

No. 1-13-3761

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

100 E. PROSPECT ACQUISITION CORP.,)	Appeal from the
)	Circuit Court of Cook County
Plaintiff-Appellee,)	
)	
v.)	No. 13 L 50502
)	
PATRICK MCLEAN,)	
)	Honorable Patrick J. Sherlock,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Denial of motion to open a judgment by confession against defendant was in error where promissory note was assigned to plaintiff but did not include plaintiff and defined "Borrower" as a collective of one corporation and three individuals including defendant and confession of judgment provision only identified original "Lender" and Borrower collectively and did not provide warrant of attorney joint and severally.

¶ 2 Plaintiff 100 E. Prospect Acquisition Corp. was granted judgment by confession against defendant Patrick McLean for the default on a June 24, 2004, promissory note (Note) executed by defendant, Christopher Figaro, Nicholas Figaro, and 100 E. Prospect, LLC. Defendant sought to vacate and then to open the judgment by confession asserting that all four borrowers identified

in the Note. The trial court ultimately denied defendant's motion, finding that he agreed to be jointly and severally liable under the Note which authorized judgment by confession.

¶ 3 On appeal, defendant asserts that the trial court lacked jurisdiction to enter judgment by confession against less than all four borrowers and erred in denying his motion to vacate under section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2012)).

Defendant also argues for the first time that the trial court erred in denying his motion to vacate because plaintiff is not identified in the Note and judgment by confession provisions must be strictly construed. For the following reasons, we reverse the judgment of the circuit court and remand the matter for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 On or about, June 24, 2004, defendant and co-borrowers 100 E. Prospect, LLC, Nicholas Figaro, and Christopher Figaro (collectively defined as "Borrower"), executed a promissory note (Note) in the principal amount of \$544,000 in favor of the lender, First Suburban National Bank Maywood (Lender). Borrower jointly and severally promised to pay the Lender the principal amount together with interest at a rate of 6.75% per *anum* until due, with calculated monthly payments of \$4,168.18 and final payment of \$472,296.95 on the maturity date of June 24, 2009.

¶ 6 The Note contained a confession of judgment provision, which provides in full:

"CONFESSION OF JUDGMENT. Borrower hereby irrevocably authorizes and empowers any attorney-at-law to appear in any court of record and to confess judgment against Borrower for the unpaid amount of this Note as evidenced by an affidavit signed by an officer of Lender setting forth the amount then due, attorneys' fees plus costs of suit, and to release all errors, and waive all rights of appeal. If a copy of this Note, verified by an affidavit, shall have been

filed in the proceeding, it will not be necessary to file the original as a warrant of attorney. Borrower waives the right to any stay of execution and the benefit of all exemption laws now or hereafter in effect. No single exercise of the foregoing warrant and power to confess judgment will be deemed to exhaust the power, whether or not any such exercise shall be held by any court to be invalid, voidable, or void; but the power will continue undiminished and may be exercised from time to time as Lender may elect until all amounts owing on this Note have been paid in full. Borrower hereby waives and releases any and all claims or causes of action which Borrower might have against any attorney acting under the terms of authority which Borrower has granted herein arising out of or connected with the confession of judgement [*sic*] hereunder."

¶ 7 On or around December 22, 2009, Christopher Figaro and Nicholas Figaro executed a change in terms agreement with the Lender, extending the maturity date of the Note to June 24, 2010, but stating "[a]ll other terms and conditions remain in full force and effect." On October 22, 2010, Lender First Suburban National Bank Maywood was closed by the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation (FDIC) was named receiver. Also on that date, the FDIC entered into a purchase and assumption agreement with Seaway Bank and Trust Company (Seaway), transferring all of Lender's accounts to Seaway.

¶ 8 On May 10, 2013, "for value received," Seaway assigned and transferred all right, title and interest in the Note to plaintiff. On May 20, 2013, plaintiff filed the underlying complaint for judgment by confession against defendant. In support, plaintiff attached as exhibits: the Note; the December 22, 2009, change in terms agreement; the purchase and assumption agreement among the FDIC and Seaway; an endorsement to the Note, assigning all right, title, and interest in the

Note to plaintiff from Seaway; an affidavit of George Stratigakes, president of plaintiff, stating that he had reviewed loan documents and averred that a total of \$590,554.48 was due to plaintiff from defendant; a petition for attorney fees; and a confession of judgment entered by attorney-at-law Robert K. Naumann.

¶ 9 On June 3, 2013, a judgment order was entered against defendant in the total amount of \$590,554.48, comprised from \$452,023.49 in principal, \$90,859.75 in interest, and \$47,671.24 in escrow shortage. The order also included judgment for attorney fees of \$1,050.00 and costs of \$407.00 incurred by plaintiff in filing the action. The first notice defendant allegedly received of the proceedings was on July 1, 2013, when he received an alias citation for discovery of assets on behalf of plaintiff.

¶ 10 On July 2, 2013, defendant filed an appearance in the matter and a motion to vacate the judgment order pursuant to section 2-1301(e) of the Code of Civil Procedure. 735 ILCS 5/2-1301(e) (West 2012). Defendant asserted that he did not receive notice that suit had been filed against him until July 1, 2013, and his attorney filed the motion to vacate immediately upon learning of the judgment from defendant. Defendant argued that the judgment must be vacated because the agreement defined "Borrower" collectively as defendant, 100 E. Prospect LLC, and Christopher and Nicholas Figaro, and plaintiff did not name all four parties in the complaint. On July 23, 2013, the trial court entered an order stating that the "motion to vacate is denied in that a motion to open would be the appropriate action" and granted leave to file a motion to open judgment before another judge.

¶ 11 On August 6, 2013, defendant filed a motion to open judgment pursuant to Illinois Supreme Court Rule 276 (Ill. S. Ct. R. 276 (eff. July 1, 1982)). Pursuant to Rule 276, defendant presented argument of his diligence, stating that he had filed his motion within one day of first

receiving notice of the underlying action and attaching an affidavit in support. Defendant also attached an answer and affirmative defenses and a proposed counter-complaint and third party complaint against plaintiff and third party defendants 100 E. Prospect, LLC, Christopher Figaro, and Nicholas Figaro. In addition, defendant attached a complaint for shareholder remedies in a related action that he brought against his co-borrowers and the company of which they were all shareholders, McFig Corp.

¶ 12 Defendant alleged that the trial court had no jurisdiction to enter the judgment by confession because the complaint only named defendant and the Note defined Borrower only collectively as all four signers of the Note and nowhere authorized confession of judgment against any fewer than all four named borrowers. Defendant further alleged that all payments were made to First Suburban National Bank Maywood until that bank was closed and that no other payments were made only because no notice was provided of where and to whom payments should be sent. Defendant alleged that his co-borrowers and plaintiff were engaged in a scheme to freeze defendant out of 100 E. Prospect LLC and McFig Corp.

¶ 13 Following a response filed by plaintiff, the judge handling supplementary proceedings entered an order on October 8, 2013, stating:

"1. That Defendant's Rule 276 motion to open shall be and is hereby deemed to be a motion for reconsideration of Judge Sherlock's order entered on July 23, 2013, as it pertains to jurisdiction and whether the confession of judgment was appropriate pursuant to 2-1301(e) and the Note.

2. That all remaining issues set forth in the Defendant's motion to open are stayed.

3. That this cause is hereby remanded to Judge Sherlock."

¶ 14 Defendant filed a reply brief and argument was held before Judge Sherlock. On October 31, 2013, Judge Sherlock entered an order stating that the "court hereby finds that Defendant having agreed to be jointly and severally liable under the note he authorized confession of judgment against him and as a result of no new facts being alleged Defendant's motion as it pertains to a motion for reconsideration is denied." The court remanded the matter for any other issues to be resolved by the judge handling supplementary proceedings. This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 We begin by noting that plaintiff notified this court that it had elected not to file a brief and we are without the benefit of a response from plaintiff to defendant's arguments on appeal. As our supreme court has said, "[w]e do not feel that a court of review should be compelled to serve as an advocate for the appellee or that it should be required to search the record for the purpose of sustaining the judgment of the trial court. It may, however, if justice requires, do so. Also, it seems that if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court of review should decide the merits of the appeal. In other cases if the appellant's brief demonstrates *prima facie* reversible error and the contentions of the brief find support in the record the judgment of the trial court may be reversed." *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 17 Unfortunately, we are also without the benefit of transcripts of the hearings and arguments presented to the trial court in this case. The lack of transcripts and response brief have only leant more confusion to the atypical procedural course this case has wound. However, because the case law on the issue of judgments by confession is clear and we are presented with, essentially, a single issue, we decide the merits of the appeal.

¶ 18 It is unclear why the trial court re-characterized defendant's August 6, 2013, Rule 276 motion to open judgment by confession as a motion to reconsider the July 23, 2013, order.

Whatever the trial court's reasoning to reclassify the motion, defendant was left to argue that the trial court erred in denying his 2-1301(e) motion to vacate. The trial court concluded that because the Note provided joint and several liability, defendant authorized judgment by confession against him, and with no new facts presented, reconsideration was denied.

¶ 19 Therefore, defendant argues before this court that the trial court erred in denying his motion to vacate judgment pursuant to section 2-1301(e) because it failed to strictly construe the confession of judgment provision in the Note. Defendant seeks reversal of the denial of his motion to vacate. Defendant also asks this court to vacate the judgment by confession and to dismiss plaintiff's complaint.

¶ 20 This court has stated that a defendant may challenge a judgment by confession in five ways: (1) defend a confirmation proceeding; (2) move to open the judgment under Rule 276; (3) move to vacate the judgment under section 2-1301(e); (4) move to vacate under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1404 (West 2012)); and (5) seek a declaration that the judgment is void *ab initio*. *Charles v. Gore*, 248 Ill. App. 3d 441,450 (1993). The decisions whether to grant a motion to open judgment by confession or to vacate judgment pursuant to section 2-1301(e) are both matters of discretion for the trial court and will not be disturbed on review absent an abuse of that discretion. *In re Haley D.*, 2011 IL 110886, ¶ 69; *Kim v. Kim*, 247 Ill. App. 3d 910, 914 (1993).

¶ 21 Section 2-1301(e) provides that "[t]he court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." 735

ILCS 5/1301(e) (West 2012). Supreme Court Rule 276 provides in full:

“A motion to open a judgment by confession shall be supported by affidavit in the manner provided by Rule 191 for summary judgments, and shall be accompanied by a verified answer which defendant proposes to file. If the motion and affidavit disclose a *prima facie* defense on the merits to the whole or a part of the plaintiff's claim, the court shall set the motion for hearing. The plaintiff may file counteraffidavits. If, at the hearing upon the motion, it appears that the defendant has a defense on the merits to the whole or a part of the plaintiff's claim and that he has been diligent in presenting his motion to open the judgment, the court shall sustain the motion either as to the whole of the judgment or as to any part thereof as to which a good defense has been shown, and the case shall thereafter proceed to trial upon the complaint, answer, and any further pleadings which are required or permitted.” 134 Ill. 2d R. 276 (eff. July 1, 1982).

¶ 22 Based on the language of the statute and Rule, we agree with the trial court's holding in the July 23, 2013, order denying defendant's initial motion to vacate pursuant to section 2-1301(e) and providing leave to file a motion to open judgment by confession as that "would be the appropriate action." Defendant properly followed this directive and filed a motion to open judgment by confession pursuant to Rule 276, including the required attachments and proposed counter-complaint and third party complaint against plaintiff and third party defendants 100 E. Prospect, LLC, Christopher Figaro, and Nicholas Figaro. For reasons unascertainable from the record, the second trial judge in this matter recharacterized this motion as a motion for reconsideration and the motion to open was never decided on the merits. Therefore, the trial judge that entered the first order in the case considered the allegations in the motion in relation

to, and under the standard of review for, a motion to reconsider the denial of the original petition to vacate. This was in error and we consider defendant's motion to open judgment by confession to determine whether the denial of that motion was an abuse of discretion.

¶ 23 Judgments by confession are viewed circumspectly. *Holm v. Comm*, 51 Ill. App. 3d 951, 953 (1977). The authority to confess a judgment must be clearly provided and strictly followed and any departure from this authority renders a judgment void. *Id.* "The policy underlying this rule of strict construction against the party in whose favor the power operates is based on the severity of the summary proceeding itself. The party granting such authority deprives himself of all defenses and delay of execution and places his cause in the hands of a hostile defender.

[Citation.] Therefore, courts are unanimous in holding that judgment may not be confessed against one who did not himself sign the warrant of attorney, whether he is assignee, guarantor, or another party obligating himself for the performances of the primary contract." *Oakland National Bank v. Tomei*, 215 Ill. App. 3d 638, 640 (1991). When a party moves to open a judgment by confession, if he has shown a *prima facie* defense, the court should set aside the judgment and permit the defense to be presented and argued. *Stranak v. Tomasovic*, 309 Ill. App. 177, 181 (1941).

¶ 24 Defendant argued in his motion that the judgment by confession should be opened to permit the opportunity to defend because the Borrower, as defined in the confession of judgment provision of the Note, was not correctly named a party to the complaint. On appeal, defendant also argues that the provision specifically defined Lender, which also is not a named party to the complaint. As addressed above, Lender is defined in the Note as "First Suburban National Bank" and Borrower is defined as "100 E. Prospect, LLC; Nicholas Figaro; Christopher Figaro; and [defendant]." Because First National Bank was closed and the Note was subsequently sold and

assigned twice, ultimately to plaintiff, "Lender" does not exist as defined by the Note. Although defendant did not raise the issue that plaintiff is not named in the Note or confession of judgment provision in his motion to open, we note that waiver is not a bar to a reviewing court's consideration where justice and the maintenance of a sound and uniform body of precedent require review. *Hux v. Raben*, 38 Ill. 2d 223, 224-25 (1967).

¶ 25 We agree that defendant presented a *prima facie* defense and the judgment should be opened for him to present his argument. Borrower and Lender are specifically defined in the Note and referred to throughout the Note. The confession of judgment provision utilizes this language as well and does not differentiate Borrower from the defined group or use the name "100 E. Prospect Acquisition Corp."

¶ 26 In a similar case, this court found the judgment by confession void where the note was in the name of American National Bank and Trust Company of Chicago, but assigned to Federal Savings & Loan Insurance Corp (Federal). Federal sought judgment by confession under the note when the defendant failed to make payments. *Federal Savings & Loan Insurance Corporation v. Quinn*, 81 Ill. App. 2d 121, 123-24 (1967). Because Federal's name appeared nowhere in the warrant of attorney, this court strictly construed the provision and found no authority was granted to confess judgment in favor of Federal. Likewise, in this case, plaintiff's name is not provided in the warrant of attorney granting power to confess judgment or anywhere in the Note. Following *Quinn*, as authority was not granted to confess judgment to plaintiff specifically, defendant presented a *prima facie* case that no authority was provided to confess judgment in favor of plaintiff.

¶ 27 In addition, we note that in denying reconsideration the trial court first stated that defendant having "agreed to be jointly and severally liable under the Note, he authorized

confession of judgment against defendant." The Note does specifically provide that the four parties defined as Borrower jointly and severally promised to pay Lender. However, the judgment by confession provision does not contain any such language. Therefore, in this case, as this court concluded in *Holm*, "[i]f the words, which are normally found in warrants authorizing the attorney to confess judgment 'against us jointly or severally' had been included, our determination would have been different." *Holm, supra* at 954. For the foregoing reasons, we reverse the judgment of the circuit court denying defendant's motion to open judgment by confession and remand to the trial court to vacate that judgment and for further proceedings.

¶ 28

III. CONCLUSION

¶ 29 For the reasons stated, we reverse the judgment of the circuit court, and remand for further proceedings consistent with this order.

¶ 30 Reversed and remanded for further proceedings.