2012 IL App (1st) 111743-U

FIRST DIVISION
DECEMBER 3, 2012

1-11-1743

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HILLSIDE LUMBER, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
KRZYSZTOF KARBOWSKI, 1001 NORTH, INC., and MIRAGE CONSTRUCTION, INC.,	)	
	)	No. 09 L 2757
Defendants-Appellants,	)	
	)	
and	)	
	)	
MCM PROPERTIES, INC., TIME PROPERTIES, INC., IVONA KARBOWSKI,	)	
	)	Honorable
	)	Barbara McDonald,
Defendants.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Petitioners failed to provide a complete appellate record of the circuit court proceedings, so as to allow the reviewing court to properly address the issue of whether the circuit court abused its discretion in denying the petitioners' section 2-1401 petition to vacate a default judgment.

¶ 2 This appeal arises from a May 19, 2011 order entered by the circuit court of Cook County, which denied an amended section 2-1401 petition to vacate (735 ILCS 5/2-1401(West 2010)) a July 1, 2010 default judgment entered against defendants Krzysztof Karbowski (Karbowski), 1001 North, Inc. (1001 North), and Mirage Construction, Inc. (Mirage). On appeal, Karbowski, 1001 North and Mirage argue that the circuit court abused its discretion in denying their amended section 2-1401 petition to vacate the default judgment. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On May 1, 2006, plaintiff Hillside Lumber, Inc. (Hillside) entered into a written "credit agreement" with Mirage. Pursuant to the credit agreement, a credit line was extended to Mirage to purchase construction materials from Hillside. In exchange, Mirage was obligated to pay for the construction materials within 30 days after being invoiced by Hillside. The credit agreement was signed by Karbowski, as president of Mirage, and contained the following guaranty language: "[i]n consideration of the extension of credit granted by [Hillside], the undersigned does hereby unconditionally guarantee payment of whatsoever amount [Mirage], or its successor, at anytime owes to [Hillside] ***." Thereafter, Mirage defaulted on some of the payments owed to Hillside.

¶ 5 Subsequently, Hillside agreed to refrain from filing a lawsuit to collect the unpaid balance, in exchange for Karbowski's execution of four promissory notes. On May 2, 2008, Karbowski signed two promissory notes in the amounts of $25,976.51 and $77,919.23, which listed "Karbowski of Mirage" as the borrower and Hillside as the lender. On June 21, 2008, Karbowski signed two additional promissory notes in the amounts of $49,402.86 and $18,277.31 in favor of Hillside as the

lender. The $49,402.86 promissory note listed "Karbowski of 1001 North *** & Mirage" as the borrower, while the $18,277.31 promissory note named the borrower as "Karbowski of Mirage." All four promissory notes included language that "in the event [b]orrower is a corporation or other entity, the undersigned does hereby unconditionally agree to guarantee payment of any portion of the loan amount the [b]orrower named herein or its successor, owes to the [l]ender," and "[t]he undersigned further agrees to pay all of [l]ender's costs and expenses, including attorney's fees, incurred in any court proceeding for the collection of any and all amounts due under the [n]ote." However, Karbowski, Mirage, and 1001 North failed to pay the amounts due under the promissory notes.

¶ 6 On March 6, 2009, Hillside filed a complaint against Karbowski, Mirage, 1001 North, and others,[1] alleging that they breached the terms of the credit agreement and the promissory notes. On July 2, 2009, as a result of several failed attempts to serve Karbowski individually and in his capacity as president of Mirage and 1001 North, the circuit court granted Hillside's "motion for alternative service" pursuant to section 2-203.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-203.1 (West 2010)), by allowing a copy of the summons and complaint to be posted on the door of Karbowski's residence and to be sent by postal mail. Thereafter, in July 2009, Karbowski, individually and as president of Mirage and 1001 North, was served with the summons and complaint by alternative service of process.

¶ 7 On September 25, 2009, the law firm of Fuchs & Roselli, Ltd. (Fuchs & Roselli) filed an

[1]Other named defendants included Ivona Karbowski, Time Properties, Inc., and MCM Properties, Inc.

appearance on behalf of all the named defendants.

¶ 8 On February 24, 2010, Hillside filed a first amended complaint for breach of contract, breach of guaranty, and breach of promissory notes against only Karbowski, Mirage, and 1001 North. However, Karbowski, Mirage, and 1001 North failed to file an answer or any responsive pleadings to Hillside's first amended complaint, despite the circuit court's directives to do so on two occasions.

¶ 9 On March 8, 2010, Fuchs & Roselli filed a motion for leave to withdraw as counsel for the named defendants, which the circuit court granted.[2]

¶ 10 On April 13, 2010, attorney Ronald Gertzman (Attorney Gertzman), as new counsel for Karbowski, Mirage, and 1001 North, filed an appearance before the circuit court. In May 2010, Attorney Gertzman, on behalf of Karbowski, filed a response to Hillside's first request for admission.

¶ 11 In June 2010, Hillside filed a "special routine motion for default judgment" (motion for default judgment), arguing that default judgment should be entered against Karbowski, Mirage, and 1001 North as a result of their failure to respond to Hillside's first amended complaint.

¶ 12 On July 1, 2010, the circuit court, presided over by Judge Barbara McDonald (Judge McDonald), entered a default judgment in favor of Hillside and against Karbowski, Mirage, and 1001 North in the following amounts:

> "a. Against [Karbowski] and [Mirage], jointly and severally,
>
> for damages in the amount of $205,571.66;

[2]Although unclear in the record, Karbowski, Mirage and 1001 North represent to this court that the circuit court had granted Fuchs & Roselli's motion to withdraw. The fact that Attorney Gertzman filed an appearance on their behalf shortly thereafter suggests that Fuchs & Roselli had withdrawn from representing them.

b. Against [1001 North] for damages in the amount of $49,402.86;

c. Against [Karbowski], [Mirage], and [1001 North], jointly and severally, for attorney['s] fees in the amount of $13,447.50 and costs in the amount of $1,287.81."

The default judgment order further stated that Hillside "voluntarily dismisses defendants Ivona Karbowski, MCM Properties, Inc., and Time Properties, Inc., without prejudice,"[3] and struck a July 28, 2010 status hearing date.

¶ 13 According to the affidavit of Hillside's attorney, Christopher Wunder (Attorney Wunder), a copy of the default judgment was sent to Karbowski and his counsel.

¶ 14 On September 3, 2010, in a supplemental proceeding before Judge Alexander White (Judge White) of the circuit court, a "citation to discover assets" was issued to Karbowski, Mirage, and 1001 North, in order to examine any assets or income that were not exempt from enforcement of the default judgment. Further, a "citation to discover assets to a third party" was issued to Fuchs & Roselli and Attorney Gertzman, inquiring whether they possessed any property belonging to Karbowski, Mirage, and 1001 North. Subsequently, on September 21, 2010, only Fuchs & Roselli responded to the "citation to discover assets to a third party."

¶ 15 On October 6, 2010, Judge White entered an order directing Karbowski and Attorney

[3]Ivona Karbowski, MCM Properties, Inc., and Time Properties, Inc. were only named as defendants in Hillside's original complaint, but not in its first amended complaint. Thus, it is unclear why Hillside "voluntarily dismisses" them without prejudice when they were not named parties in the first amended complaint.

Gertzman to appear before the court on November 17, 2010, for a rule to show cause as to why they should not be held in civil contempt of court for failing to respond to the citations to discover assets. On October 9, 2010, Hillside served Attorney Gertzman with a copy of the circuit court's order for a rule to show cause. On November 17, 2010, Attorney Gertzman appeared before the court on his own behalf in response to the court's rule to show cause order, and scheduled a date to appear at the office of Hillside's counsel for a "citation examination" on December 6, 2010. On November 18, 2010, Hillside served Karbowski with a copy of the circuit court's order for a rule to show cause. However, on January 11, 2011, upon Karbowski's failure to appear in court to respond to the rule to show cause order, Judge White ordered that a "writ of body attachment" be issued against Karbowski, which was later quashed on February 15, 2011.

¶ 16 On February 25, 2011, Karbowski, through his counsel Arnold Landis (Attorney Landis),[4] filed a section 2-1401 petition to vacate (petition to vacate) the July 1, 2010 default judgment, arguing that Hillside never gave Karbowski, Mirage, and 1001 North any notice that it was seeking a default judgment against them. On March 2, 2011, Attorney Landis formally filed an appearance in the circuit court on behalf of Karbowski, Mirage, and 1001 North. On March 11, 2011, Karbowski, Mirage, and 1001 North filed an amended section 2-1401 petition to vacate (amended petition to vacate) the July 1, 2010 default judgment, arguing, *inter alia*, that they never received notice of Hillside's motion for default judgment and that a meritorious defense existed to warrant vacating the default judgment against them.

[4] The record is unclear as to when Karbowski retained Attorney Landis as new counsel, or when Attorney Gertzman ceased to represent Karbowski, Mirage, and 1001 North.

¶ 17 On March 24, 2011, the case was transferred back to Judge McDonald for the adjudication of the amended petition to vacate, which was denied on May 19, 2011.

¶ 18 On June 17, 2011, Karbowski, Mirage, and 1001 North filed a notice of appeal before this court.

¶ 19 ANALYSIS

¶ 20 Our sole inquiry on appeal is whether the circuit court abused its discretion in denying Karbowski, Mirage, and 1001 North's amended section 2-1401 petition to vacate the July 1, 2010 default judgment against them.

¶ 21 Karbowski, Mirage, and 1001 North argue that the circuit court abused its discretion in refusing to vacate the July 1, 2010 default judgment because they had properly complied with the legal requirements under section 2-1401 of the Code. Specifically, they maintain that their amended petition to vacate contained a meritorious defense to Hillside's first amended complaint, and that they acted with due diligence both in presenting the defense to the circuit court and in filing the amended petition to vacate the default judgment.

¶ 22 Hillside counters that the circuit court acted within its discretion in denying Karbowski, Mirage, and 1001 North's amended petition to vacate the default judgment, where they "utterly failed to exercise due diligence in the underlying action"; did not act in due diligence in filing the original or amended petition to vacate; and lacked a meritorious defense to Hillside's cause of action.

¶ 23 As a preliminary matter, we address this court's jurisdiction over this appeal. See *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542, 949 N.E.2d 723, 727 (2011) (a reviewing court has an independent duty to consider whether it has jurisdiction over an appeal). As

discussed, on May 19, 2011, Judge McDonald entered an order denying Karbowski, Mirage, and 1001 North's amended petition to vacate. On June 17, 2011, a timely notice of appeal was filed before this court. The record further reveals that on June 1, 2011, Judge White, in a supplemental proceeding pertaining to Karbowski's failure to respond to the "citations to discover assets," entered an agreed order to continue a hearing on the "rule to show cause" against Karbowski until July 7, 2011.

¶ 24 Supreme Court Rule 304(b) (eff. Feb. 26, 2010) enumerates specific instances under which judgments and orders that do not dispose of an entire proceeding are appealable without the necessity of a special written finding by the circuit court–including a "judgment or order granting or denying any of the relief prayed in a petition under section 2-1401 of the Code ***." Ill. S. Ct. R. 304(b) (eff. Feb. 26, 2010). The instant appeal pertains solely to the circuit court's May 19, 2011 denial of the amended section 2-1401 petition to vacate. Thus, despite the pending supplemental proceedings against Karbowski at the time of the filing of the notice of appeal, and the lack of a special written finding by the circuit court in the record before us, we have proper jurisdiction over this appeal pursuant to Rule 304(b) (Ill. S. Ct. R. 304(b) (eff. Feb. 26, 2010)).

¶ 25 Turning to the merits of the case, we determine whether the circuit court erred in denying Karbowski, Mirage, and 1001 North's amended petition to vacate the July 1, 2010 default judgment against them, which we review under an abuse of discretion standard. See *Paul v. Gerald Adelman & Associates*, 223 Ill. 2d 85, 99, 858 N.E.2d 1, 9 (2006).

¶ 26 Section 2-1401 of the Code provides that "[r]elief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this [s]ection." 735 ILCS 5/2-

1401(a) (West 2010). A party seeking to set aside a final judgment or order under section 2-1401(a) of the Code must show by a preponderance of the evidence: (1) the existence of a meritorious claim or defense in the original action; (2) due diligence in pursuing the claim or defense in the circuit court; and (3) due diligence in presenting the petition for relief under section 2-1401(a). *Babcock v. Wallace*, 2012 IL App (1st) 111090, ¶ 23; *Protein Partners, LLP v. Lincoln Provisions, Inc.*, 407 Ill. App. 3d 709, 715, 941 N.E.2d 308, 313 (2010). "A meritorious defense is one that, if believed by the trier of fact, would defeat the plaintiff's claim." *Domingo v. Guarino*, 402 Ill. App. 3d 690, 700, 932 N.E.2d 50, 60 (2010) (quoting *Halle v. Robertson*, 219 Ill. App. 3d 564, 568, 579 N.E.2d 1243, 1246 (1991)). "Due diligence requires a section 2-1401 petitioner to have a reasonable excuse for failing to act within the appropriate time." *Domingo*, 402 Ill. App. 3d at 700, 932 N.E.2d at 60. "Because section 2-1401 does not afford a litigant relief from the consequences of his own mistake or negligence, a party relying on this section is not entitled to relief unless he shows that, through no fault or negligence of his own, a factual error or a valid defense was not presented to the trial court." *Id.* Particularly, a section 2-1401 petitioner is required to 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." *Id.* at 700-01, 932 N.E.2d at 60.

¶ 27 The record before us in this case is devoid of any transcripts or certified bystander's reports of the May 19, 2011 proceedings in which Judge McDonald denied Karbowski, Mirage, and 1001 North's amended petition to vacate. See Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005) (an appellant may file a bystander's report in the record on appeal if "no verbatim transcript of the evidence of

proceedings is obtainable"). From the limited record before us, we are unable to make any meaningful assessment of the circuit court's reasoning in denying the amended petition to vacate, nor do we have any means to determine what factual basis the court used in coming to that conclusion. See *Moenning v. Union Pacific R.R. Co.*, 2012 IL App (1st) 101866, ¶ 39 (absent the transcript or a bystander's report of the proceedings, the reviewing court could not conclude that the circuit court erred because it did not have "a record of the issues that were addressed or the arguments and evidence that were presented or considered by the [circuit] court in granting the petition to adjudicate lien and in making its finding that the lien was properly perfected"); *Government Employees Insurance Co. v. Buford*, 338 Ill. App. 3d 448, 452-53, 788 N.E.2d 90, 94 (2003) (circuit court's order declining to vacate the defendant's discovery sanction could not be addressed on appeal where the record lacked any transcripts or bystander's reports of the proceedings in which the order entered). As the appellants, Karbowski, Mirage and 1001 North had the burden to provide a sufficiently complete record to support any claim of error. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958, 959 (1984). In the absence of a complete record on appeal, any doubts which may arise will be resolved against the appellants, and "it will be presumed that the order entered by the [circuit] court was in conformity with law and had a sufficient factual basis." *Id.* at 392, 459 N.E.2d at 959. Because there are no transcripts of the hearing on the amended petition to vacate, or a certified bystander's report in lieu thereof, we must presume that the circuit court's May 19, 2011 order denying the amended petition to vacate was in conformity with the law and had a sufficient factual basis. Accordingly, there is no basis for holding that the circuit court abused its discretion in denying the amended petition to vacate the July 1, 2010 default judgment. See *id.*

(holding that there was no basis for a finding that the circuit court abused its discretion in the defendants' motion to vacate a judgment against them).

¶ 28 Assuming, *arguendo*, that the limited record before us is sufficiently complete to make an accurate assessment of the circuit court's denial of the amended petition to vacate, we find that it cannot be said from the little information before us that Karbowski, Mirage, and 1001 North acted with due diligence in defending against Hillside's first amended complaint–thus, their amended petition to vacate the July 1, 2010 default judgment pursuant to section 2-1401 of the Code must fail. It is undisputed that Karbowski, Mirage, and 1001 North failed to file an answer to Hillside's first amended complaint, despite the circuit court's directives to do so on two separate occasions. The first amended complaint was filed by Hillside while Fuchs & Roselli was still serving as legal counsel for Karbowski, Mirage and 1001 North. The second one of the two dates by which the circuit court had ordered them to respond to Hillside's first amended complaint was *after* Attorney Gertzman had filed an appearance as new counsel for Karbowski, Mirage and 1001 North. This repeated failure to answer Hillside's pleadings formed the basis for the default judgment entered against Karbowski, Mirage, and 1001 North, who have not presented any reasonable excuse for this failure. See *Prenam No. 2, Inc. v. Village of Schiller Park*, 367 Ill. App. 3d 62, 66, 854 N.E.2d 738, 743 (2006) ("a litigant is ordinarily bound by the negligence of his legal counsel").

¶ 29 Although Karbowski, Mirage, and 1001 North point to several instances in which they actively responded to Hillside's lawsuit, such conduct pertained mostly to their responses to Hillside's original complaint but not to Hillside's first amended complaint. See generally *Domingo*, 402 Ill. App. 3d at 701, 932 N.E.2d at 60-61 (rejecting the defendant's argument of due diligence

where the evidence of diligence related primarily to a prior case and not to the refiled complaint). Karbowski, Mirage, and 1001 North also argue that Attorney Gertzman never received notice that Hillside sought a default judgment against them. Even if this were true, they presented no reasonable excuse as to why Karbowski, Mirage and 1001 North subsequently failed to answer the "citations to discover assets" issued to them, which necessitated Judge White to enter an order for a "rule to show cause" as to why they should not be held in civil contempt of court for failing to respond to the citations to discover assets. The issuance of the "citations to discover assets" to Karbowski, Mirage, and 1001 North, and the issuance to Attorney Gertzman of the "citation to discover assets to a third party ," should have signaled to Karbowski, Mirage and 1001 North that a default judgment had been entered against them, or, at the very least, should have engendered in them a curiosity to inquire further. See generally *Segal v. Department of Insurance*, 404 Ill. App. 3d 998, 1003, 938 N.E.2d 192, 197 (2010) (rejecting plaintiff's argument that he never received notice of a court hearing, reviewing court found that knowledge of the hearing by plaintiff's attorney is imputed to plaintiff, regardless of whether counsel actually communicated the notice to plaintiff); *In re Adoption of E.L.*, 315 Ill. App. 3d 137, 151, 733 N.E.2d 846, 857-58 (2000) ("knowledge of an attorney is treated as knowledge of, or knowledge imputed to, the client, whether or not the attorney has actually communicated such knowledge to the client" in a proceeding involving a section 2-1401 petition to vacate a final judgment order of adoption). Further, the record provides support that neither Fuchs & Roselli nor Attorney Gertzman ever contacted Hillside's counsel to ascertain the status of the case at any point before or after the entry of the default judgment. Under these circumstances, we cannot say that Karbowski, Mirage, and 1001 North had proven by a preponderance of the evidence that

they acted diligently during the course of litigation. Therefore, given the absence of a complete record on appeal and the limited information available to us regarding the conduct of Karbowski, Mirage, and 1001 North, we must affirm the trial court's order in denying the amended petition to vacate the July 1, 2010 default judgment.

¶ 30 Nonetheless, Karbowski, Mirage and 1001 North argue that, even if they could not satisfy the requirement of due diligence, the circuit court should have "relaxed the due diligence requirement in order to effect substantial justice between the parties." Thus, they argue, this court should reverse the circuit court's May 19, 2011 order denying the amended petition to vacate, and vacate the July 1, 2010 default judgment. Relaxation of the due diligence requirement under section 2-1401 of the Code is " 'justified only under extraordinary circumstances.' " *Prenam No. 2, Inc.*, 367 Ill. App. 3d at 66, 854 N.E.2d at 743, citing *Ameritech Publishing of Illinois, Inc. v. Hadyeh*, 362 Ill. App. 3d 56, 60, 839 N.E.2d 625, 630 (2005). As discussed, Karbowski, Mirage and 1001 North, as appellants in this case, failed to supply this court with the transcript or a bystander's report of the hearing on the amended petition to vacate. From the scant record before us, we have no means to determine the prejudice, if any, that Hillside suffered by reason of Karbowski, Mirage and 1001 North's repeated failures to file an answer to Hillside's first amended complaint. Nor are we able to assess the circuit court's reasoning in declining to exercise its equitable powers to relax the due diligence requirement under section 2-1401 of the Code. It is also unclear what "extraordinary circumstances" were presented to the circuit court by Karbowski, Mirage and 1001 North at the hearing on the amended petition to vacate. Therefore, we must presume that the circuit court acted in conformity with the law and had a sufficient factual basis for its decision.

¶ 31 Finally, Karbowski, Mirage and 1001 North posit that the circuit court's denial of their amended petition to vacate was an abuse of discretion because the July 1, 2010 default judgment was entered on the same day as the circuit court's granting of Hillside's *motion* for default judgment, which violated a standing order of the supervising judge, Judge Joan Powell (Judge Powell). We agree with Hillside that this is a "red-herring" argument. Hillside's motion for default judgment was presented to Judge McDonald, who entered the default judgment on July 1, 2010. The entry of the default judgment against Karbowski, Mirage and 1001 North had nothing to do with Judge Powell. Accordingly, we find that this contention has no bearing upon, and has no relevance to, determining whether the circuit court abused its discretion in denying the amended petition to vacate the July 1, 2010 default judgment.

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.