. However, Rend Lake maintains that *Dils* is instructive in that it recognizes that a reasonable limit must be placed on the amount a

plaintiff can ultimately recover in a default judgment under an *ad damnum* that seeks damages "in excess of \$50,000" without providing notice to the defaulted party.

¶ 16 Unlike the complaint filed in *Dils*, the personal-injury complaint filed in *Kaput* requested damages "in excess of \$15,000" in accordance with section 2-604 of the Code. 124 Ill. 2d at 381. Defendant argued that an award of \$29,500 was void where he was not provided with notice that a greater amount was being requested. *Id.* at 382. The supreme court disagreed, noting that a request for damages "in excess of \$15,000" puts a defendant on notice that more than \$15,000 is being sought. *Id.* The court concluded that the amount of the judgment could not be deemed a surprise in view of the nature of the action pleaded; the notice in the complaint that requested damages would be in excess of \$15,000; and the fact that the size of the final award, which although twice the base amount, was not unfairly in excess of \$15,000. *Id.* However, the court clarified that its decision was not meant to "suggest *** that there is no limit on the amount that may reasonably be obtained upon default, consistent with section 2-604 and Rule 105(a), under an open-ended prayer for relief such as the one used here." *Id.*

¶ 17 In the present case, the amount of the judgment, \$300,000, did not, in a literal sense, exceed Nolte's request in her complaint for damages in "excess of \$50,000." However, Rend Lake argues that it was an unfair surprise that defeated the purpose of the notice requirements of section 2-604 and Rule 105(a). We recognize that the documents sent to Rend Lake did not indicate that Nolte would be seeking \$400,000 in damages. However, Nolte was prohibited from requesting a specific amount of damages in her personal-injury complaint, and had she pled a specific amount in excess of \$50,000, her

claim would have been subject to dismissal on motion of Rend Lake or on the court's own motion. See 735 ILCS 5/2-604 (West 2014). Thus, her complaint complied with the requirements of section 2-604.

¶ 18 With regard to Rend Lake's argument that the judgment amount should be deemed an unfair surprise to the defaulting party, the record indicates that Rend Lake was aware of the complaint being filed as well as the request for default judgment and that it failed to respond and to appear at the default judgment hearing. Specifically, the record reflects that the personal-injury complaint was served on Rend Lake's registered agent on July 7, 2015, and thereafter, forwarded to Rend Lake's accountant. The personal-injury complaint notified Rend Lake of the type of damages that Nolte would be requesting; namely, reimbursement for medical expenses as well as lost wages and pain and suffering. Further, a copy of the motion for default judgment and a copy of the notice requesting a hearing on the motion were also served on the registered agent. Despite receiving these documents, Rend Lake failed to respond or appear at the hearing.

¶ 19 In light of the nature of the action being pleaded, the nature of Nolte's injuries, the notice in the complaint that the damages would be in excess of \$50,000, and the fact that Rend Lake had received the complaint as well as notice of the default judgment hearing, we conclude that there was no unfair surprise to Rend Lake. Moreover, we note that had Rend Lake taken any action in this case, discovery would have eliminated any surprise concerning the amount of damages. Thus, we conclude that the judgment for damages was not invalid.

¶ 20 We now turn to the issue of whether the trial court abused its discretion when it denied Rend Lake's section 2-1401 petition for relief from judgment. The section 2-1401 petition requirements at issue in this case are whether Rend Lake has demonstrated due diligence in presenting its defense and whether it has shown the existence of a meritorious defense.

¶ 21 The trial court's decision as to whether to grant or deny a section 2-1401 petition will not be disturbed on review absent an abuse of discretion. *Kaput*, 124 Ill. 2d at 378. Section 2-1401 is not intended to relieve a litigant of the consequences of his own mistake or negligence. *KNM Holdings, Inc. v. James*, 2016 IL App (1st) 143008, ¶ 21. Thus, due diligence requires that the section 2-1401 petitioner 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. *West Bend Mutual Insurance Co. v. 3RC Mechanical & Contracting Services, LLC*, 2014 IL App (1st) 123213, ¶ 14.

¶ 22 Rend Lake contends that its failure to respond to the complaint or to appear at the hearing to challenge Nolte's request for an entry of a default judgment is attributable to its accountant being under the misimpression that Rend Lake's insurance company was handling the company's defense in the personal-injury action. Thus, it argues that its failure to defend against the lawsuit was the result of an excusable mistake. We disagree.

¶ 23 As noted above, due diligence requires that the petitioning party demonstrate that it acted reasonably, and not negligently, in failing to defend the lawsuit. On three different occasions, there was a failure on the part of the registered agent and/or the

accountant to notify the insurance company about the lawsuit. Under the circumstances, the failure to forward the complaint to the insurance company might be considered reasonable as the insurance company had previously investigated the matter to determine liability, and the accountant had no legal experience. However, the motion for default judgment, which indicated that Rend Lake had not entered its appearance or otherwise filed a response to the complaint, was also served on the registered agent.

¶ 24 Rend Lake further contends that equitable considerations require relaxing the diligence requirement. In particular, Rend Lake notes as follows: the default judgment was entered on November 16; Nolte's counsel did not mail a copy of the order to Rend Lake until December 15; and Rend Lake did not receive the order until on or about December 22. Rend Lake argues that Nolte's delay in sending the order resulted in Rend Lake being unable to request the judgment be vacated under section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2014)), which allows a trial court to set aside any default judgment within 30 days of its entry "upon any terms and conditions that shall be reasonable."

¶ 25 When ruling on a section 2-1401 petition that makes a fact-based challenge to a default judgment, the trial court may, in limited situations, take equitable considerations into account and relax the due-diligence requirement. *KNM Holdings*, 2016 IL App (1st) 143008, ¶ 27. The cases in which this occurs involve evidence of fraudulent conduct on the part of plaintiff in procuring or concealing the default judgment or other unusual circumstances that make enforcement of the judgment unjust. *Id.* In *Bonanza International, Inc. v. Mar-Fil, Inc.*, 128 Ill. App. 3d 714, 720 (1984), the court concluded

that the plaintiff's conduct in failing to disclose a default judgment until after the expiration of the 30-day period under section 2-1301(e) weighed in favor of vacating the default judgment under section 2-1401 because the standards for vacating a default judgment within 30 days of its entry are less stringent than after that time period has elapsed. However, the court noted that this conduct alone has been insufficient to render a default judgment unfair or unconscionable. *Id.*

¶ 26 The record reflects that the default judgment was not sent to Rend Lake until December 15, the day before the 30-day time period expired. Nolte has not given any reason for the delay in sending Rend Lake the order. Although Nolte's delay in disclosing the default judgment resulted in Rend Lake being unable to challenge the judgment under section 2-1301(e), this conduct alone is insufficient to relax the diligence requirement for equitable considerations. As shown above, there is no indication in the record that Nolte concealed the fact that she was seeking a default judgment against Rend Lake; nor has Rend Lake pointed to any fraudulent conduct on the part of Nolte in procuring the judgment. Consequently, there is nothing in the record before us that would justify relaxing the diligence requirement. Thus, we conclude that the trial court did not abuse its discretion in finding that Rend Lake failed to demonstrate due diligence.

¶ 27 Because we conclude that the trial court did not abuse its discretion in finding that Rend Lake had failed to demonstrate due diligence, we need not consider the meritorious-defense requirement.

¶ 28 For the foregoing reasons, the order of the circuit court of Franklin County is affirmed.

¶ 29 Affirmed.