ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS The newsletter of the ISBA's Section on Civil Practice & Procedure

January 2011, vol. 56, no. 6

Vacating default judgments: Make it make a difference

By Patrick Kinnally, Kinnally Flaherty Krentz& Loran, PC

Toby Kline has come to see you, referred by his regular lawyer. Toby made an agreement with Halo, Inc., to buy and deliver cup lids from Toby's company, Alloy, Inc., which makes these lids for restaurants like McDonald's. Halo has refused to pay. Alloy has filed a complaint in state court, and a default judgment has been entered against Halo. Sixty days have elapsed since that judgment was entered.

Halo's lawyer has called you and told you he just filed a "Motion to Vacate Default Judgment." He wants to know whether you will agree to the motion. He says the trial judge will probably grant it since judges want to make sure that every litigant gets his day in court. Should you agree with Stan's proposal? See, *Blazyk v. Daman Express, Inc.,* 2010 WL 5168870, Ill. App. 2 Dist., December 17, 2010 (No. 2-10-0189) ("*Blazyk*").

The facts in *Blazyk* are unremarkable. The plaintiff filed a breach of contract complaint on July 15, 2009. Neither defendant appeared, and they were defaulted on December 8, 2009,and served with that order. Forty-three days later, defendants filed a "Motion to Vacate Default Judgment." The motion stated:

> 1. Defendant's [sic] counsel was [sic] retained until January 11, 2010.
>
> 2. The Defendant has a meritorious defense.
>
> 3. Defendant has been diligent in bringing this motion.
>
> 6. [sic] That defendant's [sic] counsel's failure to appear was not intentional nor intended to disregard the authority of this tribunal.
>
> 7. In the interest of justice, this default judgment must be vacated and the matter reinstated.
>
> WHEREFORE, plaintiff [sic] prays that this court will enter an order setting aside and vacating any default judgments and allowing for the Defendant's [sic] counsel to file an appearance instanter and for such further relief as the court deems necessary.

Not a paradigm of a coherent fact pleading. Yet, over plaintiff's counsel's objection, the trial judge granted the motion since he concluded, "It would be an abuse of discretion if I don't grant their motion." Can that be a correct result? In *Blazyk*, the Second District Appellate Court said, "No." In an opinion, authored by Justice Hudson, he explains, thoroughly, what vacating a default judgment requires once 30 days have passed from the judgment's entry. 735 ILCS 5/2-1401. Read it. A couple of times.

A Section 2-1401 proceeding is not brought by motion. This is because, after 30 days have elapsed from the entry of a default judgment, the trial court loses jurisdiction. At that moment, nothing is pending in the trial court. Although motion practice occurs while a cause of action exists in the trial court, no motion can be made (other than to enforce the trial

court's judgment) once 30 days have passed. See, *Blazyk* at sl.op. at 5, fn. 1, citing *Director of Insurance v. A&A Midwest Rebuilders, Inc.* 383 Ill.App. 721 (2d Dist. 2008).

A Section 2-1401 proceeding is brought by a petition. This is because it is a new proceeding not the continuation of the old case. It is a separate and new cause of action. (*Blazyk* at p. 5). As such, the petition is akin to a complaint, and the rules relating to what that pleading must allege are contained in the rule. Like a complaint, it requires service of process. *Sarkissian v. Chicago Board of Education*, 201 Ill.2d 95 (2002).

Once the petition is properly served, the question then is the character of the petition. This analysis has two prongs: one substantive, the other procedural. As to the former spur, the issue is whether the petition asserts facts, not conclusions, which allege a meritorious defense. As to the latter, assuming a meritorious defense is pleaded, the inquiry is whether due diligence has been exercised in seeking to address the default in a timely way. See, *Rockford Financial Systems v. Borghetti*, 403 Ill.App.3d 321 (2nd Dist. 2010).

The meritorious defense analysis is subject to de novo review. The due diligence examination presents a mixed question of law and fact and is reviewed for an abuse of discretion. *Rockford Financial Systems, supra.*, but see, *People v. Vincent,* 226 Ill.2d 1, 17-18 (2007), and *Mills v. McDuffa*, 393 Ill.App.3d 940 (2d Dist. 2009).

But the overriding consideration for a trial judge considering a §2-1401 petition is whether there is a pleading and the corollary proof, based on a preponderance of the evidence, that a meritorious defense exists. Would such a defense have precluded the entry of judgment in the original action? If so, then the petition, assuming it is timely filed, should probably be granted.

In *Blazyk*, since the defendants' motion to vacate, which was really a petition, was devoid of any factual statement of a meritorious defense (or diligence), the case should be over, right? Not so fast.

A party who is charged with pleading a cause of action has a right to amend its pleadings, a right which is liberally construed. Since a first pleading should only be dismissed with prejudice if it is evident that no set of facts can be shown that would afford the pleading party any right to recover, the decision to amend a pleading rests within the sound discretion of the trial court. The appellate court concluded the defendants should be accorded such a right (*Blazyk* at sl.op. at 8) and remanded the case for the trial court to do just that. Can this be right?

Blazyk was decided on December 10, 2010, almost a year after the trial court's decision and about 18 months after the original complaint was filed. Whether or not either of the defendants had a meritorious defense they could plead is an open question, but at least they should be afforded the opportunity to do so. Which seems the wrong practical result for the plaintiff. Of course, he might have prevented this unfortunate saga for his clients if he had asserted jurisdiction as a defense since his clients were never served with summons in the §2-1401 proceeding, a defense he forfeited by not raising it.

Based on *Blazyk*, should Kline agree to the request to vacate the default judgment? Did Kevin Blazyk get any further in resolving his dispute by not agreeing to vacate the default judgment he obtained? Was any evaluation ever given as to what the defendants's meritorious defense might be or why defendants have sat on the sidelines? Are you going to get any closer to resolving Toby's dispute without such an examination? Think about why vacating a default judgment may or may not make a difference in getting an effective result that makes practical and financial sense for your client. ■