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When dispositive motions are not served on counsel of record but that counsel failed to obtain leave of court to appear—What happens?

By
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The facts in the recent decision of *J.P. Morgan v. Straus*,1 2012 IL App (1st) 112401, are complicated.

On October 19, 2009, a mortgage foreclosure complaint was filed against defendant Joseph L. Straus and others. J.P. Morgan Acquisition Corporation, as assignee, was later substituted as plaintiff.

On November 20, 2009, Joseph Straus filed his appearance and answer, *pro se*. Thereafter, on March 16, 2010, an attorney filed an "Additional Appearance" on behalf of Joseph Straus. No appearance fee was paid.

Almost six months later, on October 25, 2010, the same attorney filed another appearance on behalf of co-defendant Alice Straus, Joseph's wife, and paid the $203 filing fee.

The Cook County Appearance form has a provision on the bottom that states, "I certify that a copy of the within instrument was served on all parties who have appeared and have not heretofore been found by the Court to be in default for failure to plead." There follows a signature line for the attorney.

Before the appearance was filed by Alice Straus but after the appearances were filed by Joseph Straus, *pro se* and by counsel, on May 12, 2010, J.P. Morgan filed its motions for summary judgment, for default judgment against Alice Straus, to dismiss defendants "unknown owners and non-record claimants," and for judgment of foreclosure and sale. J.P. Morgan claims to have mailed notices of the motions to Joseph, Alice, First Eagle Bank and "unknown owners." Apparently notice was not sent to Attorney Gertzman. Nine days later the matter was heard, and the trial court entered orders granting the plaintiff's motions.

Pursuant to the judgment of foreclosure and sale, a judicial sale was held on August 24, 2010. On September 3, 2010, plaintiff filed its motion for an order approving the sale. Notice was provided in the same manner to the same defendants as the prior motions.

On October 25, 2010, the matter was heard. Attorney Gertzman appeared in court that day and presented a file-stamped copy of his appearance on behalf of Alice Straus and a motion to quash service on behalf of Alice Straus. Presumably based on those documents, plaintiff withdrew its motion to confirm the sale.

Four days later, Attorney Gertzman, on behalf of Joseph Straus, filed a motion to vacate and void the judgment of foreclosure and sale. Defendants argued that the judgment was void because Attorney Gertzman met with plaintiff's counsel prior to the March 26, 2010, hearing, at which meeting Attorney Gertzman allegedly delivered to counsel for plaintiff a copy of his additional appearance on behalf of Joseph Straus. Because defendants' attorney, Mr. Gertzman, did not receive notice of any of the hearings after March 26, 2010, defendants therefore argued that plaintiff's attorney had acted in violation in Illinois Supreme Court Rule 11.

Plaintiff's attorneys responded that they were never served with defense counsel's appearance, and that counsel had failed to properly seek leave of the trial court to file his appearance. Therefore, the argument went, plaintiff's notice was proper upon those defendants who had appeared in accordance with the Rules. Defendant Joseph Straus, in his response brief, stated, "It is extraordinarily unusual for attorney Gertzman to file an Additional Appearance, mid-day, 35 minutes [to] a scheduled court hearing, and not deliver a copy of said Appearance to opposing counsel." Attorney Gertzman added:

> It is so unbelievable that it remains extraordinarily coincidental that attorney Gertzman's Additional Appearance was filed on March 16, 2010, mid-day, only 35 minutes before the noticed 2:00 p.m. scheduled court hearing, but, however, Plaintiff's counsel fails to recall receiving attorney Gertzman's Additional Appearance…Apparently, Plaintiff's counsel suggests that attorney Gertzman filed an Appearance 35 minutes before a scheduled court hearing, became aware by telepathic waves that Plaintiff's counsel was withdrawing Plaintiff's Motion allegedly resulting in attorney Gertzman's departure from the courthouse without serving a copy of said Appearance on Plaintiff's counsel. Hogwash! ! !

After the motion to vacate and void the judgment was briefed, a hearing was held on March 11, 2011. Plaintiff insisted that it was not properly served with Attorney Gertzman's appearance as required by Rule 11, and, further argued that Attorney Gertzman filed the appearance without leave of court. Attorney Gertzman argued that he personally delivered a copy of the appearance to counsel on March 16, 2010, and that no rules require that he seek a leave to file an appearance. Attorney Gertzman also argued that plaintiff's counsel should have checked the docket and, had he done so, would have seen that his appearance was on file and provided him notice of the motions.

At the hearing, the trial court noted that the exhibit that was attached to Attorney Gertzman's motion, which supposedly showed proof that he filed his appearance, was illegible and therefore, would not be considered in support of defendant's argument. After the hearing, the matter was continued to May 18, 2011, when it was denied. The judicial sale was approved on July 18, 2011.

Decision

On appeal, the defendants asserted one issue, claiming the trial court erred in denying the motion to vacate and void the judgment. In support of their argument, they stated that, because Attorney Gertzman had filed his appearance on behalf of defendant Joseph Straus prior to the date of the motions for default judgment and summary judgment, that Attorney Gertzman should have been served with those motions in accordance with Illinois Supreme Court Rule 11(a) which states: “If a party is represented by an attorney of record, service shall be made upon the attorney.”

Defendants also argued that their counsel did not need leave of court to file his appearance because Supreme Court Rule 13(c)(1) provides: “An attorney shall file his written appearance or other pleadings before he addresses the court unless he is presenting a motion for leave to appear by intervention or otherwise.” Therefore the defendants claimed that, as long as the appearance was properly filed and personally served on plaintiff’s counsel, plaintiff was required to serve defense counsel with all pleadings.

From there, defendants asserted that plaintiff’s failure to provide notice “renders the orders that follow fatally defective,” void, and a trial court that refuses to vacate those void orders errs. *Wilson v Moore,* 13 Ill.App.3d 632 (1973). Defendants argue that proposition to be “axiomatic” and “so ingrained in Illinois law that there is ‘there is no need to chain cite’.”

Unfortunately for defendants, the appellate court disagreed.

The court began its analysis by noting that a judgment is void and may be collaterally attacked only where there is a total lack of either subject matter or personal jurisdiction in the court. A voidable order is one that is erroneous and is not subject to collateral attack, but only to direct appeal.

The court noted that “the trend of more recent authority favors finality of judgments over alleged defects in validity.” “Because of the disastrous consequences which follow when orders and judgments are allowed to be collaterally attacked, orders should be characterized as void only when no other alternative is possible.”

The court went on to note that Supreme Court Rule 104(d) states, “failure to deliver or serve copies as required by this rule does not in any way impair the jurisdiction of the court over the person of any party,” and “a defect in service does not render the court’s holding void.” Hence, the trial court had jurisdiction over the parties and the matter, and its order was not void.

In considering whether the trial court’s denial of the motion to vacate was in error, the justices applied the standard of “abuse of discretion,” which requires the moving party to establish sufficient grounds for vacating the judgment. A finding of abuse of discretion will only lie where no reasonable person would take the view adopted by the trial court. Therefore, no finding of abuse was made.

On the issue of whether one needs leave of court before an appearance can be filed, the appellate court held that, where counsel files an appearance after 30 days of receipt of service, leave of court must be obtained. The appellate court also noted that, as a matter of course, leave of court is regularly sought when an additional appearance is filed whether to replace an attorney or for a *pro se* defendant who has secured representation. The common sense of this requirement is that it

provides for the assurance that the court and the parties are properly apprised of the parties and the representation.

Finally, the appellate court deferred to the trial court on the issue of the credibility of the parties as to whether counsel for the plaintiff had received a copy of Attorney Gertzman's appearance. Because the trial court found the file-stamped copy of the appearance which Attorney Gertzman presented in support of his claim that the appearance was served was illegible and because the Attorney Gertzman only made "broad, conclusory arguments that there was no possible outcome but that Plaintiff's Counsel was served," defendant's argument on that point was overruled.

The moral of this story is to always seek leave to file your appearance after 30 days from the date of service have elapsed. ■

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1. The subject opinion was originally a Supreme Court Rule 23 order, written by Justice Michael J. Murphy, who died after this decision was filed. Thereafter, Justices Quinn and Connors granted a motion to publish the decision, which was then published in its original Rule 23 form.