2011 IL App (1st) 102883-U

Third Division
November 9, 2011

No. 1-10-2883

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(3)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DWIGHT LOFTS, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
	)	09 M1 101051
v.	)	
	)	
CARLY CAMPBELL and SHAWN LOOMIS,	)	Honorable
	)	Anthony L. Burrell,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

¶ 1 *HELD*: A trial court's order that grants a section 2-1401 petition to vacate a default judgment will be reversed if the petition fails to set forth facts that establish the existence of a meritorious defense, due diligence in presenting the defense to the circuit court in the original action, and due diligence in filing the petition for relief.

¶ 2 On January 7, 2009, Dwight Lofts, LLC, (Lofts), the plaintiff, filed a complaint against the defendants, Carly Campbell and Shawn Loomis, for breach of contract. On January 11, 2010, the trial court entered a default judgment against the defendants when they failed to appear at a status hearing. The defendants filed a section 2-1401 petition (735 ILCS 5/2-1401 (West 2007)) to vacate the judgment and the court granted the petition. Lofts appeals and maintains that the trial court abused its discretion when it granted defendants' section 2-1401 petition to vacate the default judgment because (1) the defendants failed to comply with the Supreme Court Rules when they served the plaintiff; (2) the defendants failed to set forth a meritorious defense in their petition; and (3) the defendants failed to exercise due diligence. We find that the trial court erred when it granted the defendants' section 2-1401 petition to vacate. Therefore, we reverse the order entered by the trial court and remand with directions.

¶ 3 BACKGROUND

¶ 4 Lofts owned certain residential property known as "Dwight Lofts." On September 3, 2008, Lofts and Carly Campbell entered into a "housing agreement" which granted Campbell a "limited license" to access and make personal residential use of one assigned single or double occupancy bedroom space within a four bedroom loft unit for the period beginning August 27, 2008, and ending on August 11, 2009. The agreement further provided that Campbell could terminate the agreement at any time, but if she did so she would "remain fully responsible for the Total Contract Fee that would have accrued under this Housing Agreement, through the end of the full original Term."

¶ 5 On August 13, 2008, Shawn Loomis, Campbell's mother, signed a "guaranty of housing agreement" with Lofts in which Loomis guaranteed that Campbell would perform all the conditions under the housing agreement, including the punctual payment of all fees and charges and any future liability that Campbell might incur under the agreement. Campbell moved out of Dwight Lofts on

October 10, 2008. On January 7, 2009, Lofts filed a complaint against the defendants to recover $15,305, the amount allegedly due under the terms of the contract.

¶ 6 Lofts' attorney appeared in court on March 27, 2009, and the court scheduled the first status hearing for May 8, 2009. On May 8, 2009, Attorney Daniel Evans appeared on behalf of the defendants, at the request of defendants' counsel. At the hearing, the court entered an order which allowed the defendants seven days to answer or otherwise plead.

¶ 7 On June 24, 2009, the defendants filed their answer, affirmative defenses, and counterclaim. On July 29, 2009, Lofts filed two motions, a motion to strike defendants' affirmative defenses and a second motion to strike defendants' counterclaim. Lofts' attorney served defendants' counsel with a notice of motion setting the hearing on the motions for October 2, 2009. The October 2, 2009, order indicates that defendants' counsel failed to appear at the hearing. Therefore, the trial court granted Lofts' motion to strike the affirmative defenses and the motion to strike the counterclaim and set the case for a prove-up on November 17, 2009.

¶ 8 According to a letter in the record, Lofts' counsel faxed a copy of the court order to defendants' counsel. The court held a hearing on November 13, 2009, although the court had scheduled the hearing for November 17, and the court scheduled another status hearing for January 11, 2010.

¶ 9 In Lofts' response to defendants' petition to vacate, Lofts' attorney stated that he did not send notice of the January 11, 2010, status hearing because the court's electronic docket revealed that defendants' counsel had not filed an appearance. When the defendants and their counsel failed to appear at the January 11, 2010, status hearing, the court entered a default judgment against the defendants in the amount of $15,605 plus costs.

¶ 10 On March 17, 2010, Lofts filed a supplementary proceeding (735 ILCS 5/2-1402 (West 2008)) and served a citation to discover assets on Chase Bank. On April 5, 2010, Chase Bank filed its answer to the citation proceedings. The answer indicated that Chase had placed a hold on Loomis' account for the amount of $16,409.

¶ 11 On April 7, 2010, the defendants filed a *pro se* motion for countersuit/counterclaim in the original action. In the motion, defendants alleged (1) that Lofts placed Campbell in housing with a drug addict, and (2) that Campbell repeatedly complained to management about the problem but they failed to assist her. Defendants further alleged that Campbell was forced to move out because a "majority" of the other residents discovered that Campbell was "ratting" on her roommate and she feared for her safety.

¶ 12 On April 9, 2010, defendants filed an emergency section 2-1401 petition to vacate the default judgment. Defendants' section 2-1401 petition alleged that the default judgment should be vacated because Lofts (1) failed to provide notice of the January 11, 2010 hearing; (2) failed to provide notice of the default judgment; (3) failed to provide timely notice of the citation to discover assets; and (4) because the defendants had a meritorious defense.

¶ 13 Campbell and Loomis supported their petition to vacate with their own affidavits and with the affidavit of April Board, their attorney. Each affiant averred that Lofts did not provide them with notice of the January 11 status hearing or notice of the default judgment that the court entered at the status hearing. Loomis also averred that she did not receive notice of the citation to discover assets until after the bank placed a hold on her account.

¶ 14 Defendants also appended the following documents to their petition: (1) a copy of the circuit court's case information summary report; (2) a letter to the clerk of the circuit court from defendants' counsel; (3) correspondence between defendants' counsel and Lofts' counsel; and (4) a copy of defendants' answer, affirmative defenses and counterclaim which were stricken in the original proceeding.

¶ 15 In their answer to Lofts' complaint, defendants admitted that Campbell moved out of the loft on October 10, 2008, but they denied the allegation that they owed Lofts $15,305, pursuant to the terms of the contract.

¶ 16 In their affirmative defenses, defendants pled (1) accord and satisfaction; (2) constructive eviction; (3) fraud; (4) violations of the implied covenant of habitability; and (5) violation of the Chicago Residential Landlord Tenant Ordinance.

¶ 17 Defendants alleged in their counterclaim (1) that Lofts "intentionally or recklessly misrepresented material facts in conjunction with the lease," by failing to advise Campbell that her assigned roommate had a mental disturbance and a history of drug use; (2) that if Campbell had known that her roommate had a mental disturbance or a history of drug use, she would not have executed the agreement; (3) that Campbell reported the problem to Lofts' employees and "begged" for a change of unit; (4) that Campbell was in danger because Lofts' representative publicly told the roommate about Campbell's complaints; (5) that Campbell was forced to move out because she feared for her health and safety; and (6) that Campbell had to seek other housing. Defendants also alleged that Loomis did not sign the housing agreement.

¶ 18 Lofts filed a motion to dismiss the section 2-1401 petition and argued that the defendants served plaintiff's attorney and not plaintiff as required by Supreme Court Rule 105. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989).

¶ 19 Lofts later filed its response to defendants' petition to vacate the default judgment. Lofts alleged in its response to the section 2-1401 petition that defendants failed to show that they exercised due diligence in defending the original action and in attempting to vacate the default judgment. The response also alleged that defendants failed to set forth a meritorious defense. In addition, Lofts argued that because defendants did not file an appearance, its counsel was not obligated to send notice of any court date to the defendants.

¶ 20 Lofts appended the following documents to its response: (1) defendants' notice of appearance which did not contain the file stamp of the Clerk of the Circuit Court of Cook County; (2) letters to defendants' counsel from plaintiff's counsel; (3) a copy of the October 2, 2009, court order; and (4) a check made out to Lofts from Loomis' account which the bank returned to Lofts because the account was either frozen or blocked.

¶ 21 The court held an emergency hearing on April 13, 2010, and continued the matter until May 4, 2010. On May 25, 2010, and July 20, 2010, defendants' attorney requested two continuances for the hearing on the motion to vacate. The circuit court granted both requests. The court conducted a hearing on the section 2-1401 petition on September 14, 2010, and entered an order which granted the petition and vacated the default judgment. The court's order also gave the defendants seven days to file their appearance. Defendants' counsel filed her appearance on September 16, 2010, on behalf of the defendants. Lofts filed a notice of appeal which refers to Supreme Court Rule 304(a). Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010).

¶ 22 ANALYSIS

¶ 23 I. Jurisdiction

¶ 24 A. Appellate Court

¶ 25 Lofts' notice of appeal references Supreme Court Rule 304(a), but an appeal from an order granting or denying a section 2-1401 petition is brought pursuant to Supreme Court Rule 304(b)(3). *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002) (citing 155 Ill. 2d R. 304 (b)(3)). Our Supreme court has held that a party's citation to an "improper" rule does not divest this court of jurisdiction if this court has jurisdiction. *Gardner v. Mullings*, 234 Ill. 2d 503, 510 (2009). Although Lofts brought its appeal pursuant to Rule 304(a), this court has jurisdiction because the corporation's appeal would have been proper if brought pursuant to Rule 304(b)(3). Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010) (Rule 304(b)(3) permits an appeal from a judgment or order granting or denying any of the relief prayed for in a petition brought pursuant to section 2-1401 of the Code of Civil Procedure). Accordingly, we have jurisdiction to review this appeal.

¶ 26 B. Trial Court

¶ 27 Lofts argues that the trial court lacked jurisdiction to hear defendants' petition to vacate because defendants served plaintiff's attorney and not plaintiff as required by Rule 105. A party seeking relief under section 2-1401 must give notice to opposing parties according to the supreme court rules. *Mrugala v. Fairfield Ford, Inc.*, 325 Ill. App. 3d 484, 488 (2001). Rule 106 provides that notice of the filing of a petition under section 2-1401 of the Code of Civil Procedure shall be given by the same methods provided for in Rule 105. Ill. S. Ct. R. 106 (eff. Aug. 1, 1985). Rule 105 provides that the petitioner must direct notice to the opposing party and must serve that party either by summons, by prepaid registered mail, or by publication. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989). The notice is invalid if it is not served by one of the methods prescribed by Rule 105, and the trial court lacks jurisdiction and its subsequent orders are likewise invalid. *Mrugala*, 325 Ill. App. 3d at 488 (citing *Welfelt v. Schultz Transit Co.*, 144 Ill. App. 3d 767, 772 (1986)).

¶ 28 We note, however, that there are two exceptions to this rule. *Mrugala*, 325 Ill. App. 3d at 488. First, when an opposing party appears and argues the merits of a section 2-1401 petition despite the failure of receipt of proper notice, a court will deem the party to have forfeited the jurisdictional defect. *Mrugala*, 325 Ill. App. 3d at 488 (citing *Welfelt*, 144 Ill. App. 3d at 772). This exception does not apply here because Lofts filed a motion to dismiss for improper service of process before it filed its response to the motion to vacate. Therefore, Lofts did not forfeit this jurisdictional defect.

¶ 29 Second, the appellate court has found an equitable exception to the methods of service prescribed by Rule 105(b). *Mrugala*, 325 Ill. App. 3d at 488 (citing *Welfelt*, 144 Ill. App. 3d at 772). Service of a section 2-1401 petition on the party's attorney of record in the original proceeding and not the party itself is sufficient when the original attorney is in court representing his or her client in a matter ancillary to the original judgment. *Welfelt*, 144 Ill. App. 3d at 772 (citing *Public Taxi Service, Inc. v. Ayrton*, 15 Ill. App. 3d 706, 712 (1973)). The *Ayron* court noted that the object of process is to notify a party of pending litigation, so as to secure his appearance. Therefore, if the attorney's subsequent actions, such as attempting to obtain satisfaction of the judgment, shows that he is still the party's attorney, then there is no logical reason why the party should not be notified through him. *Ayrton*, 15 Ill. App. 3d at 712-13 (citing *Lord v. Hubert*, 12 Ill. 2d 83 (1957)).

¶ 30 Lofts' attorney continued to represent Lofts, and in an attempt to satisfy the judgment in the original proceeding, filed a supplementary proceeding and served a citation to discover assets on Chase Bank on March 17, 2010. Because Lofts's attorney continued to represent Lofts in the supplementary proceeding, defendants could notify Lofts of the pending section 2-1401 petition by serving its attorney. *Ayrton*, 15 Ill. App. 3d at 712 (citing *Hubert*, 12 Ill. 2d 83). Therefore, we find that the trial court had jurisdiction to rule on the section 2-1401 petition to vacate.

¶ 31 II. Standard of Review

¶ 32 Both parties assert that we should apply the abuse of discretion standard to review the trial court's grant of the section 2-1401 petition. According to *People v. Vincent*, 226 Ill. 2d 1 (2007), there are five types of final dispositions available in a section 2-1401 litigation: the trial judge may dismiss the petition; the trial judge may grant or deny the petition on the pleadings alone (summary judgment); or the trial judge may grant or deny relief after holding an evidentiary hearing at which it resolves factual disputes. *Vincent*, 226 Ill. 2d at 9. The *Vincent* court held that when a court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, that order will be reviewed *de novo*. *Vincent*, 226 Ill. 2d at 18. In this case, the trial court granted the section 2-1401 petition after reviewing the pleadings, supporting documents and listening to the arguments of the parties' attorneys. Therefore, since the court reviewed the pleadings and entered a judgment without an evidentiary hearing, we review the order *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 33 III. Briefs Cannot be Used to Supplement the Record

¶ 34 We note that the defendants have appended to their brief documents that were not included in the record on appeal. Parties cannot use briefs and appendices to supplement the record, therefore, we will ignore the documents that were not included in the record. *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826 (2001) (citing *Jones v. Police Board*, 297 Ill. App. 3d, 922, 930 (1998)).

¶ 35 IV. Section 2-1401 Petition to Vacate a Default Judgment

¶ 36 Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a judgment older than 30 days. 735 ILCS 5/2-1401 (West 2007); *Vincent*, 226 Ill. 2d at 7. Section 2-1401(b) provides that the petition must be filed in the same proceeding in which the order or judgment was entered, but it is not a continuation of the original action. 735 ILCS 5/2-1401. The statute requires the petitioner to support the petition with affidavits or other appropriate showing as to matters not of record. *Vincent*, 226 Ill. 2d at 7 (citing 735 ILCS 5/2-1401(b) (West 20002)). The purpose of a section 2-1401 petition is to alert the circuit court to facts that, if they had been known at the time, would have precluded entry of the judgment. *People v. Haynes*, 192 Ill. 2d 437, 461 (2000). However, the proceeding is not intended to give the litigant a new opportunity to put in issue matters which have previously been or could have been adjudicated. *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 110 (2009) (citing *In re Marriage of Halas*, 173 Ill. App. 3d 218, 223 (1988)). Moreover, it does not afford a litigant a remedy whereby he may be relieved of the consequences of his own mistakes or his counsel's negligence. *Hirsch*, 397 Ill. App. 3d at 110 (citing *Shapira v. Lutheran General Hospital*, 199 Ill. App. 3d 479, 483 (1990)).

¶ 37 To state a claim for relief under section 2-1401, the petitioner must affirmatively set forth specific facts supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *Smith v. Airoom Inc.*, 114 Ill. 2d 209, 220-21 (1986) (citing *Bonanza International, Inc. v. Mar-Fil, Inc.*, 128 Ill. App. 3d 714, 717 (1984)). The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence. *Smith*, 114 Ill. 2d at 221 (citing *Mitchell v. Seidler*, 68 Ill. App. 3d 478, 482 (1979)).

¶ 38 A. Meritorious Defense

¶ 39 To prove the existence of a meritorious defense, the petitioner must not merely assert that she has a meritorious defense, but must plead sufficient supporting facts. *Coleman v. Caliendo*, 361 Ill. App. 3d 850, 854-55 (2005) (citing *Beauchamp v. Zimmerman*, 359 Ill. App. 3d 143, 148 (2005)). The court will consider whether a meritorious defense exists which ensures that vacatur of the order will not be a useless act. *Coleman*, 361 Ill. App. 3d at 854 (quoting *In re Application of the County Treasurer*, 347 Ill. App. 3d 769, 774 (2004)). Pleading a meritorious defense is not enough. The petitioner must explain why she did not raise that defense during the original proceeding. See *In re Detention of Morris*, 362 Ill. App. 3d 321, 323 (2005).

¶ 40 Here, Lofts argues that defendants failed to state a meritorious defense in their section 2-1401 petition. As an initial pleading, a section 2-1401 petition is treated like a complaint (*Vincent*, 226 Ill.

2d at 15), and must allege specific facts that support each element of the cause of action. *Smith*, 114 Ill. App. 2d 220-21. Defendants alleged in their section 2-1401 petition that the default judgment should be vacated "because the defendants have a meritorious defense." However, the defendants did not allege facts in their section 2-1401 petition which explained what their meritorious defense was. Instead, they simply stated they had one. Therefore, defendants' petition failed to comply with the pleading requirements necessary for relief under section 2-1401. See *Blazyk v. Daman Exp. Inc.*, 406 Ill. App. 3d 203, 208 (2010) (citing *Callaghan v. Village of Clarendon Hills*, 401 Ill. App. 3d 287, 300 (2010)).

¶ 41 B. Due Diligence in the Original Proceeding

¶ 42 Lofts also contends that the defendants did not exercise due diligence in defending the original action and in filing their section 2-1401 petition. Due diligence requires the section 2-1401 petitioner to have a reasonable excuse for failing to act within the appropriate time. *Smith*, 114 Ill. 2d at 222 (citing *Steinberg's Department Store, Inc. v. Baysingar*, 86 Ill. App. 3d 1140, 1143 (1980)). The petitioner must 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 resist the judgment. *Smith*, 114 Ill. 2d at 222 (citing *American Reserve Corp. v. Holland*, 80 Ill. App. 3d 638, 643 (1980)). In determining the reasonableness of the excuse offered by the petitioner, the court must consider all of the circumstances attendant upon entry of the judgment, including the conduct of the litigants and their attorneys. *Smith,* 114 Ill. 2d at 222 (citing *Canton v. Chorbajian*, 88 Ill. App. 3d 1015, 1022-23 (1980)).

¶ 43 Turning to the issue of defendants' diligence in the original proceeding, defendants' counsel admitted in the section 2-1401 petition that she received a copy of the October 2 order which granted Lofts' motions to strike defendants' affirmative defenses and counterclaim. However, the defendants failed to file a motion seeking leave of court to refile or amend their affirmative defenses and counterclaim. The defendants' section 2-1401 petition does not provid this court with a reasonable excuse for their failure to refile or amend their affirmative defenses or counterclaim.

¶ 44 C. Due Diligence in Filing the Section 2-1401 Petition

¶ 45 Lofts further argues that defendants failed to exercise due diligence in attempting to vacate the default judgment. The circuit court entered the default judgment on January 11, 2010. The defendants filed their section 2-1401 petition to vacate on April 9, 2010, approximately three months after the entry of the default judgment. The defendants' section 2-1401 petition does not provide this court with facts setting forth a reasonable excuse which explains why it took them approximately three months to file their section 2-1401 petition to vacate.

¶ 46 CONCLUSION

¶ 47 In this case, we find that the defendants have failed to set forth facts in their petition which establish the three elements that entitle a party to relief under section 2-1401. Because the defendants have failed to set forth facts that establish the three elements that entitle them to relief under a section 2-1401 petition, we hold that the trial court erred when it set aside the default judgment. Therefore, we reverse the trial court's order that granted defendants' petition to vacate the default judgment and remand with directions for the trial court to enter an order which sets a date for the defendants to file an amended section 2-1401 petition. *Blazyk*, 406 Ill. App. 3d at 209. Finally, in the event defendants' amended section 2-1401 petition fails to set forth facts that establish the three required elements, the court should dismiss the case.

¶ 48 Reversed and remanded with directions.