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2013 IL App (3d) 120791-U

Order filed September 30, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

OTTAWA SAVINGS BANK,) Appeal from the Circuit Court
) of the 13th Judicial Circuit,
Plaintiff-Appellee,) La Salle County, Illinois,
)
v.) Appeal No. 3-12-0791
) Circuit No. 11-CH-159
KENNETH E. JOHNSON, UNKNOWN)
OWNERS AND NON-RECORD)
CLAIMANTS,) Honorable
) Joseph P. Hettel,
Defendants-Appellants.) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court erred in entering default judgment against defendant where plaintiff neither filed a written motion nor provided notice to defendant that it would be seeking default judgment against him.

¶ 2 Plaintiff Ottawa Savings Bank filed a foreclosure complaint against defendant Kenneth E. Johnson, seeking to foreclose on two properties. The trial court ordered defendant to respond to the complaint by February 10, 2012. On February 14, 2012, the parties appeared in court, and defendant

moved *instantly* to file his motion to strike and dismiss plaintiff's complaint. The trial court denied the motion. Plaintiff then orally moved for entry of default judgment against defendant. The trial court granted plaintiff's motion. Thereafter, the trial court entered a judgment of foreclosure and an order confirming the sheriff's sales of the properties. Defendant appeals the trial court's orders (1) entering default against him, (2) granting plaintiff a judgment of foreclosure, and (3) confirming the sheriff's sales of the properties. We reverse the trial court's entry of default against defendant and remand for further proceedings.

¶ 3 Between 2005 and 2009, defendant obtained three mortgages from plaintiff for two parcels of property. Defendant failed to make timely payments to plaintiff. In April 2011, plaintiff filed a three-count foreclosure complaint against defendant.

¶ 4 Defendant timely filed a motion to strike and dismiss the complaint because the notes and mortgages for the properties were not attached to the complaint. On January 13, 2012, the trial court granted defendant's motion to strike and dismiss and granted plaintiff leave to file an amended complaint with all of the required exhibits. Plaintiff filed an amended complaint and attached the necessary exhibits. Defendant was given 28 days to answer or otherwise plead, and the parties were scheduled to appear in court on February 14, 2012.

¶ 5 In response to plaintiff's amended foreclosure complaint, defendant prepared a motion to strike and dismiss, pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)), arguing that plaintiff failed to attach a Homeowner Notice to the summons, as required by section 15-1504.5 of the Code (735 ILCS 5/15-1504.5 (West 2012)). The court file contains a certificate of service showing that the motion to strike and dismiss was mailed and faxed to plaintiff on February 8, 2012. However, there is no certificate of service showing that the motion

was mailed or faxed to the court.

¶ 6 When the parties appeared in court on February 14, 2012, plaintiff acknowledged that it received defendant's motion to strike and dismiss several days earlier and had already drafted a response to it. However, at the time of the hearing, the court file did not show that the motion to strike and dismiss had been filed with the court.¹ As a result, defendant moved *instantly* to file the motion. The trial court denied defendant's request. Plaintiff then orally moved for default judgment to be entered against defendant, and the trial court granted plaintiff's motion, entering default judgment against defendant on all counts. Defendant filed a motion to reconsider, an amended motion to strike and dismiss the amended foreclosure complaint, and a motion to vacate default judgment. The trial court denied all of defendant's motions and entered a judgment of foreclosure against defendant.

¶ 7 A few weeks later, defendant filed another motion to vacate default judgment, which the trial court denied. Soon thereafter, plaintiff filed a motion to confirm the sheriff's sales of the properties, along with reports of the sales. Defendant filed a motion objecting to the confirmation of sales of the properties. The trial court entered an order confirming the sheriff's sales.

¶ 8 I. Default

¶ 9 Defendant first argues that the trial court erred in entering a default judgment against him when he appeared in court on the date of the first scheduled hearing with a motion to strike and dismiss that had already been served on plaintiff.

¶ 10 If a defendant is served with process and fails to enter an appearance, file pleadings or make

¹ Defendant's motion to strike and dismiss was received in the mail by the court later that day and was file-stamped as received on February 14, 2012.

any other response to the plaintiff's complaint, the plaintiff may move for entry of a default judgment pursuant to section 2-1301 of the Code (735 ILCS 5/2-1301 (West 2012)). *American Service Insurance Co. v. City of Chicago*, 404 Ill. App. 3d 769, 778 (2010). If the trial court grants the motion, it will enter an order of default in favor of the plaintiff and against the defendant. *Id.* at 779.

¶ 11 A court should enter a default judgment only "as a last resort." *Panko v. Advanced Appliance Service*, 55 Ill. App. 3d 301, 305 (1977). Entering default against a defendant is a "drastic" measure. *Schoonover v. American Family Insurance Group*, 230 Ill. App. 3d 65, 70 (1992). "The entering of a default is one of the most drastic actions a court may take to punish for disobedience to its commands." *Widucus v. Southwestern Electric Cooperative, Inc.*, 26 Ill. App. 2d 102, 109 (1960). "[A] default should only be condoned when, as a last resort, it is necessary to give the plaintiff his just demand." *Id.*

¶ 12 A default judgment should be set aside when it will not cause hardship to the plaintiff to go to trial. *Id.* Where the issues are relatively uncomplicated, it is not improper for a trial court to allow a defendant to file his answer *instantly* and to thereafter proceed to trial, since the ends of justice are better served by trial on the merits than by entering a default judgment. *Panko*, 55 Ill. App. 3d at 305. An appellate court can reverse a trial court's entry of default judgment if it finds that substantial justice has not been done between the litigants. *Plantaric v. Michaels*, 98 Ill. App. 3d 154, 157 (1981).

¶ 13 A defendant is entitled to notice in writing before a plaintiff moves for default judgment. *Daily Journal v. Smith*, 118 Ill. App. 2d 411, 415 (1969); *Sentry Royalty Co. v. Craft*, 79 Ill. App. 2d 410, 417 (1967). A plaintiff is obligated, both by court rules and common courtesy, to notify the defendant if it intends to present a motion for default judgment against him. *Lutz v. Lutz*, 55 Ill. App.

3d 967, 972 (1977). The applicable circuit court rules provide: "All motions shall be filed with the Clerk of the Court prior to their presentment to the court. *** Written notice of hearing on all motions shall be given by the party requesting the hearing to all parties who have appeared and have not theretofore been defaulted for failure to plead ***." Rules of Practice of the Circuit Court, Thirteenth Judicial Circuit, Rule 2.1(a) & (c) (eff. Aug. 1, 1984). These rules have the same effect as statutes. *Craft*, 79 Ill. App. 2d at 417.

¶ 14 Additionally, Illinois Supreme Court Rule 104 provides: "Pleadings subsequent to the complaint, written motions, and other documents 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." Ill. S. Ct. R. 104(b) (eff. Jan. 1, 1970). Notice to a defendant of a plaintiff's intent to move for default judgment is necessary so that the defendant is "afforded an opportunity of a hearing to prevent the default order as well as the decree being so promptly entered." *Craft*, 79 Ill. App.2d at 417.

¶ 15 Here, the record shows no proof that written notice was provided to defendant before plaintiff moved for default judgment, nor does plaintiff contend that notice was given. Such notice was mandatory, pursuant to local and supreme court rules. See Rules of Practice of the Circuit Court, Thirteenth Judicial Circuit, Rule 2.1(a) & (c) (eff. Aug. 1, 1984); Ill. S. Ct. R. 104(b) (eff. Jan. 1, 1970). Notice would have given defendant an opportunity to prevent the default order from "being so promptly entered." See *Craft*, 79 Ill. App.2d at 417.

¶ 16 Since defendant was not provided written notice that plaintiff would seek entry of a default judgment at the February 14, 2012, hearing, the trial court erred in entering an order of default judgment against defendant. Since substantial justice has not been done between the litigants, we

reverse the trial court's default judgment order and remand for further proceedings.

¶ 17

II. Remaining Issues

¶ 18 Because we find that the trial court erred in ordering a default judgment to be entered against defendant, we need not reach the remaining issues raised by defendant.

¶ 19 The judgment of the circuit court of La Salle County is reversed, and the cause is remanded for further proceedings consistent with this decision.

¶ 20 Reversed and remanded.