2016 IL App (1st) 153001-U

SECOND DIVISION
November 22, 2016

No. 1-15-3001

ARTHUR E. ENGELLAND,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
	)	
v.	)	No. 14 M1 130782
	)	
THOMAS HARMER,	)	Honorable
	)	Dennis M. McGuire,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's decision to vacate a default judgment is affirmed.

¶ 2 Plaintiff-appellant Arthur Engelland filed this lawsuit to recover unpaid fees for legal services he performed for defendant-appellee Thomas Harmer. After failing to file an appearance and answer, default judgment was entered against Harmer. Harmer sought to vacate the default judgment pursuant to section 2–1401 of the Code of Civil Procedure (735 ILCS 5/2–1401 (West 2012)), and the circuit court granted his petition. Engelland now appeals. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 The record shows that in 2011, Harmer hired Engelland to represent him as counsel in defense of a civil litigation matter. After a jury trial in March 2014, a $765,000 judgment was entered against Harmer. Thereafter, Engelland unsuccessfully sought full payment of outstanding legal fees in the amount of $20,985. On May 29, 2014, Engelland filed this action against Harmer alleging breach of contract for failure to pay the legal fees due.

¶ 5 On October 8, 2014, Harmer was personally served with summons and the complaint at his residence on Rangeline Road in Carmel, Indiana. Sometime after service, and unbeknownst to Engelland, Harmer moved to Florida and arranged for his mail to be forwarded to his new Florida address. Harmer failed to appear or answer the complaint. On December 4, 2014, Engelland filed a motion for default judgment against Harmer for failing to appear and answer the complaint. Engelland sent notice of the motion to Harmer, but sent it to an address on "Rangline" Road in "Camel," Indiana.

¶ 6 On December 22, 2014, after hearing plaintiff's motion for default judgment, the circuit court entered a default judgment against Harmer. The clerk of the circuit court of Cook County sent a postcard notification addressed to Harmer's Indiana address, but misspelled the street and city address as "Ragine" Road in "Camel," Indiana. Because Harmer had forwarded his mail to his new Florida address, the forwarded postcard was received at his Florida address on January 22, 2015, thirty-one days after the default judgment was entered.

¶ 7 The following day, January 23, 2015, through counsel, Harmer filed a petition to vacate the default judgment pursuant to section 2–1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2–1401 (West 2012)). The petition's notice was amended several times due to

issues locating a valid address to serve Engelland. At one point, Engelland moved to quash service of the petition to vacate because of an invalid address. Eventually, on June 8, 2015, Harmer filed a motion for service by alternative means pursuant to section 2–203.1 of the Code (735 ILCS 5/2–203.1 (West 2012)).[1]

¶ 8 Harmer subsequently amended the petition to vacate and asserted that he received service of the summons and the complaint on October 8, 2014. When he moved to Florida he requested the United States Postal Service to forward all mail to his new Florida address. He never received Engelland's notice of the motion for default judgment, which was sent to an incorrect address because of the misspelled street and city name of the Indiana residence. Because of mailing delays, he did not receive notice of the default order—which was sent to his Indiana address and also misspelled road and the town name—until January 22, 2014, 31-days after default judgment was entered. Due to the delay in receiving the notice, he did not have sufficient time to petition to vacate the default judgment pursuant to section 2-1301 of the Code (735 ILCS 5/2–1301 (West 2012)). After he received the complaint and summons, he retained counsel to file an answer denying that he owed the legal fees, to assert affirmative defenses and to file a counterclaim for legal malpractice and breach of fiduciary duty. On or about December 1, 2014, he authorized his attorney to file an answer and counterclaim. A copy of the pleadings were sent to Engelland's counsel that day, however, through inadvertent error, the appearance, answer and counterclaim were not filed with the court. Attached to the amended petition was Harmer's

[1] Attached to Harmer's motion for alternative service were affidavits of non-service of the motion to vacate, showing the various attempts made by Harmer to serve Engelland at his home address, his business address, and a third personal address that was discovered by Harmer after non-delivery at the other two addresses.

affidavit stating his understanding and belief that a responsive pleading had been filed with the court on or about December 1, 2014. Also included in the record was the affidavit of Harmer's counsel stating that she received a copy of the complaint on or about October 9, 2014 and incorrectly noted the due date for a responsive pleading as December 8, 2014. She prepared an answer and counterclaim to be filed on December 1, 2014. The firm's docket clerk served a copy of the appearance, answer and counterclaim on plaintiff on December 1, 2014, but failed to file these documents with the circuit court. She did not discover this error until she reviewed the pleadings on January 22, 2015, after receiving the notice of default from Harmer.

¶ 9 Lastly, Harmer asserts in his petition that he has a meritorious defense and counterclaim, alleging that Engelland breached his fiduciary duty and committed legal malpractice in the underlying litigation. The petition briefly states the reasons for the alleged malpractice and the attached counterclaim sets forth the underlying facts supporting his claim.

¶ 10 On September 9, 2015, after hearing, the circuit court granted Harmer's petition to vacate default judgment. The court found that based on the totality of the circumstances—the notice and motion for default judgment were sent to the incorrect address, Harmer's attorney mistakenly failed to file the answer and counterclaim on December 1, and that Harmer's attorney admitted to a careless docketing error—Harmer demonstrated the exercise of due diligence. Thereafter, Engelland timely filed this appeal.

¶ 11 ANALYSIS

¶ 12 As a preliminary matter, we note that we have jurisdiction over this appeal pursuant to Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010), which provides that "[a] judgment or order

granting or denying relief prayed in a petition under section 2–1401 of the Code of Civil Procedure" is immediately appealable. Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002) (a trial court's ruling on a section 2–1401 petition is deemed a final order and immediately reviewable under Supreme Court Rule 304(b)(3)).

¶ 13 We review a trial court's decision granting or denying a section 2–1401 petition to vacate a judgment either *de novo* or for abuse of discretion. *KNM Holdings, Inc. v. James*, 2016 IL App (1st) 143008, ¶ 17. When a section 2–1401 petition involves a purely legal question, we employ the *de novo* standard of review. *Id.* (citing *Warren County & Water Conservation District v. Walters*, 2015 IL 117783, ¶¶ 47-51). However, where the petition involves a fact-dependent challenge to the final judgment, such as a finding of due diligence, we employ the abuse of discretion standard. *Id.*

¶ 14 In this case, the parties' appeal briefs and the record inform us that the trial court's decision in granting the section 2–1401 petition involved a finding of due diligence after Harmer set forth factual allegations to support his petition. Engelland argues on appeal that the circuit court abused its discretion in granting Harmer's petition to vacate the default judgment, therefore, we apply the abuse of discretion standard in reviewing Engelland's claim of error. *Warren County & Water Conservation District v. Walters*, 2015 IL 117783 at ¶¶ 50-51.

¶ 15 Section 2–1401 of the Code provides that a party may challenge a judgment more than 30-days after its entry, if the following elements are established by a preponderance of the evidence: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim; and (3) due diligence in filing the section 2–1401 petition to vacate the default

judgment. [2] *Warren County & Water Conservation District* 2015 IL 117783 at ¶ 51. "Whether a section 2–1401 petition should be granted lies within the sound discretion of the circuit court, depending on the facts and equities presented, and its ruling will not be disturbed absent an abuse of discretion." *Glavinskas v. William L. Dawson Nursing Center, Inc.*, 392 Ill. App. 3d 347, 353 (2008).

¶ 16 The trial court abuses its discretion only where its ruling is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Petraski v. Thedos*, 2011 IL App (1st) 103218, ¶ 97. Accordingly, when reviewing a trial court's decision to deny or grant a section 2–1401 petition, the question is "not whether the appellate court agrees with the circuit court, but whether the circuit court acted arbitrarily, without employing conscientious judgment, or whether, in view of all the circumstances, the court exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted." *Id.* From our view of the record, given the circumstances of this case, the trial court's decision to grant defendant's section 2–1401 petition does not constitute an abuse of discretion.

¶ 17 As to the first element, a meritorious defense or claim "is one that raises questions of law deserving investigation or a real controversy as to the essential facts." *West Bend Mutual Insurance Co. v. 3RC Mechanical & Contracting Services, LLC*, 2014 IL App (1st) 123213, ¶ 13. "To prove the existence of a meritorious defense or claim, a petitioner must allege facts that

[2] We note that Engelland's appeal brief does not address whether Harmer was diligent in presenting his section 2–1401 petition and therefore, has waived our review of that element on appeal. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 23 (an argument not raised in an appellant's opening brief is waived).

would have prevented entry of the judgment if they had been known by the trial court." *Butcher v. EHS Trinity Hospital*, 321 Ill. App. 3d 131, 136 (2001). Section 2-1401(b) provides that the "petition must be supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2012).

¶ 18 Engelland argues that the facts set forth in Harmer's petition and attachments do not establish a meritorious defense by a preponderance of the evidence and are inadequate to assert as a defense to unpaid legal fees.

¶ 19 In Harmer's section 2–1401 petition, he alleges, with specificity, that he has a viable counterclaim against Engelland for legal malpractice and breach of fiduciary duty which resulted in the $765,000 judgment against Harmer related to the claimed unpaid fees. Pursuant to section 2–1401(b), Harmer supported his petition by attaching a copy of his answer, affirmative defenses and counterclaim. Whether Harmer's malpractice defense would ultimately prevail at trial is not at issue in a section 2–1401 proceeding. *Pirman v. A & M Cartage, Inc.*, 285 Ill. App. 3d 993, 1001 (1996). Under section 2–1401, Harmer need only assert sufficient facts, which if believed by the trier of fact, would defeat Engelland's claim. *Id.* Moreover, his malpractice defense is a valid defense to a claim for attorney's fees. *See Bennett v. Gordon*, 282 Ill. App. 3d 378, 385 (1996) (plaintiff entitled to seek redress for injuries caused by attorney malpractice and to defend against fee petition by challenging attorneys' representation). Accordingly, we find the record supports the trial court's finding that Harmer asserted a meritorious defense, and the trial court's decision was was not arbitrary, fanciful or unreasonable.

¶ 20 As to the next element, Engelland argues the trial court abused its discretion in finding Harmer was diligent in responding to this litigation. "Due diligence requires the section 2–1401

petitioner to have a reasonable excuse for failing to act within the appropriate time." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 222 (1986). Section 2–1401 is not intended to relieve a litigant of the consequences of his own mistake or negligence. *Warren County*, 2015 IL 117783 at ¶ 38. The petitioner must show that the failure to defend against the lawsuit was the result of an excusable mistake and that the petitioner, under the circumstances, acted reasonably and not negligently. *Id.* In assessing the reasonableness of the petitioner's excuse, all of the surrounding circumstances must be considered including the conduct of the litigants and their attorneys. *Id.*

¶ 21 Engelland asks us to find that the trial court abused its discretion in finding Harmer met his burden of showing due diligence. He argues that Harmer was served on October 8, 2014, but chose not to answer until after the default was entered. He further argues that Harmer's two excuses for the delay (his attorney's docketing error and filing miscommunication) are not excusable mistakes sufficient to show due diligence in responding to this litigation.

¶ 22 In Harmer's section 2-1401 petition, he asserted that believed his appearance, answer and counterclaim had been filed with the clerk of the court on or about December 1, 2014, three days before Engelland mailed the notice of motion for default judgment. Harmer's attached affidavit stated that he believed the responsive pleadings were filed and sent to Engelland's attorney on December 1, 2014. Also attached was an affidavit from Harmer's attorney's stating that she erred when docketing the filing due date, but in any event, the pleadings were prepared, sent to plaintiff and ready for filing on December 1 but were not filed that day because of her docketing clerk's mistake. Harmer also argued Engelland contributed to the delay in Harmer receiving the notice and motion for default judgment and the clerk's notice of default judgment by misspelling Harmer's Indiana address. The record confirms these errors.

¶ 23 Ultimately, after considering the parties' arguments and the affidavits on file, the trial court found that Harmer was diligent in asserting his defense and counterclaim, as well as in filing the section 2–1401 petition. We agree with the trial court's considered reasoning that under the circumstances— Harmer's move to Florida, that the misspelled addresses likely caused undue delay in receipt of notice of the lawsuit and pending default proceedings, Harmer sent the complaint to his attorney and authorized counsel to send a response, Harmer's attorney admitted to a docketing error of the due date for the responsive pleadings and the error in timely filing the response—Harmer exercised due diligence in responding to this litigation.

¶ 24 While section 2–1401 requires that diligence be due, a specific modicum of diligence is not delineated. *West Bend Mutual v. 3RC Mechanical & Contracting Services, LLC*, 2014 IL App (1st) 123213, ¶ 9. A guiding principle "in the administration of section 2–1401 relief is that the petition invokes the equitable powers of the circuit court, which should prevent enforcement of a default judgment when it would be unfair, unjust, or unconscionable." *Airoom*, 114 Ill. 2d at 225. The trial court's power to set aside a default judgment and permit a defendant to have his day in court is rooted in "substantial principles of right and wrong" and should be used to prevent injury and to further justice and where "justice and good conscience may require it." *Id*. Employing these principles, under these circumstances and this record, the misspellings in the notices to Harmer informing him of the motion for default judgment, the hearing on the motion and order granting default judgment, the mistakes of Harmer's attorney, and the uncontroverted testimony by Harmer's attorney that a copy of the answer and counterclaim were sent to Engelland's attorney on December 1, 2014, before they were due, we find the trial court's conclusion that Harmer was diligent in responding to the litigation was not arbitrary, fanciful or

unreasonable.

¶ 25 CONCLUSION

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

¶ 27 Affirmed.