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PUTTING DEFAULT ON THE TENANT: DEFAULTING TENANTS AND WRITTEN APPEARANCES IN EVICTIONS IN ILLINOIS

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By
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Introduction

The adage that home is a castle (at least one you can defend) is not necessarily true in Illinois where evictions are conducted through a summary statutory proceeding,[1] which can transform tenants from lord of the manor to homelessness in a matter of days. Tenants are particularly vulnerable in eviction cases since most are *pro se* and are unaware of the procedural rules.[2] Exacerbating the problem further is that most eviction courts are burdened with huge caseloads and have little time or inclination to protect tenants' rights.[3] Most troublesome, however, is that the Illinois Supreme Court Rules have created a potential procedural ambiguity[4] that allows a trial court to whisk tenants into the street without giving them a chance to defend their housing.[5]

The ambiguity arises, ironically, out of Illinois Supreme Court Rule 181 (b)(2)[6] ("the Eviction Rule"), which was ostensibly implemented in 1970 to simplify the eviction process for tenant defendants.[7]

The Eviction Rule states:

> The defendant must appear at the time and place specified in the summons. If the tenant appears, he need not file an answer unless ordered by the court; and when no answer is ordered, the allegations of the complaint will be deemed denied, and any defense may be proved as if it were specifically pleaded.[8]

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1 735 ILCS 5/9-101 ct. seq (West 2000).

2 *No Time for Justice.* A Study of Chicago Eviction Court, December 2003.

3 *Chicago Eviction Court Bench Book*, February 2001.

4 Supreme Court Rule 181(b)(2), 166 Ill.2d R. 181(b)(2).

5 *Rockford Housing Authority v. Donahue*, 337 III. App. 3d 571; 786 N.E.2d 227 (2003).

6 Supreme Court Rule 181(b)(2), 166 Ill.2d R. 181(b)(2).

7 See the 1974 Supreme Court Rule 101(b), 166 Ill.2d R. 101(b), Committee Comments which recognized that a summons in an eviction should give tenants "as much specific information ... as possible" and criticized trial courts for failing to do so under Supreme Court Rule 181, 166 III.2d R. 181 (b)(2).

8 Supreme Court Rule 181 (b)(2), 166 Il1.2d R. 181 (b)(2).

While the Eviction Rule relieves the tenant of having to file the usual written defense, it oddly fails to address whether written appearances arc still required. This failure allows for an aggressive trial court to dispense with conducting a hearing on the merits by defaulting an unsuspecting tenant for not entering a written appearance.[9] Despite the apparent ambiguity, however, the correct interpretation of the Eviction Rule is that it does not require a written appearance and it is unfair, therefore, for a trial court to default a tenant for failing to do so.

Before discussing the language of the Eviction Rule itself, it is necessary to understand what authority the trial court has in entering a default judgment. Traditionally, the trial court had almost unfettered authority in defaulting tenants regardless of the result.[10] The only limitation on the trial court under the traditional approach was that it had to act within "the bounds of reason."[11] Uncomfortable with vesting too much power in the trial court, a contemporaneous and less deferential approach developed[12] now known as "substantial justice," which focuses on the fairness and not on the rationale of the trial court.[13]

Both standards coexisted until 1960 when the Fourth District Appellate Court in *Widicus v. Southwestern Electric Cooperative, Inc.* effectively rejected the traditional approach by stating the main issue when entering a default judgment is substantial justice.[14] The *Widicus* decision severely limited the authority of the trail court by pointing out that a default judgment is rarely justified and should be used only as a last resort.[15] While the Illinois Supreme Court's adoption of *Widicus* has been somewhat mixed,[16] the modern trend has been to reject the traditional approach and to limit the authority of the trial court to enter a default judgment only to circumstances where it is fair to the parties.[17]

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[9] *Rockford Housing Authority*, 337 III.App.3d at 572.
[10] *Scales v. Labar*, 51 Ill. 232, WL 5312 (Ill.) (1869).
[11] *Venzor v. Carmen's Pizza Corporation*, 235 Ill. App. 3d 1053, 1059; 602 N.E.2d 81 (1992).
[12] *Mason v. McNamara*, 57 Ill. 274, WL 6625 (Ill.) (1870).
[13] *Widicus v. Southwestern Electric Cooperative. Inc.*, 26 Ill. App. 2d 102; 167 N.E.2d 799 (1960).
[14] *Id.* at 102.
[15] *Id.*
[16] In *Patrick v. Burgess-Norton Manufacturing Company*, 63 Ill.2d 524; 349 N.E.2d 52 (1976), the Illinois Supreme court adopted the rationale of *Widicus* and focused solely on substantial justice in evaluating a default judgment. In *People ex rel. Reid v. Adkins*, 48 Ill.2d 402; 270 N.E.2d 841 (1971), the traditional standard was absorbed into the substantial justice standard when the Illinois Supreme Court stated that a trial court abuses its discretion if substantial justice is not done between the parties. However, in *Foutch v. O'Bryant*, 99 Ill.2d 389, 392; 459 N.E.2d 958 (1984), the Supreme Court implicitly relied on the traditional approach without discussing substantial justice. *Foutch* appears to be an aberration, however, in that it was based largely on the defendant's failure to provide an adequate record on appeal.
[17] *Larson v. Pedersen*, 349 Ill. App. 3d 203; 811 NE 2d 1204 (2004); *Mann v. The Upjohn Company*, 324 Ill. App. 3d 367; 753 N.E.2d 452 (2001); *Bank and Trust Company v. Line Pilot Bungee, Inc.*, 323 Ill. App. 3d 412; 752 N.E.2d 650 (2001); *Marren Builders v. Lampert*, 307 Ill. App. 3d 937; 719 N.E.2d 117 (1999); *Biscan v. Village of Melrose Park Board of Fire & Police Commissioners*, 277 Ill. App. 3d 844; 661 N.E.2d 424 (1996); *Venzor*, 235 Ill. App. 3d 1053.

Under the substantial justice approach, therefore, it is unfair for a trial court to use the Eviction Rule to default a tenant for failing to file a written appearance for three reasons. First, the express language of the Eviction Rule does not require a written appearance in forcible entry and detainer actions ("Evictions"). Second, it is unfair for a trial court to enter a default judgment once a tenant answers the complaint by appearing in court.[18] Third, a default judgment is too drastic a remedy and is usually not warranted under the circumstances.[19] A tenant's appearance in court, therefore, effectively denies the authority of the trial court to use the Eviction Rule to enter a default judgment.

A. Written appearances not required

The first reason that it is unfair for a trial court to default a tenant for failing to enter a written appearance is that it is not required when considering the language of the Eviction Rule. When interpreting the Eviction Rule, the normal rules of statutory construction apply which involve examining: 1) the plain language; 2) each section in relation to the whole; and 3) the purpose for enactment.[20] When applying these methods to the Eviction Rule, it is clear a written appearance in Evictions is not required for three reasons.

1. Express language

First, the plain language of the Eviction Rule is that the tenant's presence in court constitutes the entering of an appearance *and* answering the complaint. The Eviction Rule states that "the tenant must appear at the time and place specified in the summons" and "need not file an answer."[21] A formal appearance is made, therefore, when the tenant physically appears before the trial court. Once in court, the Eviction Rule expressly waives the necessity of filing further written documents.[22]

2. Entire Illinois Supreme Court Rule

Second, reading the Illinois Supreme Court Rule in its entirety, it is evident that a written appearance is not required in Evictions. Illinois Supreme Court Rule 181(b) states:

> **When Summons Requires Appearance on Specified Day.**

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[18] 735 ILCS 5/2-1301(d) (West 2000).
[19] *Biscan*, 277 Ill. App. 3d at 848.
[20] *Hill v. Joseph Behr and Sons, Inc.*, 293 Ill. App, 3d 814, 817; 688 N.E.2d 1226 (1997),
[21] Supreme Court 181(b)(2), 166 Il1.2d R, 18I(b)(2).
[22] See *Stamm v. Lucas*, 19 Ill. App. 3d 1086, 1089; 312 N.E. 695 (1974).

> (1) Actions for Money. Unless the "Notice to Defendant" (see Eviction Rule 101(b)) provides otherwise, an appearance in a civil action for money in which the summons requires appearance on a specified day may be made by appearing in person or by attorney at the time and place specified in the summons and making the appearance known to the court, or before the time specified for appearance by filing a written appearance, answer, or motion, in person or by attorney. The written appearance, answer, or motion shall state with particularity the address where service of notice or papers be made upon the party or attorney so appearing. When a tenant appears in open court, the court shall require him to enter an appearance in writing. When an appearance is made in writing otherwise than by filing an answer or motion, tenant shall be allowed 10 days after the day for appearance within which to file an answer or motion, unless the court, by Eviction Rule or order, otherwise directs.
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> (2) Forcible Detainer Actions. In actions for forcible detainer (see Eviction Rule 101(b)), the defendant must appear at the time and place specified in the summons. If the tenant appears, he need not file an answer unless ordered by the court; and when no answer is ordered, the allegations of the complaint will be deemed denied, and any defense may be proved as if it were specifically pleaded.[23]

Illinois Supreme Court Rule 181(b) is divided into two sections and describes how appearances are made in cases in which the summons requires an appearance on a particular day. The first section, 181 (b)(1), states the general rule for entering an appearance and the second section, 181 (b)(2), is an exception for Evictions. The first section expressly states that defendants are required to file a written appearance when appearing in court.[24] The second section for Evictions, however, omits all language regarding a written appearance and simply states that a tenant must appear at the place specified in the summons. The Eviction exception is significant for several reasons. First, entering an appearance in Evictions is different from other civil matters or there would be no need for the express exception. Second, the only purpose for omitting the written appearance language for Evictions is that is not required. To conclude otherwise would make section 181(b)(2) meaningless because it would be redundant of section 181(b)(1). It is the intent of Illinois Supreme Court Rule 181(b), therefore, to require written appearances in actions for money but not in Evictions.

3. Written appearances unnecessary

[23] Supreme Court 181(b)(2), 166 Ill2d R, 181(b)(2).
[24] Supreme Court 181(b)(1), 166 Ill2d R. 181(b)(1).

Third, when considering the purpose of Evictions, it is evident that a written appearance is not required. The purpose of Evictions is to summarily decide property claims as evidenced by the Eviction Rule waiving the necessity of a written answer, which is, arguably, more crucial to litigation than a written appearance. Further, a written appearance is unnecessary in Evictions. The function of a written appearance is to determine jurisdiction and to facilitate subsequent filings.[25] There is usually no issue of jurisdiction in Evictions since both parties are in court. Also, having a written appearance in the court file does not aid any subsequent filings since it is unlikely there will be any. Even if there were to be additional filings, however, a tenant is obviously a named party and the complaint will contain the tenant's address. It is contrary, therefore, to the purpose of a summary proceeding to require the unnecessary formalities of a written appearance when a tenant is standing before the court having already answered the complaint. The purpose of the Eviction Rule, therefore, does not require a written appearance. Since the purpose and language of the Eviction Rule waive a written appearance, it is unfair for a trial court to default a tenant for failing to file a written appearance.

B. Complaint has been answered

The second reason it is unfair to enter a default judgment is that tenant's presence in court answers the complaint. The trial court may default a tenant for "want of an appearance, or for failure to plead.[26] As stated above, a tenant's physical appearance in court is an appearance and an answer denying the allegations of the complaint.[27] Courts have long recognized that once the complaint has been answered, it is an error for the trial court to enter a judgment of default.[28] An answer necessitates a hearing on the merits.[29] This necessity is particularly true in summary proceedings.[30] Consequently, it is unfair for the trial court to default a tenant for failing to file a written appearance once the complaint has been answered.

C. Default too drastic an action

The final reason it is unfair to default a tenant for not entering an appearance is that it is too drastic a measure. Even if, *arguendo*, a tenant is required to enter a written appearance, failing to do so docs not merit a default

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[25] See Supreme Court Rule 104, 134 Il1.2d R. 104, and 735 ILCS 5/2-301 (West 2000) *et seq*.
[26] 735 ILCS 5/2-1301(d) (West 2000),
[27] See *Stamm*, 19 Ill. App. 3d at 1089.
[28] See *Dils v. City of Chicago*, 62 Ill. App. 3d 474, 479; 378 N.E.2d 1130 (1978); citing *Martin v. Mathews*, 70 Ill. App. 504, 506 (1896) and *Apperson v. Gogin*, 3 Ill. App. 48, 55 (1878).
[29] *Dils*, 62 Ill. App. 3d at 479.
[30] *Ryan v. Bening*, 66 Ill. App. 3d 127, 132; 383 N.E.2d 681 (1978).

judgment.[31] A default is an extreme measure, which is rarely warranted.[32] The factors for determining if the trial court acted fairly in entering a default judgment include: the tenant's diligence; the severity of the penalty; and the hardship on the plaintiff for not entering the default.[33] Further, the entering of a default judgment is subject to close scrutiny.[34]

For example, it is unfair for a trial court to default a tenant for failing to: reappear in court after filing a counter claim;[35] file an answer that was not ordered by the court;[36] and file a timely answer.[37] Similarly, defaulting a tenant for not entering a written appearance is unfair. First, a tenant simply appearing in court on time for an Eviction demonstrates due diligence. Second, the penalty to tenants of entering a default judgment is severe because they are deprived of the chance to defend their housing even from an illegal eviction or from a party who may not even own the property. Conversely, the only burden generally on the landlord for not entering a default judgment is proving the allegations of the complaint.[38] Since the hardships are usually overwhelming against a tenant in an Eviction,[39] a hearing on the merits is virtually mandatory.

Further, the trial court generally has less drastic options available than ordering a default, including: having a hearing on the merits without further filings; ordering a tenant to file an appearance;[40] giving the tenant an appearance form; or continuing the matter to allow the tenant the time file an appearance. Without exploring and exhausting all of these options, a trial court lacks the authority to order a default. Consequently, absent a tenant failing to appear for a trial, a default judgment can rarely be justified by the trial court.

In summary, it is unfair for a trail court to default a tenant for not entering an appearance in an Eviction. Despite the pressures of a busy docket, a trial court should not use the Eviction Rule as sword but rather as a shield to ensure that tenants receive their day in court.

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[31] *Biscan*, 277 Ill. App. 3d at 848.
[32] *Id.*
[33] *Wilken Insulation Company v. Holtz*, 186 Ill. App. 3d 151, 155; 542 N.E.2d 157 (1989).
[34] *People v Kruger*, 146 Ill. App. 3d 530, 534, 495 N.E.2d 993 (1986).
[35] *Ryan*, 66 Ill. App. 3d at 131.
[36] *Freeborn & Peters v. Professional Seminars Associates, Inc.*, 176 Ill. App, 3d 714, 719; 531 N.E.2d 806 (1988).
[37] *Durham v. Rockford Mutual Insurance Company*, 169 Ill. App. 3d 211, 214; 523 N.E.2d 670 (1988).
[38] *Rockford Housing Authority*, 337 Ill. App.3d at 576.
[39] *Id.*
[40] *Biscan*, 277 Ill. App. 3d at 848.