2012 IL App (1st) 112768-U

FIFTH DIVISION
September 28, 2012

No. 1-11-2768

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BEVERLY BUS GARAGE FEDERAL CREDIT UNION, Plaintiff and Counterdefendant-Appellant, v. ALVANDO DEAN, Defendant and Counterplaintiff-Appellee.	)	Appeal from the Circuit Court of Cook County 09 M1 134050 Honorable Pamela Hill-Veal, Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

O R D E R

¶ 1 HELD: The trial court abused its discretion by entering an order for default judgment against Beverly Bus without notice.

¶ 2 Plaintiff/counterdefendant Beverly Bus Garage Federal Credit Union (Beverly Bus) appeals the trial court's grant of default judgment and award of damages to defendant/counterplaintiff Alvando Dean. On appeal, Beverly Bus argues that the trial court erred in entering a default judgment without notice and the trial court erred in awarding damages

without an evidentiary hearing.

¶ 3 In April 2009, Beverly Bus filed its complaint against Dean to collect $9,650.89 from an unpaid loan. Beverly Bus attached a copy of a loan agreement, dated November 4, 2005, in which Dean financed $10,332.25. In June 2009, Dean filed his answer, affirmative defenses and a counterclaim. In his answer, Dean denied the allegations of the complaint and asserted that the contract was void as a forgery and unclean hands as affirmative defenses.

¶ 4 Dean filed a counterclaim alleging a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2008)). Dean alleged that he was a member of Beverly Bus and was a former CTA bus driver. At the time the complaint was filed, he was 73 years old and he went on disability in 1999 after a work-related injury. Dean had several loans through Beverly Bus. His disability insurer, CUNA Mutual Group, made the installment payments on two of Dean's loans and paid off both loans. Dean's other insurer, American Risk Insurance, also paid $6,151.36, toward the outstanding balance of the loans paid by CUNA. Dean stated that he was told by the manager of the credit union that any overpayment would be returned. Dean continued to make payments on another loan.

¶ 5 Dean's daughter also obtained automobile loans through Beverly Bus. After 2002, Beverly Bus was audited and Dean's daughter could no longer have her own account because she was not a CTA employee and her loans were consolidated under Dean's account. This consolidation resulted in the renumbering of all loans on the account. Dean's daughter was involved in a car accident and proceeds from State Farm paid off her loan. Dean's daughter also

paid $10,000 to pay off all loans, including Dean's loans.

¶ 6 Dean was informed by the credit union manager that the loans were not paid off. Dean stated that he requested an accounting, but was told that the accounts "were tied up due to various audits." Dean was also assured that he would be refunded any overpayment and complained that his statements were incorrect. Dean alleged that he never had three of the loans listed on his statement. Two of the loans were shown as paid, but one listed a balance. Dean filed a credit union dispute form in January 2008, stating that he should not owe any money. Dean continued to make payments until September 2008. Dean alleged that the loan agreement attached to Beverly Bus's complaint was forged and the date of loan agreement was the same as the loan he previously disputed.

¶ 7 Dean further alleged that Beverly Bus engaged in deceptive and unfair practices in violation of the Consumer Fraud Act by collecting and retaining the overpayment of Dean's loans, misrepresenting the remaining balances on Dean's loans so he would continue to make payments, and forging a loan agreement and suing Dean for the balance he does not owe. Dean sought actual and punitive damages, a declaration that disputed loan agreement was void, and attorney fees.

¶ 8 In August 2009, Beverly Bus filed its answer and affirmative defenses to the counterclaim. Beverly Bus denied the allegations and as affirmative defenses, asserted that (1) Dean failed to state a claim for which relief may be granted, (2) Beverly Bus acted in accordance with all applicable commercial standards and state and federal laws, (3) some or all of the damages claimed by Dean are not recoverable, and (4) reserved the right to assert any additional

defenses that may exist. Also, in August 2009, Dean filed his first set of written discovery requests to Beverly Bus. In September 2009, Dean filed a motion to dismiss Beverly Bus's affirmative defenses, which the trial court granted. In October 2009, Dean filed a motion to compel Beverly Bus to respond to his discovery requests. The trial court ordered Beverly Bus to respond to outstanding discovery by November 17, 2009. On November 19, 2009, the trial court entered a default judgment against Beverly Bus and set prove-up for December 11, 2009. The order also dismissed Beverly Bus's complaint for want of prosecution.

¶ 9 In December 2009, Beverly Bus filed a motion to vacate the default judgment and the dismissal for want of prosecution. The motion stated that Beverly Bus failed to appear at the November 19 status hearing because of a scheduling conflict. Beverly Bus also filed its answers to Dean's discovery requests. The trial court subsequently vacated the default judgment and dismissal for want of prosecution.

¶ 10 In April 2010, Dean filed a motion for rule to show cause against Beverly Bus for failure to comply with the trial court's order that Beverly Bus should respond to all outstanding discovery requests by March 30, 2010. The motion was entered and continued and Beverly Bus was ordered to submit an affidavit of completeness as to its responses to Dean's discovery requests. The record does not indicate any further action on this motion.

¶ 11 In September 2010, the trial court noted that the next status date in January 2011 would be for a hearing on summary judgment or if no summary judgment motion was filed, a status date to set a date for trial. At the January 2011 status hearing, the case was continued until March. Counsel for Beverly Bus failed to appear at the March 30, 2011, status hearing. The case was

continued at subsequent status hearings. The order entered at the June 2011 status hearing indicated that deposition of Dean was to be completed by July 21, 2011, the date of the next status hearing.

¶ 12 At the July 21, 2011, status hearing, Beverly Bus failed to appear and the trial court entered a default judgment against Beverly Bus with a prove-up set for August 2011. The order also dismissed Beverly Bus's case for want of prosecution. In August 2011, Dean filed his memorandum of prove-up and requested actual damages of $6,151.36 for the loan overpayment, $15,000 for emotional distress and $50,000 in punitive damages, as provided under the Consumer Fraud Act (815 ILCS 505/10a(a) (West 2008)). Dean also requested reasonable attorney fees and expenses.

¶ 13 On August 22, 2011, the trial court entered its order from the prove-up hearing. The order stated that "all parties appearing at the prove up hearing" on Dean's counterclaim. The court ordered that the Beverly Bus loan dated November 4, 2005, was void and judgment was entered in favor of Dean and against Beverly Bus in the amount of $71,151.36, plus attorney fees and costs. Dean was to submit a fee petition no later than September 5, 2011.

¶ 14 On September 14, 2011, the trial court conducted a hearing Dean's attorney fee petition. The ordered stated that "counter-plaintiff appearing at the hearing on his petition for fees and costs." The court granted Deans' petition and found that Dean's request for $33,181.50 for attorney fees and costs was reasonable and necessarily incurred.

¶ 15 This appeal followed.

¶ 16 Initially, we must address the issue of our jurisdiction. Dean argues that this court lacks

jurisdiction to consider the trial court's order of August 22, 2011, because Beverly Bus's amended notice of appeal only lists the date of September 14, 2011, for the judgment/order being appealed. "A reviewing court is obliged to examine its jurisdiction and to dismiss an appeal if it determines that it lacks the requisite jurisdiction." *Pestka v. Town of Fort Sheridan Co., L.L.C.*, 371 Ill. App. 3d 286, 293 (2007).

¶ 17 "As an appellate court, we have jurisdiction to review a case, only if the appellant has filed a proper notice of appeal." *Filliung v. Adams*, 387 Ill. App. 3d 40, 48 (2008) (citing *People v. Smith*, 228 Ill. 2d 95, 104 (2008)). Supreme Court Rule 303(b)(2) provides that the notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. June 4, 2008). "[O]nce the judgment or part is named, the 'notice of appeal confers jurisdiction on a court of review to consider only the judgements or parts thereof specified in the notice.' " *Filliung*, 387 Ill. App. 3d at 48 (quoting *Smith*, 228 Ill. 2d at 104). "[W]hile a notice of appeal is jurisdictional, it is generally accepted that such a notice is to be construed liberally." *Smith*, 228 Ill. 2d at 104.

¶ 18 In this case, Dean asserts that we lack jurisdiction to consider the issues raised on appeal because the notice of appeal limited our consideration to the order entered on September 14, 2011, the order awarding attorney fees. However, an exception to Rule 303(b)(2) exists when "an unspecified judgment was reviewable if the specified judgment 'directly relates back to it.' " *Filliung*, 387 Ill. App. 3d at 49 (quoting *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 434 (1979)); see also *Bank of America, N.A. v. 108 N. State Retail LLC*, 401 Ill. App. 3d 158, 169-70 (2010). This exception is applicable in this case. The award of attorney fees relates back

to the trial court's default judgment in favor of Dean on the counterclaim. The entry of default judgment and award of damages was a necessary step to the order awarding attorney fees.

¶ 19 Moreover, the order from August 22, 2011, was not a final judgment. Supreme Court Rule 301 provides that every final judgment of a circuit court in a civil case is appealable as of right. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). Rule 303(a)(1) provides that a notice of appeal must be filed within 30 days after the entry of the final judgment appealed from or, if a timely postjudgment motion directed against the judgment is filed, within 30 days after the entry of the order disposing of the last pending postjudgment motion. Ill. S. Ct. R. 303(a)(1). "A final judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit. A judgment is final if it determines the litigation on the merits so that, if affirmed, nothing remains for the trial court to do but to proceed with its execution." *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33 (2005).

¶ 20 In *Lamar Whiteco Outdoor Corp. v. City of West Chicago*, 395 Ill. App. 3d 501 (2009), the Second District found that the notice of appeal specified a nonfinal order because the amount of attorney fees had not been set. The court noted the Supreme Court's holding in *Liberty Mutual Insurance Co. v. Wetzel* that "an order is not final if it finds the defendant liable but does not fix the amount of damages." *Lamar Whiteco*, 395 Ill. App. 3d at 505 (citing *Wetzel*, 424 U.S. 737, 742 (1976)). The Second District observed that the Seventh Circuit Court of Appeals in *Szabo v. United States Marine Corp*., "relied on *Wetzel* and likened a finding of eligibility for attorney fees to a finding of liability for damages when, in each case, no dollar amount is

determined." *Lamar Whiteco*, 395 Ill. App. 3d at 505 (citing *Szabo*, 819 F.2d 714 (7th Cir.1987)). "The *Szabo* court stated, 'the judgment sought to be appealed includes an order to pay attorney's fees but no specification of the amount of fees to be paid, suggesting an analogy to the case where liability is determined but the quantification of damages is left for later determination—a classic example of a nonfinal order.' " *Lamar Whiteco*, 395 Ill. App. 3d at 505 (quoting *Szabo*, 819 F.2d at 717 (citing *Wetzel*, 424 U.S. at 744)). The court in *Lamar Whiteco* dismissed the appeal, finding that "[t]he judgment is not ready to be executed because the amount of the fees and costs has not been determined." *Lamar Whiteco*, 395 Ill. App. 3d at 505.

¶ 21 Here, the August 22 order did not fix absolutely the right of the parties such that all that remained would be the execution of the judgment. The August 22 order left open the award of attorney fees and specifically set a future date for Dean to file his petition for attorney fees. The September 14 order was final as it resolved all pending issues and awarded all components of the monetary judgment, specifically the attorney fees and costs. Beverly Bus filed its amended notice of appeal listing the September 14 order as the judgment appealed from within 30 days of the entry of that order. Accordingly, the September 14 order was the final judgment of the trial court and Beverly Bus complied with Rules 301 and 303(a)(1) by filing its notice of appeal within 30 days of a final judgment. Therefore, we have jurisdiction to consider this appeal.

¶ 22 We now turn to the trial court's entry of default judgment. Beverly Bus does not contest the dismissal for want of prosecution of its complaint on appeal, but contends that the default judgment entered without any notice was erroneous, more specifically that it was a void order.

¶ 23 Dean responds that Beverly Bus has forfeited its arguments concerning the default

judgment because Beverly Bus did not file a motion to vacate the default judgment in the trial court and it may not raise issues on appeal that were not first presented to the trial court. Beverly Bus states that it made an oral motion to vacate the default judgment at the August 2011 hearing, which the trial court denied. The record, however, does not contain any reference or acknowledgment of an oral motion to vacate. The trial court order dated August 22, 2011, does not refer to an oral motion to vacate the default judgment or any ruling on the motion. The trial court's half-sheet also fails to include any notation that an oral motion to vacate was made and denied.

¶ 24 "While it is true that the general rule in Illinois is that errors not raised in the trial court and raised for the first time on appeal are waived, we note that it is also well settled that 'the waiver rule is an admonition to the parties and provides no limitation on this court's jurisdiction.' " *Severino v. Freedom Woods, Inc.*, 407 Ill. App. 3d 238, 249 (2010) (quoting *In re Mark W.*, 383 Ill. App. 3d 572, 588 (2008), citing *Illinois State Chamber of Commerce v. Filan*, 216 Ill. 2d 653, 664 (2005)). " ' "A reviewing court may, in furtherance of its responsibility to provide a just result and to maintain a sound and uniform body of precedent, override considerations of waiver that stem from the adversarial nature of our system." ' " *Severino*, 407 Ill. App. 3d at 249 (quoting *In re Mark W.*, 383 Ill. App. 3d at 588, quoting *Filan*, 216 Ill. 2d at 664). Given the particular circumstances of this case and the issues raised, we choose to review the trial court's entry of the default judgment.

¶ 25 Beverly Bus's primary complaint on appeal is that the trial court erroneously entered a default judgment without any prior notice given to Beverly Bus that such a judgment would be

entered. Dean argues that the order was proper and that notice was given after the fact. He also contends that the order was an appropriate sanction for a series of continuous discovery violations. Dean points out that Beverly Bus failed to appear at multiple status hearings, had never taken or even filed a notice for Dean's deposition, and previously failed to comply with discovery requests.

¶ 26 The record, however, does not show the circumstances under which the sanction of a default judgment was entered. Since it is clear that Dean did not file a written motion seeking an entry of default judgment and the parties do not assert that Dean made an oral motion for default judgment at the July 21 hearing, it is possible that the trial court *sua sponte* entered the order for default judgment. In any event, Dean does not contest that there was no advance notice of a default judgment motion given to Beverly Bus.

¶ 27 In addition to lack of notice, we do not know the basis upon which the trial court entered the default judgment since the form order contains no findings of fact.

¶ 28 The order from June 22, 2011, set the case for status on July 21, 2011, and ordered that the deposition of Dean was to be completed by that date. That order did not include any language suggesting that a failure to complete the deposition by that date would result in a dismissal or default. Beverly Bus failed to appear for status on July 21 and had not completed Dean's deposition. Thus, it appears from the record that the default judgment was entered as a discovery sanction under Supreme Court Rule 219(c) (Ill. S. Ct. R. 219(c)(v) (eff. July 1, 2002)).

¶ 29 "Parties to an action who have appeared are entitled to notice of any impending motions or hearings." *Berg*, 293 Ill. App. 3d at 734; see also Ill. S. Ct. R. 104(b) (eff. Jan. 1, 1970)

("Pleadings subsequent to the complaint, written motions, and other papers required to be filed shall be filed with the clerk with a certificate of counsel or other proof that copies have been served on all parties who have appeared and have not theretofore been found by the court to be in default for failure to plead").

¶ 30 While Rule 219(c) authorizes a trial court to impose a sanction, including the entry of a default judgment, on a party who unreasonably fails to comply with the court's discovery rules or orders (Ill. S. Ct. R. 219(c)(v) (eff. July 1, 2002)), "[a] just order of sanctions under Rule 219(c) is one which, to the degree possible, insures both discovery and a trial on the merits." *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 123 (1998). The trial court's purpose in imposing sanctions is to coerce compliance with discovery rules and orders, not to punish, the dilatory party. *Shimanovsky*, 181 Ill. 2d at 123. A sanction which results in a default judgment is a drastic sanction to be invoked only in those cases where the party's actions show a deliberate, contumacious or unwarranted disregard of the court's authority and should be employed only as a last resort after the trial court's other enforcement powers have failed to advance the litigation. *Shimanovsky*, 181 Ill. 2d at 123.

¶ 31 "The imposition of sanctions is a matter largely within the discretion of the trial court and should not be disturbed on review unless the order constitutes an abuse of discretion, such as where the record shows that the party's conduct was not unreasonable or where the sanction itself is not just." *Buffington v. Yungen*, 322 Ill. App. 3d 152, 154 (2001). "However, the predicate to such deference is that the trial court make an informed and reasoned decision." *In re Estate of Baker*, 242 Ill. App. 3d 684, 687 (1993) (citing *In re Estate of Smith*, 201 Ill. App. 3d 1005

(1990)); see also *Berg v. Mid-America Industrial, Inc.*, 293 Ill. App. 3d 731, 736-37 (1997). "A trial court's decision on sanctions must clearly set forth the factual basis for the result reached in order to be afforded deferential treatment." *Estate of Baker*, 242 Ill. App. 3d at 687-88.

¶ 32 In *Buffington*, the Second District reversed and remanded the trial court's entry of default judgment without notice to the defendant. In that case, the trial court had entered multiple orders to compel discovery against the defendants, including two sanctions imposing attorney fees. The parties appeared at a hearing on the defendants' motion for summary judgment, and with no other motions pending, the trial court struck the defendants' answer and entered a default judgment for failing to comply with discovery as ordered. *Buffington*, 322 Ill. App. 3d at 153-54. The reviewing court reasoned that, "defendants were in court for a hearing on their motion for summary judgment. Defendants received no notice that a motion seeking a default judgment would be presented. Moreover, there is no record that plaintiff made an oral application to the court for such a motion. Nor does plaintiff allege that an oral motion was in fact given at the hearing on defendants' motion for summary judgment." *Buffington*, 322 Ill. App. 3d at 155.

¶ 33 The *Buffington* court discussed the imposition of sanctions under Rule 219(c) and held that the defendants' discovery violations did not warrant the entry of a default judgment.

> "While it is clear that defendants failed to timely comply with the trial court's order to respond to discovery, there is nothing in the record that exhibits a deliberate or contumacious disregard for the court's authority. Thus, the reasons for and the basis of the trial court's imposition of such an onerous sanction are unclear.

> Without evidence of the proscribed conduct, the entry of an order of a default judgment against defendants was not a sanction proportionate to defendants' violation of the discovery process." *Buffington*, 322 Ill. App. 3d at 156.

¶ 34 The reviewing court also noted that while it did not condone the defendants' actions, "this does not mean that defendants must lose their right to their day in court by such a drastic sanction when defendants had no notice of any motion seeking the relief granted by the trial court and there is no evidence of a deliberate, contumacious disregard of the court's discovery orders." *Buffington*, 322 Ill. App. 3d at 156-57. The court in Buffington held that the default judgment was void. *Buffington*, 322 Ill. App. 3d at 155.

¶ 35 While we agree with the reasoning in *Buffington* that it was error to enter a default judgment without notice and without the requisite showing of a deliberate and contumacious disregard for the trial court's authority, we conclude that an improper default judgment is merely voidable, rather than void. "Whether a judgment is void or voidable depends on whether the court entering the challenged order possessed jurisdiction over the parties and the subject matter." *Universal Underwriters Insurance Co. v. Judge & James, Ltd.*, 372 Ill. App. 3d 372, 383 (2007) (citing *In re Marriage of Mitchell*, 181 Ill. 2d 169, 174 (1998). A judgment may be collaterally attacked as void only where the court lacked jurisdiction as to the parties or the subject matter. In contrast, a judgment is voidable when it was erroneously entered by a court with jurisdiction and may not be collaterally attacked. *Universal Underwriters*, 372 Ill. App. 3d at 383. "Once a court has obtained jurisdiction, an order will not be rendered void nor will the

court lose jurisdiction merely because of an error or impropriety in the court's determination of the facts or law." *Universal Underwriters*, 372 Ill. App. 3d at 383.

¶ 36 In the instant case, the trial court had jurisdiction over the parties and the subject matter. Therefore, the default judgment cannot be attacked as void, but we can review it to determine whether the trial court entered the judgment erroneously and is voidable.

¶ 37 Here, the record does not support the entry of default judgment without notice to Beverly Bus. The case was set for status on July 21, 2011. Although Beverly Bus failed to appear and had not taken Dean's deposition as previously ordered, "there is nothing in the record that exhibits a deliberate or contumacious disregard for the court's authority." *Buffington*, 322 Ill. App. 3d at 156. As in *Buffington*, the reasons for the trial court's imposition of the default judgment are "unclear." *Buffington*, 322 Ill. App. 3d at 156. Further, the entry of a default judgment is the most severe sanction under Rule 219(c) and it was not proportionate to Beverly Bus's violation of the discovery process. The trial court could have imposed a less severe sanction against Beverly Bus and the record does not disclose that the court had exhausted all other sanctions in order to coerce compliance. Beverly Bus's failure to take Dean's deposition would not have affected Dean's position in the case. While we do not approve of Beverly Bus's failure to comply with discovery orders or its failure to appear on the status date, the entry of a default judgment was a drastic sanction, entered without notice and without any evidentiary finding by the trial court that Beverly Bus acted with a deliberate and contumacious disregard for the court's authority. Accordingly, we conclude that the trial court abused its discretion in entering a default judgment without notice to Beverly Bus.

¶ 38 Based on the foregoing reasons, we vacate the entry of the default judgment and all subsequent orders entered by the trial court and remand for further proceedings consistent with this order. Because we have vacated the entry of the default judgment, we need not reach the issue of whether it was error to enter an award for damages without an evidentiary hearing. Dean's request for attorney fees for this appeal is denied.

¶ 39 Vacated and remanded.