No. 2—10—0669
Order filed May 13, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NEW CENTURY TOWN CONDOMINIUM ASSOCIATION NO. 3,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellant,	)	
v.	)	No. 09 LM 1909
BRADLEY F. AUBEL and all unknown occupants,	)	Honorable Michael J. Fusz,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

Held: We will not disturb a trial court's disposition of a section 2—1401 petition following an evidentiary hearing unless its findings that the defendant presented a meritorious defense and exercised due diligence are against the manifest weight of the evidence. Here, they are not.

ORDER

Plaintiff-appellant, New Century Town Condominium Association No. 3 (association), appeals the trial court's grant of defendant-appellee Bradley F. Aubel's section 2—1401 petition (735

ILCS 5/2—1401 (West 2008)), wherein the court vacated a $719.73 default judgment and accompanying order of possession against Aubel. We affirm.

I. BACKGROUND

This case arose out of a dispute concerning certain unpaid association fees. Though the record does not contain much detail about the parties' relationship prior to the instant dispute, it seems that, for the past 11 years, Aubel, a criminal defense attorney, has been the title owner for a condominium within the complex operated by the association. To some degree, the parties dispute the facts surrounding the evolution of the claim.

A. Evolution of the Claim through the Default Judgment

On July 3, 2009, the association, through counsel, sent Aubel a notice and demand for possession via certified and regular mail (735 ILCS 5/9—104.1 (West 2008)), wherein the association demanded $954.74 ($737.51 in unpaid association fees and $217.23 in attorney fees). The notice and demand informed Aubel that the association might seek possession of the premises if payment was not made in full by August 6, 2009. The notice and demand also provided Aubel with 30 days to dispute the debt in writing.

According to the association, four days later, on July 7, 2009, Aubel's assistant, Marilu Salazar, contacted the association's counsel and requested an explanation for the amount demanded. In response, again according to the association, on July 13, 2009, the association sent Aubel a "debt verification document," which showed that, as of that date, Aubel actually owed $472.74 in unpaid association fees, not $737.51 as stated in the notice and demand.

On August 14, 2009, the association filed against Aubel a joint action complaint for possession of the condominium unit and for association fees. On August 29, 2009, a special process

server personally served Aubel. According to Aubel, who claimed to have made his August payment as usual, this is the first he personally heard of the dispute.

Just a few days later, on September 2, 2009, the case was called and both Aubel and the association's counsel came before the court. At Aubel's request, the matter was continued to September 30, 2009, so that Aubel could file an appearance and jury demand. Aubel then provided the association's counsel with his business card and requested that counsel fax him a written copy of the court's order. Aubel needed to leave because he was representing a client in a criminal case in another courtroom.

According to the association, on September 4, 2009, its counsel attempted to send Aubel a copy of the court's written order (first by facsimile, which did not go through, and then by first-class mail). However, Aubel claims he never received a copy of the order. Instead, according to Aubel, he believed that he straightened out all amounts due through mid-September. At that point, he thought the controversy was over.

As such, on September 30, 2009, Aubel did not appear at the continued hearing. The trial court entered a default judgment against him for $719.73 ($309.73 for unpaid association fees, $200 in attorney fees, and $210 in court costs). The court also granted the order for possession, but stayed the order for 60 days until November 29, 2009. The court then continued the matter to November 4, 2009, for a hearing on the association's request for additional attorney fees and costs.

On October 29, 2009, the association mailed Aubel a copy of the default judgment against him and notice of the upcoming November 4, 2009, hearing. According to Aubel, he never received notice of the default judgment or the additional hearing. As such, Aubel did not appear at the November 4, 2009, hearing.

According to the association, as of November 29, 2009, Aubel still did not "remit payment in full," and, as the stay on the order of possession had expired, the association placed an order for possession with the Lake County Sheriff to effectuate an eviction.

According to Aubel, the first time he received notice that the controversy had not been resolved in mid-September, as he had previously thought, was on December 23, 2009, when he found a copy of the default judgment and order of possession taped to his garage door. He had continued to make his regularly scheduled association payments for the months of October, November, and December 2009.

On December 24, 2009, Aubel filed a section 2—1203 motion to set aside the default judgment and the order for possession. 735 ILCS 5/2—1203 (West 2008). That same date, Aubel filed his first appearance. On December 30, 2009, attorney Harold Saafeld filed a supplemental appearance on behalf of Aubel. On February 17, 2010, the court denied Aubel's section 2—1203 motion, finding that it lacked jurisdiction to hear it because Aubel filed the motion more than 30 days after the September 30, 2009, default judgment and order for possession was entered. Six days later, on February 23, 2010, Aubel filed a section 2—1401 petition to vacate. 735 ILCS 5/2—1401 (West 2008).

B. Hearing on the Section 2—1401 Petition to Vacate

On April 28 and June 4, 2010, the trial court conducted an evidentiary hearing on the matter. The same judge that entered the default judgment conducted the hearing.

At the hearing, Aubel testified that he believed he was current on his accounts. For example, on August 10, 2009, after receipt of the initial letter but *prior to the filing of the complaint*, he paid outstanding association fees. According to Aubel, the association provided him with a receipt of

payment, which he labeled as Exhibit 1. On September 1, 2009, two days after he was served and one day prior to the date his case was initially called, he received his September statement from the association. The statement, which he labeled as Exhibit 2, showed an amount due for September that was one dollar less than the typical monthly association due. This was because Aubel's account had been credited with a slight overpayment from a prior month.

Aubel testified that he did come to court on September 2, 2009, when the instant fee-dispute case was called, but he did not file a formal appearance. He was preparing to defend a Class-x felony case, the jury selection for which was set to begin that same day in another courtroom. As a result, he requested a continuance in this fee-dispute case. He provided the association's attorney with his business card, but, according to Aubel, she never sent him an order for the new court date as she had said she would.

Aubel testified that later, in mid-September, he, through his assistant, Marilu Salazar, called the association. Salazar put the phone on "speaker" mode and spoke with Debbie Mateos, the association's legal director. At that point, the association objected to testimony concerning the speaker-phone conversation, arguing that it was hearsay. The trial court overruled the objection without comment. Aubel continued that, while on speaker-phone, Mateos confirmed that Aubel's account had a "zero balance." At that point, Salazar reminded Mateos about the lawsuit. Mateos told Aubel and Salazar not to worry, that she would contact the attorneys, and that the suit would be dismissed.

Aubel stated that the association (as opposed to the attorney's office) continued to accept payment of his association fees for the months of September, October, November, and December. Aubel explained that it was his understanding that the association would not accept these fees if a

lawsuit was pending. Aubel submitted a photograph of a sign on the association's office window, which he labeled as Exhibit 3, and which stated, "If you are in collection, all payments must be made at the attorney's office. We will not accept any collection payments at this office." Aubel further stated that he did not understand the lawsuit was still pending until December 23, 2009, when he found the notice of the default judgment and order of possession taped to his garage door. At that time, Aubel initiated his attempts to vacate the default judgment.

On cross-examination, Aubel conceded that he never checked the court file to see if the case was actually dismissed. He acknowledged that he, as an attorney, frequented the courthouse and knew the location of the clerk's office. He explained, "I trusted Debbie Mateos's statement." When asked whether he ever tried to contact the law firm directly, rather than simply relying on Mateos's statement, Aubel answered that he, through Salazar, had tried to contact them "at some point" following the initial hearing but that the law firm never returned his call.

Next, Salazar testified that she is Aubel's assistant, and that she pays his bills. She testified that, in August 2009, she paid a total of $258 to the association. First, she paid $250. Then, second-guessing herself as to the exact amount due, she submitted an additional $8. These payments were received by the association and showed up as receipts on the association's accounting statements to Aubel, as shown in part of what defendant labeled Exhibit 2. Then, the September statement showed that Aubel owed about one dollar less than the standard association fee because Aubel had overpaid the prior month and his account had been credited.

Salazar corroborated Aubel's account of the mid-September phone conversation with Debbie Mateos, wherein Mateos allegedly confirmed Aubel's belief that he had a zero balance and informed

him that the lawsuit would be dismissed. However, Salazar differed slightly from Aubel on a separate point in that she stated she did not directly contact the law firm on Aubel's behalf until January 2010.

Robyn Kish, the association's attorney, testified that, on September 2, 2009, she appeared in court on the matter. Aubel was present, but he requested additional time to file an appearance. Aubel was unable to wait for a copy of the court's continuance order, and so he provided Kish with a copy of his business card and requested that she send him a copy of the order. Kish testified that she sent Aubel a copy of the continuance order. Likewise, Kish sent Aubel a copy of the default judgment and a notice on the hearing for attorney fees. It was not until Kish placed the order for possession with the Sheriff's office that the law firm received Aubel's motion to vacate the default judgment.

Regarding correspondence between Aubel and her firm concerning outstanding fees, Kish stated that, on July 13, 2009, approximately 10 days after the firm sent the initial notice and demand document, the firm sent Aubel a "debt verification document." It is the firm's standard practice to send the debt verification document when a resident questions the initial notice and demand document. However, on cross examination, Kish conceded that she did not personally send the debt verification document, and her firm retained no proof of mailing—it merely retained a draft of the letter on file.

Also on cross examination, Aubel presented Kish with his Exhibits 1 and 2, which included accounting statements given to him by the association and which documented the August payment of $258, the one-dollar credit, and the September payment. Kish responded that she "could not recall" whether the association had contacted her firm to update it regarding Aubel's payments. In any case, Kish essentially conceded that it *did* appear that the amounts listed as due on the statements

sent to Aubel by the association were in conflict with the amount of $309.73 in past due association fees set forth at the prove-up for the default judgment. Finally, Kish acknowledged that the firm waited 29 days following the entry of the default judgment before notifying Aubel of the judgment and order for possession.

Next, Debbie Mateos testified that she is the closing and legal director at the association. It is her responsibility to send notices to residents with outstanding payments and to turn over accounts to the attorneys when an account is in collection. Aubel presented Mateos with his Exhibits 1 and 2. Mateos was familiar with the statements, stating that they were issued by the association's accounting department. However, Mateos said it was possible for them to be inaccurate (or incomplete) because they "could" omit legal fees. Mateos stated that the transaction reports submitted by the association (in its Exhibit 3) *did* show the outstanding legal fees.

Mateos stated that she could not recall whether she ever spoke on the telephone to either Aubel or Salazar. She could not recall whether she had ever told Aubel and Salazar that she would instruct the association's attorneys to dismiss the suit. However, during cross examination, Aubel showed Mateos a copy of her own affidavit, wherein she attested to having a conversation with Salazar about the account, telling Salazar to contact the attorney.

Mateos confirmed that it was the association's policy not to accept payments from residents who are in collection, explaining, "we're directed by all the associations' attorneys that *** we do not process any payments until we have word from the attorney whether or not we can accept that or it's then directed either back to the attorney or directed back to the homeowner."

After all the witnesses had been called, the association moved to admit its exhibits. Aubel then moved to admit his exhibits (*i.e.*, among others, Exhibits 1 and 2, which had set forth the

accounting statement). The association objected, arguing that, although Aubel had presented his exhibits during his presentation, his presentation was now closed, and he never formally moved for the exhibits to be admitted into evidence. In response, Aubel moved to reopen proofs so that the exhibits could be admitted into evidence. Over the association's objection on the ground of timeliness, the court granted the motion. The court explained that the exhibits were illustrative of Aubel's testimony.

As to the question of diligence, the court stated it was "troubled" by the fact that Aubel, himself an attorney, never filed a formal appearance in the case. Nevertheless, without much comment, the court found that Aubel exercised sufficient diligence in the context of a section 2—1401 proceeding under the circumstances. As to the question of a meritorious defense, the court stated it was "very troubled" by certain inconsistencies in the parties' exhibits. It noted that, according to the association's Exhibit 3 (resident transaction report), which Mateos had deemed to be the more accurate statement of accounts, the first entry of a legal fee was dated August 20, 2009, for $600, after this lawsuit was filed, and that, with the addition of the $600 *legal* fee, the account showed a balance of $598.04 (apparently due to the slight overpayment by Aubel for that month's *association* fee, meaning that Aubel would have been current on his association fee). In this respect, the association's Exhibit 3 conflicted with its own Exhibit 2 (the notice and demand), which showed an outstanding balance of $737.51 in association fees and $217.23 in legal fees. Additionally, both the association's Exhibits 2 and 3 were in conflict with Aubel's Exhibits 1 and 2 (August and September accounting statements and receipts), which were also prepared by the association and which showed Aubel to be in good standing. As such, the court ruled that it would vacate the default

judgment and order of possession and allow for Aubel to defend the action on the merits. This appeal followed.

II. ANALYSIS

The association challenges the trial court's grant of Aubel's section 2—1401 petition. Section 2—1401 sets forth a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days. 735 ILCS 5/2—1401 (West 2008); *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). The statute requires that a petition be supported by affidavit or other appropriate showing as to matters not of record. *Vincent*, 226 Ill. 2d at 7. It further states that a petition must be filed not later than two years after the entry of judgment, excluding the time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed. *Id*. Relief under section 2—1401 is predicated upon proof, by a preponderance of the evidence, of: (1) diligence in pursing the original action; (2) diligence in pursuing the 2—1401 petition; and (3) a meritorious defense. *Id*. at 7-8.

The parties express confusion as to the standard of review. The supreme court in *Vincent* set forth what it termed a "touchstone" for future analyses aimed at determining the proper standard of review of a trial court's disposition of a 2—1401 petition. *Vincent*, 226 Ill. 2d at 15-17. It explained that, while remedy under section 2—1401 is rooted in equity, the General Assembly abolished the common-law writ system and replaced it with the statutory petition. *Id*. at 16. The court noted that it is therefore incorrect for courts to continue to view the relief granted by a 2—1401 petition in strictly equitable terms, to be awarded at the trial court's discretion. *Id*. at 16. Rather, proceedings under section 2—1401 are subject to the usual rules of civil practice. *Id*. at 8. A section 2—1401 petition is essentially a complaint initiating a new proceeding and inviting responsive pleadings. *Id*.

Five types of final dispositions are possible in 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 a hearing at which factual disputes are resolved." *Id.* at 9. The *Vincent* court expressly determined the standard of review only for the "type" of section 2—1401 disposition before it (stating that a dismissal on the pleadings, as in any other civil proceeding, is reviewed *de novo)*, and it stated that a determination of the proper standard of review applicable to other "types" of section 2—1401 dispositions (such as a grant or denial of relief following an evidentiary hearing) must await other cases. *Id.* at 17. However, the *Vincent* court submitted that future analyses should be "grounded in the notion that each of the dispositions available in a section 2—1401 action is borrowed from our civil practice pleadings and rules." *Id.* at 17. After *Vincent*, courts, including this one, have relied upon the above-quoted words in holding that, where a section 2—1401 petition is resolved following an evidentiary hearing, the trial court's factual findings regarding due diligence and the existence of a meritorious defense should be reviewed according to the manifest-weight standard. See, *e.g.*, *S.I. Securities v. Powless*, 403 Ill. App. 3d 426, 440 (2010); *Domingo v. Guarino*, 402 Ill. App. 3d 690, 699 (2010).

Here, the trial court conducted an evidentiary hearing before determining that Aubel met the section 2—1401 requirements of due diligence and the existence of a meritorious defense. As with any civil proceeding, we will not upset the trial court's findings of fact following an evidentiary hearing unless they are against the manifest weight of the evidence.

B. Evidentiary Rulings

Before we determine whether the trial court's findings were against the manifest weight of the evidence, we must address the association's argument that some of that evidence should not have

been admitted. The association challenges the trial court's decisions to: (1) reopen the proofs for the admission of Aubel's exhibits (particularly Exhibits 1 and 2); and (2) allow Aubel and Salazar to testify to the content of the conversation with Mateos.[1] Generally, we review a trial court's evidentiary rulings according to an abuse-of-discretion standard. See, *e.g.*, *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 34 (2008).

Whether a party may introduce evidence he should have introduced at an earlier stage of the case rests with the sound discretion of the trial court and will not be interfered with absent an abuse of discretion. *People v. Robbins*, 21 Ill. App. 3d 317, 320 (1974). The factors to be considered in determining whether a party should be permitted to reopen the proofs include: (1) whether the failure to introduce evidence occurred due to inadvertence, which would weigh in favor of admission, or calculated risk, which would weigh against admission; (2) whether the opposing party will be surprised or unfairly prejudiced by the evidence; (3) whether the new evidence is of the upmost importance to the movant's case; and (4) whether any cogent reason exists to justify denying the request. *Polk v. Cao*, 279 Ill. App. 3d 101, 104 (1996).

Looking to the factors set forth in *Polk*, we find that the trial court did not abuse its discretion in admitting Aubel's exhibits. Given that Aubel presented the first three of these exhibits during his case in chief, it appears that his failure to formally seek their admittance was due to inadvertence and the association is hard-pressed to claim surprise or disadvantage. If it was surprised, it should have requested an opportunity to again view the exhibits and submit them to further cross-examination,

---

[1] The association also complains about testimony regarding the statements of two staff who passed along the call to Mateos, but we find that focusing on Mateos's statements adequately addresses the association's concerns.

but it did not so request. Even on appeal, the association does not argue that Aubel's exhibits of the accounting lack authenticity; it merely argues that Aubel's exhibits should not have been admitted. The exhibits, particularly the statement of accounts, were of great importance to Aubel's case in that they set forth a version of the accounting prepared by the association showing Aubel to be current in his accounts. Finally, we can see no reason that the trial court should have excluded the evidence, as it was necessary to a fair resolution of the case.

The association argues that it was unfairly prejudiced by the trial court's decision to admit Aubel's exhibits, particularly the statement of accounts submitted by Aubel. The association notes that the trial court specifically relied on the statement of accounts, stating that it (the court) was "troubled by the fact that the resident transaction reports [submitted by the association] [and the] statement of the account and notices sent to [and submitted by Aubel] are inconsistent." The court stated that Aubel's statements show him to be current on his payments (or even ahead by one dollar, not counting legal fees and costs related to the association's action).

We reject the association's argument. The rule set forth in *Polk* means to guard against *surprise*; it does not seek to guard against evidence that, once admitted, may *damage* the non-movant's case. *Polk*, 279 Ill. App. 3d at 104. Here, particularly with regard to the most "damaging" exhibits (the statement of accounts), the association cannot claim surprise. As it admits in its brief, Aubel *presented* the statement of accounts during his case in chief, and Mateos admitted that the statements came from the association's own accounting department.

Next, the association argues that neither Aubel nor Salazar should have been allowed to testify regarding the telephone conversation with Mateos, wherein Mateos allegedly told Aubel that the account was current and that she, as the legal director, would tell the attorneys to dismiss the lawsuit.

The association contends that Mateos's statement was hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted, thus resting for its value upon the credibility of the out-of-court asserter. *People v. Carpenter*, 28 Ill. 2d 116, 121 (1963). The association contends that Mateos's statements were offered for the truth of the matter asserted—that Aubel's fees had been paid in full.

We do not agree that the contested statements constitute hearsay. Aubel and Salazar did not testify to Mateos's statements to demonstrate that the accounts *were* in fact current (that was the purpose of Aubel's Exhibits 1 and 2) or that the association did indeed contact the attorneys to tell them to dismiss the suit (clearly, they did not). Rather, Aubel offered Mateos's statements for the purpose of its "affect on the listener," in the sense that Aubel used the statements to explain why he did not pursue the matter further in court. See, *e.g.*, *First Star Bank of Illinois v. Peirce*, 306 Ill. App. 3d 525, 537 (1999) (statement is not hearsay when offered to show its affect on the defendant, to explain his actions and beliefs); and *Brawner v. City of Chicago*, 377 Ill App. 3d 875 (2003) (the content of the out-of-court statements made to an officer were not hearsay where they were offered for the purpose of evaluating the reasonableness of the officer's actions under the circumstances).

Having determined that the trial court did not err in its evidentiary rulings, we now turn to whether its findings regarding a meritorious defense and due diligence were against the manifest weight of the evidence.

C. Meritorious Defense

A meritorious defense is one that, if believed by a trier of fact, would defeat the plaintiff's claim. *Halle v. Robertson*, 219 Ill. App. 3d 564, 568 (1991). Courts have used the term "meritorious defense" interchangeably with the phrase, "a defense *** that would have precluded judgment in the

original action." See, *e.g.*, *Vincent*, 226 Ill. 2d at 7-8. The meritorious defense should apply to the whole or a material part of the default judgment. See, *e.g.*, *Sarro v. Illinois Mutual Fire Insurance Co.*, 34 Ill. App. 2d 270, 273 (1962).

Here, Aubel submitted, in his Exhibits 1 and 2, a statement of accounts that showed his association fees to be current within one month. In fact, the trial court noted that, according to these statements, Aubel actually maintained a one-dollar credit. These statements did not show any amount owing for attorney fees. These statements, if believed and if known by the trial court, would have precluded entry of the default judgment and, obviously, the order of possession. By logical extension, these statements call into question the legitimacy of the attorney fees sought by the association (*i.e.*, if Aubel's accounts were current, then the association's litigious actions and potential miscommunication with its counsel should, at the very least, be subject to scrutiny and cross-examination). It is interesting that, even on appeal, the association does not question the authenticity of Exhibits 1 and 2, nor does it dispute that the association sent these statements to Aubel. It merely maintains that these statements should never been admitted, leaving its own exhibits (2 and 3) to serve as the only evidence on the matter. And, as the trial court noted, even the association's Exhibits 2 and 3 contain inconsistencies that call into question the default judgment amount.

C. Due Diligence

The association argues that the trial court's finding that Aubel exercised due diligence in the original action and in the section 2—1401 proceeding was against the manifest weight of the evidence. In the context of a section 2—1401 case, "due diligence" requires the petitioner to have a reasonable excuse for failing to act within a reasonable amount of time. *Domingo v. Guarino*, 402

Ill. App. 3d 690, 700 (2010). A petitioner may not be granted relief from the consequences of his or her own mistake or negligence. *Id*.

The association relies largely upon *Smith v. Airoom*, 114 Ill. 2d 209 (1986), wherein the supreme court held that the trial court did not "abuse its discretion" in denying the defendant's section 2—1401 petition based on the defendant's failure to establish due diligence by a preponderance of the evidence.[2] This court is not bound to reach the same result as *Airoom* for at least two reasons.

First, from a procedural standpoint, the *Airoom* court *affirmed* the trial court's finding that Airoom lacked diligence in its attention to the case. Here, the association is asking this court to *reverse* the trial court's finding that Aubel exercised sufficient diligence in the context of a section 2—1401 case. The trial court's finding that Aubel, by a preponderance of the evidence, exercised sufficient diligence is entitled to some degree of deference, as we may only disturb the finding if it is against the manifest weight of the evidence.

Second, from a factual standpoint, the *Airoom* court expressly noted that neither the plaintiffs nor their attorney led Airoom to believe that their legal remedies were not being pursued. *Airoom*, 114 Ill. 2d at 228.[3] In contrast, here, both Aubel and Salazar, testified that the association's closing

---

[2] Prior to *Vincent* (2007), courts commonly reviewed a trial court's section 2—1401 disposition according to an abuse-of-discretion standard.

[3] We acknowledge that, in *Airoom*, the court made this observation in the context of its equity analysis. However, the circumstance of one litigant leading the other to believe that the suit has been dismissed also speaks to whether the other had a reasonable excuse in failing to submit his or her defense to the court in a timely manner.

and legal director, Debbie Mateos, told them that the assessment was current, that she would fax a copy of the proof of payment to the attorneys, and that the case would be dismissed. Aubel testified that he was further encouraged to believe that the association was no longer pursuing legal remedy because it continued to accept his monthly association fees from September through December, and, as confirmed by Mateos, the association had a policy against accepting association fees once a resident's case has been "turned over to the attorneys." We cannot conclude that the trial court's determination that Aubel presented a reasonable excuse for failing to present his defense in a timely manner was against the manifest weight of the evidence.

III. CONCLUSION

For the aforementioned reasons, we affirm the judgment of the circuit court of Lake County.

Affirmed.