

## The Citywide Realty Company Case and the Handling of Confessions of Judgment in the State of Illinois

The practicing bar should be alerted to the existence of the Citywide Realty Company case and its implications and limitations in the handling of Confessions of Judgment. It is hoped that the major clarification in the handling of confession matters brought about by the case will give impetus to the long overdue and much needed amendment of Rule 276 of the Supreme Court of the State of Illinois.

By Edward S. Margolis

Emerging from the pages of the June 1979 advance sheets is a case which should be of significant interest to the practicing bar in Illinois. The Illinois Appellate Court in *Citywide Realty Company v. Fryer*, 70 Ill. App. 3d 649, granted leave to the appellants to file an interlocutory appeal on the question of the propriety of filing an answer, affirmative defense, and counterclaim in response to a summons to confirm a judgment by confession without first opening such judgment as required by Rule 276 of the Supreme Court of the State of Illinois.

Judge Mejda, in a well-reasoned opinion, makes the distinction between the procedures initiated by the plaintiff in confirming a judgment by confession and those initiated by the defendant under Rule 276 to vacate such judgment by confession. The court concludes that it is not necessary for the defendant to proceed under Rule 276 as a pre-condition to filing a responsive pleading in the confirmation proceedings.

While it is essential for the practicing bar to be alerted to the existence of the Citywide Realty case, it is of equal importance that there be a general understanding of its limitations. This decision, which gives the defendant the right to a trial de novo on the merits upon receipt of a confirmation summons, clarifies one of the most confusing aspects of the confession of judgment procedure in the State of Illinois. It does not, however, give the practicing lawyer any further insight as to the current status of the plaintiff's judgment by confession.

Before discussing problems which will confront practitioners in the post-Citywide Realty Company era, a brief discussion of the procedures involved in confessing judgment in the State of Illinois is in order. Almost every practicing attorney, at one time or another, is called upon by a client to confess judgment on a note or other instrument which is in default. The relevant section of the Civil Practice Act which addresses itself to this question is Section 50(3):

***Any person for a debt bonafide may confess judgment by himself or attorney duly authorized, without process. The Application to Confess Judgment shall be made in the county in which the note or obligation was executed or in the county in which one or more of the defendants reside or in any county in which is located any property, real or personal, owned by any one or more of the defendants ....***

It would appear from the language of Section 50 that obtaining a judgment by confession does not present a difficult problem under the law of the State of Illinois. While this may be true, enforcement of any such judgment is quite another matter. In reviewing the provisions of Illinois law applicable to the enforce- "It would appear from the language of Section 50 that obtaining a judgment by confession does not present a difficult problem under the law of Illinois." ment of judgments by confession, one becomes aware of a certain writ known as the "Summons to Confirm Judgment by Confession." This writ apparently has its origins in the Illinois Garnishment Act, Chapter 62, Section 82 of the Illinois Revised Statutes, wherein it is stated as follows: A judgment by confession -without service of process on the defendant shall not be the basis of seeking a Deduction Order unless such judgment is confirmed after service of process by a trial de novo as it such Confession of Judgment had not been obtained .... It now becomes clear that one cannot go from a judgment by confession directly to the issuance of a wage deduction summons without first taking the intervening step of confirming the judgment by confession. Further limitations on the rights of a plaintiff who has obtained a judgment by confession are found in Section 6.4 of the general Orders-Circuit Court of Cook County: (b) The Clerk of the Circuit Court of Cook County shall not accept an Affidavit for a Non-Wage Garnishment and shall refuse to issue Summons in such proceeding based upon a Judgment by Confession unless such judgment is confirmed after service of process. (c) The Clerk of the Circuit Court of Cook County

shall not issue a Citation to Discover Assets, Rules to Show Cause, and Warrants for Arrest based on judgments entered by confession unless such judgments are confirmed after service of process. The general orders of the Circuit Court of Cook County when read in conjunction with the restrictions set out in the Garnishment Act present a formidable barrier to a plaintiff seeking enforcement of a judgment by confession in Cook County. It is clear that such plaintiff may not proceed by way of garnishment, wage or non-wage, and may not initiate supplementary proceedings as provided by Section 73 of the Civil Practice Act of the State of Illinois. A simple solution to this problem is for the plaintiff to proceed to have "An infinitely more complex problem in the pre-Citywide Realty era arose when an attorney received the so-called summons to confirm judgment by confession." summons issued to confirm the judgment by confession, as a confirmed judgment by confession is enforceable in the same manner as any ordinary judgment. An infinitely more complex problem in the pre-Citywide Realty era arose when an attorney received the so called summons to confirm judgment by confession. Often, this was the first time that the defendant had any notice that a judgment had been entered against him. At this point, the practitioner was confronted by a dilemma. While the summons to confirm judgment by confession instructs the defendant to file his appearance in the instant "confirmation proceedings", time was running against him in connection with the vacation of the original judgment by confession. As noted by Judge Mejda, the procedure for vacating a judgment by confession is separate and apart from the confirmation procedures and is governed by Rule 276 of the Supreme Court of the State of Illinois, which states as follows: A motion to open a Judgment by Confession shall be supported by Affidavit in the manner provided by Rule 191 for Summary Judgment and shall be accompanied by a Verified Answer which the defendant proposes to file. If the Motion and Affidavit disclose the prima facie defense on the merits on the whole or part of the plaintiff's demand, the Court shall set the Motion for hearing. The plaintiff may file counter-affidavits. If at a hearing upon the Motion it appears that the defendant has a defense on the merits to the whole or part of the plaintiff's demand and that he has been diligent in presenting his Motion to open the judgment, the Court shall sustain the Motion either as to the whole of the judgment or as to any part thereof as to which a good defense has been shown and the case shall thereafter proceed to trial upon the Complaint, Answer, and any further Pleadings which are required or permitted . . . The original judgment stands as security, and all further proceedings are stayed until the further Order of Court, but if the defense is to a part only of the original judgment, the judgment "As noted by Judge Mejda, the procedure for vacating a judgment by confession is separate and apart from the confirmation procedures . . ." stands as to the balance and execution may issue thereon. Under the Citywide Realty Company Case, the defendant need no longer worry about vacating the judgment by confession pursuant to Rule 276 in order to respond to a summons to confirm judgment by confession. While this, on the surface, appears to simplify procedures for the defendant, and to afford him additional protections under the law, there are still traps built into the law of confession of judgment lying in wait for the unwary practitioner. The basic problem goes to the nature of the judgment by confession itself. While one might speculate that the unconfirmed judgment by confession in the State of Illinois is unenforceable, practitioners must be on their guard as to the possibility that a plaintiff might enforce his unconfirmed judgment by way of personal property levy or by filing a memorandum of judgment on the unconfirmed judgment, thus creating a judgment lien against the defendant's real property. Further, outside of the County of Cook, there seems to be no prohibition whatsoever on a judgment creditor proceeding by way of a nonwage garnishment or through supplementary proceedings, commonly known as a Citation to Discover Assets, as provided in Section 73 of the Civil Practice Act. Although such procedures, it could be argued, are the taking of property without due process, it is clear that the Garnishment Act does not prohibit such enforcement measures. Further, it might be persuasively argued that a person who signs a confession note or other instrument knowingly has waived any rights to notice and has given his consent to the attachment of his personal property or to the imposition of a lien on his real estate. A logical cure to this dilemma would be to amend Rule 276 of the Supreme Court of the State of Illinois to once and for all define the effect of confirmation proceedings on a judgment entered by confession. It is clear that the Court in the Citywide Realty Company case intended that the plaintiff relinquish something at the time that confirmation proceedings are instituted, and the ruling without question states that it is clear that the court in Citywide Realty intended that plaintiff relinquish something at the time that confirmation proceedings are instituted. the plaintiff can no longer prevent the defendant from filing responsive pleadings by insisting that the defendant first proceed under Rule 276 to vacate the judgment by confession. Citywide Realty, however, goes no further and does not seem to put any limitation upon the plaintiff's right to proceed with other enforcement measures either prior to or during the pendency of confirmation proceedings which could hypothetically involve protracted discovery and even a trial by jury. Through the appropriate amending of Rule 276 of the Supreme Court of the State of Illinois in the post-Crtv/-wide Realty Company era, the remaining confusion concerning confessions of judgment in the State of Illinois can be remedied once and for all. It is herewith proposed that the following paragraph be added to the currently existing Rule 276: However, where a Plaintiff has served upon the Defendant Summons to Confirm Judgment by Confession, the Defendant upon filing an Appearance and Answer shall be entitled to a Trial de novo. Upon the filing of an Appearance and Answer by the Defendant, the Judgment by Confession shall be opened without further proceedings, and the Plaintiff shall be foreclosed from undertaking any measures to enforce the open Judgment by Confession. During the pendency of the Confirmation Proceedings, the Judgment by Confession shall stand as security. Under the proposed amendment to Rule 276, defendant appearing pursuant to a confirmation summons and filing his response thereto could not be subject to enforcement measures against him on the underlying judgment by confession. The plaintiff, on the other hand, would retain the judgment as security, but would be unable to levy on the defendant's personal property, encumber the defendant's real property, or enforce the judgment by means of garnishment or citation to discover assets pending the disposition of the confirmation proceedings. It is hoped that this article will serve to inform the practicing bar of the existence and implications of the Citywide Realty Company v. Fryer decision and will serve as an impetus to the long overdue amending of Rule 276 of the Supreme Court of the State of Illinois, which for so long has been a singular source of frustration and confusion to all practitioners who have had the experience of handling judgments by confession.