

2012 IL App (2d) 120056-U
No. 2-12-0056
Order filed August 21, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
MARTIN L. VUTTERA,)	of Winnebago County.
)	
Petitioner-Appellee,)	
)	
and)	No. 07-D-883
)	
SANDRA L. VUTTERA,)	Honorable
)	R. Craig Sahlstrom,
Respondent-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

Held: The trial court properly dismissed respondent's section 2-1401 petition.

¶ 1 In January 2009, petitioner, Martin L. Vuttera, and respondent, Sandra L. Vuttera, divorced. In December 2010, respondent moved pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)), to vacate the dissolution judgment. In response, petitioner moved pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), to dismiss respondent's petition. The trial court granted petitioner's motion to dismiss, and respondent appeals. For the following reasons, we affirm.

¶ 2

I. BACKGROUND

¶ 3

A. Petition for Dissolution and Judgment

¶ 4 The parties were married on September 4, 1965. On July 18, 2007, after 42 years of marriage, petitioner filed a petition to dissolve the marriage. At the time of the dissolution proceedings, petitioner, age 65, was a retired firefighter and respondent, age 65, was a part-time nurse.

¶ 5 On January 5, 2009, the trial judge held a pretrial conference to determine a settlement agreement. Neither petitioner nor respondent was present, but both were represented by counsel.¹ After the conference, with both parties in attendance, the court conducted a prove-up hearing. There, the trial judge advised the parties that, at the pretrial conference, “Both of your attorneys were forceful advocates for you. We didn’t go in the back and get together and come up with some agreement.” The judge advised the parties of his opinion, based on the information presented at the pretrial conference, as to an equitable and appropriate settlement of the dissolution petition. The judge explained that he had examined the parties’ financial situation “and tried to find something that I thought was fair to both parties.” Specifically, the judge found that, in his opinion, an equal division of the marital estate, which totalled about \$400,000, would be most appropriate. Taking into account the length of the parties’ marriage and their disparity in income (petitioner’s income

¹The pretrial conference transcript (if one was transcribed) was not included in the record on appeal. To the extent respondent challenges representations or recollections of what occurred therein, we must assume the court’s order was proper. See *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92 (1984) (Appellant bears the burden to present a sufficiently complete record to support his or her claims of error, whether by a hearing transcript, bystander’s report, or agreed statement of facts).

from his pension and respondent's income from her part-time employment), the judge further found permanent monthly maintenance of \$1,750 (which he believed to be about 32% of petitioner's monthly pension income²) to respondent would be appropriate. The judge commented on respondent's opportunity to increase her monthly income by investing her \$200,000 in liquid assets from the division of the marital estate. The judge clarified to the parties that, after listening to his opinion and advice, "you don't have to accept it. You can have the hearing if you want." The judge stated, however, that, unless the testimony at the hearing was "substantially different from what I've gone through with you now concerning the numbers and what the attorneys have told me in the back, you'd probably come up with, essentially, the same result, applying the same reasoning." The court told the parties they could meet and discuss it with their counsel, reiterating that "you don't have to accept what I've just said."

¶ 6 After a short recess, the parties returned with an agreement. Petitioner testified first to the terms of the agreement. Specifically, petitioner testified that he understood that numerous accounts had been acquired over the course of the marriage, and that, while some accounts were large, their values had been severely fluctuating in the market. He agreed that "we are going to get together and do an evaluation so that there can be an equal division of those accounts." Further, petitioner testified that respondent would receive the marital residence, but the value of the marital residence would be included in the total of all marital accounts,³ which would then be equally divided.

² It does not appear that petitioner's annual pension income was ever noted for the record. Respondent concedes this in her amended section 2-1401 petition; nevertheless, she alleges that petitioner's annual pension income was \$85,000.

³ Although not in the record, respondent concedes that the value of the marital residence is

Petitioner agreed that respondent would keep whatever household goods and furnishings she had, and that \$1,750 would be withheld each month from his pension check as permanent maintenance to her. Further, petitioner agreed that, if he received a cost-of-living allowance, respondent's maintenance would increase to equal 31% of that allowance, "in keeping with the 31 percent that reflects the amount of maintenance [petitioner would be] paying." Finally, petitioner agreed to provide respondent with \$1,000 toward her attorney fees. Petitioner waived his right to request maintenance from respondent.

¶ 7 Respondent next testified to her understanding of the agreement. Specifically, respondent confirmed for her counsel that she: (1) was present in court to hear petitioner's testimony; (2) "participated this morning and previously in discussions with me regarding negotiations back and forth regarding the property issues and the maintenance issues;" and (3) was present in court earlier to hear the trial judge's recommendation regarding maintenance and property issues. She was asked, "And after a couple of adjustments, have you agreed to resolve the case on all issues in a manner consistent with the testimony given here" by petitioner. Respondent replied, "yes," and further testified that: (1) she believed that the terms were fair and equitable; (2) she was neither coerced nor forced into accepting the terms of the agreement; and (3) no one promised her anything beyond what was presented in court. Respondent next agreed that she was "asking the court to accept the oral agreement that we've reached today and that was presented by your husband and to incorporate the terms of that agreement into the ultimate judgment for dissolution of marriage."

¶ 8 The court found that the parties had resolved all financial issues, including maintenance and attorney fees, "as testified to by [petitioner.]" The court ordered that the agreement be reduced to a

approximately \$110,000.

written judgment, granted the dissolution, and retained jurisdiction “to see that the financial agreements of the parties are, in fact, followed through upon.”

¶ 9 On February 12, 2009, the written judgment was filed. The judgment reflected the parties’ oral settlement agreement as testified to at the prove-up hearing: the parties would equally divide all marital accounts; petitioner was awarded his pension as his sole property; petitioner would withhold from his pension as maintenance to respondent \$1,750 monthly and, if and when petitioner’s pension received a cost-of-living increase, maintenance would increase in amount equal to 31% of the cost of living increase; respondent would be awarded the household goods and furnishings currently in the marital residence; and respondent was awarded the marital residence as her sole property, subject to petitioner receiving a credit against the marital accounts for one-half of the value of the marital residence.

¶ 10 B. Post-Judgment Proceedings

¶ 11 On December 17, 2009, petitioner filed a petition for rule to show cause, alleging that respondent refused to divide the marital property in half per the judgment.

¶ 12 On January 21, 2010, respondent changed counsel. Respondent’s new counsel filed a response to petitioner’s petition for rule to show cause, denying the allegations. Respondent then filed a motion to continue the hearing because petitioner had not provided respondent with specific asset valuations and respondent’s former counsel had yet to provide respondent’s new counsel with a copy of respondent’s file (this motion was granted on January 28, 2010). Respondent also filed a petition to show cause because petitioner had been paying \$1,250 a month in maintenance instead of the required \$1,750.

¶ 13 On June 28, 2010, respondent changed counsel a second time, and, on October 28, 2010 respondent changed counsel a third time (to her current counsel). At that time, respondent's current counsel filed a petition to modify/increase maintenance on the basis that she had retired. On December 22, 2010, respondent filed a section 2-1401 petition to vacate the court's judgment for dissolution.

¶ 14 On February 8, 2011, a hearing was conducted to address respondent's petition to modify/increase maintenance. Respondent's counsel argued that a \$1,000 increase in monthly maintenance was proper due to respondent's retirement and because her current monthly maintenance payments were not one-half of petitioner's monthly pension income. After having an in-depth discussion on the parties' finances, income, and respondent's share of the judgment, the court ordered a temporary maintenance increase of \$600 per month, which amounted to a monthly maintenance of \$2,560 (alleged to be 40% of petitioner's monthly income).⁴ Although not scheduled to be heard at that time, allegations were raised regarding respondent's section 2-1401 petition to vacate. Specifically, respondent argued that the settlement agreement was unconscionable because respondent would stop receiving maintenance payments when petitioner died. The trial judge, however, recalled that respondent had chosen to receive her portion of petitioner's pension in the form of maintenance payments, and noted that, when a pension is divided in such a manner, those payments stop when the pensioner dies. The court explained that petitioner could have taken out a life insurance policy to secure the maintenance payments, "but that wasn't bargained for" and "I'm not going to make him do it now." Additionally, the judge defined the meaning of unconscionable

⁴It is not clear from the record whether this "temporary" increase continues.

as “something that shocks your conscience,” and found, “So far my conscience hasn’t been shocked.”

¶ 15 On April 4, 2011, petitioner moved, pursuant to section 2-615 of the Code, to dismiss respondent’s section 2-1401 petition to vacate. On May 25, 2011, a hearing commenced on the petition to vacate and motion to dismiss. At this hearing, the parties and the trial judge acknowledged that an evaluation of the pension had occurred before the dissolution judgment, and the judge commented, “there was a fairly lengthy discussion concerning what their assets were.” The judge recalled that respondent originally wanted one-half of the pension and maintenance, but that she eventually decided to receive the pension in maintenance form. The judge stated that “none of this was done in secret,” and that, in giving his suggestions on the division of marital property and maintenance, he did not actually pronounce anything. The judge further recollected telling the parties at the prove-up that “you don’t have to accept any of this” (referring to his suggestions), and “you’re entitled to a hearing.” The court pointed out that the parties formed an agreement on their own terms. At the end of the hearing, the judge decided to resume the discussion at a later date.

¶ 16 C. Amended Section 2-1401 Petition

¶ 17 In the interim, however, on June 13, 2011, respondent filed an amended section 2-1401 petition, alleging that she exercised due diligence before filing the petition and arguing that the judgment should be vacated because it was unconscionable and ambiguous, there were mistakes of fact, and she experienced duress and coercion before it was entered into.

¶ 18 As to due diligence before filing the petition, respondent alleged: (1) she was distressed during the dissolution settlement proceedings and subsequently sought psychological assistance and a leave of absence from work; (2) because the parties’ accounts were not specified in the judgment,

respondent's counsel was attempting to identify the relevant accounts, ascertain the balances thereof, and divide the same; (3) respondent changed counsel multiple times; (4) respondent's counsel had difficulty obtaining information from previous counsel and petitioner's attorney; and (5) when she was able, respondent consulted Deborah Aurand, C.P.A., regarding her financial status.

¶ 19 The petition claimed that the settlement agreement was unconscionable because: (1) respondent had been unable to review and sign the settlement agreement; (2) petitioner was receiving \$200,000 in financial accounts and \$1.6 million from his pension, while respondent was receiving only the house worth \$110,000 and \$90,000 in financial accounts; (3) respondent was receiving \$1,750 in monthly maintenance, though the court said she would be receiving 32% of petitioner's pension income each month (which she alleged should have been \$2,266); (4) the court told respondent that she would have \$200,000 to invest from the marital accounts; (5) petitioner's testimony at the prove-up contradicted what the trial judge told the parties at the prove-up, allegedly resulting in her receiving 54% less to invest; (6) no one at the prove-up stated which party would be awarded petitioner's pension as property, but the judgment awarded petitioner the entire pension; (7) no provision was made to insure that respondent continue to receive a portion of the pension for the remainder of her life, such that "if [respondent] dies before [petitioner], he ceases to pay maintenance effectively awarding him 95%. If [petitioner] dies before respondent, she has received only 5%;" (8) if the pension is not considered property, is it unconscionable that respondent receives only 32% of the pension stream of income; and (9) respondent has to pay state and federal taxes on the maintenance, while petitioner only pays federal taxes on his pension income.

¶ 20 Further, the petition claimed that there was a mutual mistake of fact because: (1) the court said respondent should receive 32% of the monthly pension income, but the judgment only allowed

for \$1,750; (2) the court told respondent that she would receive \$200,000 to invest, but she received 54% less in the judgment; and (3) respondent's age and possible retirement were never taken into account.

¶ 21 As to ambiguity, the petition claimed that the judgment was ambiguous because: (1) it listed no specific accounts or financial assets that were to be divided; (2) it failed to list the value of the marital residence; and (3) it did not take into account petitioner's pension.

¶ 22 Finally, as to coercion/duress, the petition alleged: (1) respondent's former counsel told her to accept the court's recommendation from the pre-trial conference in which she was not present; (2) the pension was never mentioned at prove-up; (3) respondent did not know what she was agreeing to at the prove-up; (4) because the court stated at the prove-up that it would probably come up with the same conclusion after a hearing, respondent "could not have known" whether she could request a modification of the agreement's terms; (5) respondent was under emotional distress during the court proceedings; (6) respondent did not have an opportunity to personally review and sign the judgment; and (7) respondent's counsel told her that to appeal would be to question the decision of the court, therefore, despite respondent's request, no motion to reconsider was filed.

¶ 23 Respondent's affidavit was attached to the petition to vacate. The affidavit asserted that: (1) respondent was coerced by her former counsel; (2) during the prove-up, respondent was in an emotional state and remembers almost nothing about it; (3) after the prove-up, respondent sought psychological help and began taking medication for her emotional state; (4) respondent's previous counsel told her that an appeal would be costly and that the judge would not likely change his mind; (5) respondent sought help from a financial advisor, but this evidence was not used in court; (6) respondent did not know what she was supposed to receive from the judgment because it was

ambiguous; (7) petitioner's counsel refused to provide statements and documentation of the financial balances; and (8) respondent's future is not secure because, if petitioner dies, respondent has only social security income on which to live.

¶ 24 On June 30, 2011, petitioner again moved pursuant to section 2-615 of the Code to dismiss the amended petition to vacate. The motion to dismiss stated that respondent failed to plead specific facts that occurred that would have precluded the entry of a judgment, respondent did not plead a meritorious defense, and respondent did not exercise due diligence.

¶ 25 At a November 17, 2011, hearing on the amended petition and motion to dismiss, the trial court found that there was no fraud, duress, or coercion involved when respondent agreed to the terms of the settlement agreement. Specifically, the court stated:

“under oath, your client [respondent] was asked has anyone coerced you or forced you in anyway to accept these terms. And her answer was no. Has anyone promised you anything outside of what's been presented here in court? And, again, her answer was no. And she said these things under oath. She was under no apparent disability. She was able to read, write, and understand the English language.”

The court also addressed respondent's argument that the agreement was unconscionable, emphasizing that respondent was relying on figures discussed in the pre-trial conference, which were only a summary before the agreement was created. The court reminded the parties that, if its figures from the pre-trial conference were in error, “the parties could have gone back.” Moreover, the judge stated that he could not find the agreement unfair or unconscionable on its face, and that, if it were unconscionable, he would not have accepted it. The court noted that the parties were both

represented by attorneys and had, after dealing with each other at arm's length, arrived at a negotiated settlement.

¶ 26 On December 8, 2011, the court granted petitioner's motion to dismiss the amended section 2-1401 petition. Respondent appeals.

¶ 27

II. ANALYSIS

¶ 28 On appeal, respondent argues that the trial court erred in dismissing her amended section 2-1401 petition to vacate the marital settlement agreement. Respondent requests that this court grant the section 2-1401 petition to vacate because: (1) the settlement agreement was unconscionable; (2) respondent was under coercion/duress; (3) a mistake of fact and ambiguity existed; and (4) she exercised due diligence in filing the petition. In the alternative, she requests that we remand the cause to the trial court for an evidentiary hearing on the merits of the petition. For the following reasons, we reject respondent's arguments and affirm.

¶ 29 Section 2-1401 provides a procedure for vacating a judgment older than 30 days. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). However, the statute provides that, unless the petition could not have been brought earlier due to legal disability and duress or because the ground for relief was fraudulently concealed, section 2-1401 petitions for relief must be filed no later than two years after the entry of the order or judgment. 735 ILCS 5/2-1401(c) (West 2010). For respondent to receive relief under section 2-1401, she must assert specific facts that support the following elements by preponderance of the evidence: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 30; *Vincent*, 226 Ill. 2d at 7-8. The purpose of such a petition is to bring before the court

that rendered judgment facts that, if known at the time judgment was made, would have precluded its entry. *In re Marriage of Johnson*, 339 Ill. App. 3d 237, 241 (2003). Relief is available under section 2-1401 if the settlement agreement is unconscionable or if it was made due to duress, coercion, or fraud. *Roepenack*, 2012 IL App (3d) 110198, ¶ 30.

¶ 30 Section 2-1401 petitions are subject to dismissal for want of legal or factual sufficiency. Specifically, a section 2-1401 petition may be dismissed where the allegations, taken as true, do not state a meritorious defense or diligence under section 2-1401 case law. *Vincent*, 226 Ill. 2d at 8. We review *de novo* an appeal of a dismissal of a section 2-1401 petition. *Id.* at 18.

¶ 31 A. Unconscionability

¶ 32 Respondent argues that the settlement agreement is unconscionable because the court did not equally divide the pension and other marital accounts. She argues that, while petitioner received \$200,000 in liquid assets and a pension allegedly worth \$1.6 million, respondent received the marital residence worth \$110,000, only \$90,000 in liquid assets, and maintenance in the amount of \$1,750 per month—payments which will not survive petitioner. Respondent argues that the pension should have been equally divided as property and not maintenance. Respondent concludes that, after a 44-year marriage, she received only 35% of the financial assets and only 31% of the pension pay out as maintenance. Finally, she argues that the trial court never acknowledged her entitlement to 50% of the value of the pension, and that, instead, petitioner is receiving his entire pension with no corresponding setoff award to respondent.

¶ 33 When reviewing a claim that an agreement is unconscionable, courts look to two factors: (1) the conditions under which the agreement was made; and (2) the economic circumstances of the parties that result from the agreement. *In re Marriage of Bielawski*, 328 Ill. App. 3d 243, 251

(2002). A settlement agreement is unconscionable when a lack of meaningful choice by one of the parties exists together with contractual terms that are unreasonably favorable to the other party. *Id.* at 250. However, a mere favoring of one party over another is not enough to find a settlement agreement unconscionable. *In re Marriage of Gorman*, 284 Ill. App. 3d 171, 181 (1996). The agreement must be found completely one-sided or oppressive. *Id.* at 182.

¶ 34 Contrary to respondent's arguments, the agreement here is not completely one-sided or oppressive. Although respondent repeatedly suggests that she improperly and unconscionably received maintenance instead of property, she ignores that the record reflects that she chose to receive her pension interest in the form of maintenance and that she was *also* awarded property in the form of: (1) the marital residence as her sole property; (2) personal property; (3) household goods and furnishings; and (4) one-half of the marital financial accounts. The assets granted to petitioner and respondent equaled \$200,000 each. Although petitioner was awarded the pension as his property, the judgment obligates him to take \$1,750 of that monthly pension income and pay it to respondent as maintenance. In fact, because those numbers were calculated when respondent was working (and petitioner was not), on February 8, 2011, after respondent retired, the trial judge increased the maintenance payments to about 40% of petitioner's monthly pension income. In other words, even if petitioner received the pension as property, he did not receive it free and clear of *any* responsibility to share it with respondent.

¶ 35 Further, respondent was represented by counsel and participated in the negotiated settlement, factors which weigh against unconscionability. See *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 220 (1984) (because respondent actively participated in the negotiations, the agreement was not unconscionable); *In re Marriage of Steadman*, 283 Ill. App. 3d 703, 710 (1996)

(noting that the record reflected the wife was unhappy with the settlement terms, but that “this unhappiness does not negate the fact that she stated under oath to counsel and the trial court that this was her agreement” and, moreover, that, when assessing unconscionability, it is significant that the parties negotiated at “arms length with the aid of counsel”). The trial judge recalled the negotiations and commented, after the settlement, that, although the parties’ did not have to accept his recommendations, the parties’ attorneys acted as “forceful advocates” and had engaged in in-depth discussions, at arm’s length, on the assets in question. See *Hamm-Smith*, 261 Ill. App. 3d at 220 (where circumstances not unconscionable because each party was represented by a different attorney).

¶ 36 Respondent tries to minimize her participation in the negotiated settlement terms, essentially alleging in her petition and on appeal that she did not understand the terms to which she was agreeing, could not help her attorney because she did not know anything about their finances, and repeatedly asserting that the pension was not mentioned at the prove-up hearing. However, these assertions are belied by the record. For example, the trial judge personally recalled during the May 25, 2011, hearing, that respondent, through counsel, had agreed at the settlement conference to receive the pension in the form of maintenance payments. The trial court recalled that, in the conference, respondent wanted the pension and maintenance but the parties negotiated that, instead, respondent would receive only maintenance from the pension. The court’s recollection is consistent with the parties’ testimonies at the hearing. There, petitioner testified that the parties agreed that he would pay respondent \$1,750 from his pension check as permanent monthly maintenance. Then, in her testimony, respondent affirmed, under oath, that she participated in negotiations regarding the property and maintenance issues, that she heard the trial court’s recommendations and petitioner’s

testimony regarding the settlement they reached while in recess, and that “after a couple of *adjustments*,” (emphasis added.) she wished to resolve the case *in a manner consistent with petitioner’s testimony*.

¶ 37 Respondent’s claim that the agreement was unconscionable because the court was mistaken in its calculations at the prove-up is unfounded because these calculations were mere suggestions made by the judge that he repeatedly told the parties they did not have to accept. Indeed, before the parties recessed and returned with their final agreement, the trial judge reiterated that they could have a hearing and that they did not have to accept his suggestions. Further, at no time during the prove-up did either party bring to the court’s attention that his suggested calculations were incorrect. The parties agreed to their own terms, and respondent testified that these terms were fair. Although the agreement was decided within a short time at the prove-up, the parties had negotiated the terms at arm’s length, and the written judgment was not entered for over one month, during which time respondent made no objections. Again, even if the agreement favors petitioner, that circumstance alone does not make it unconscionable. *In re Marriage of Riedy*, 130 Ill. App. 3d 311, 318 (1985).

¶ 38 B. Coercion or Duress

¶ 39 Respondent alleged that the settlement agreement was made under coercion or duress because the trial judge pressured and misled her when he stated after the pre-trial conference that, if a hearing were held, he would “probably come up with the same” decision. Moreover, respondent again argues that the pension was never referred to during the prove-up or in the judgment, consequently, she had no reason to know what she was agreeing to, and that the pension should be treated as property to be divided. Further, respondent argues that she was not aware that she was agreeing to terms different from the suggestions made by the court. Finally, respondent contends that she did

not know how divorce was handled in court, her attorney suggested she could not challenge the court's decision, and that she was under emotional distress during the proceedings.

¶ 40 A finding of coercion or duress consists of an agreement made under oppression, undue influence, or the taking of undue advantage of the stress of another resulting in deprivation of that party's free will. *In re Marriage of Tabassum*, 377 Ill. App. 3d 761, 775 (2007). Coercion and duress essentially have the same meaning. *Id.* The burden of proof falls to the party asserting coercion/duress; as a result, that party must show, by clear and convincing evidence, that she was without the quality of mind essential to the making of the agreement. *Id.*; *Hamm-Smith*, 261 Ill. App. 3d at 215.

¶ 41 For many of the reasons discussed in our rejection of respondent's unconscionability claim, we reject respondent's claim that the trial court erred in dismissing her section 2-1401 petition because she entered into it as a result of coercion or duress. Again, respondent specifically testified that she was neither coerced nor forced into accepting the terms of the agreement, nor had anyone promised her anything beyond what was promised in court. She further testified that the pension was the subject of negotiations in the settlement conference, that she participated in the negotiations involving property and maintenance, and that she wished to settle the case in the manner testified to by petitioner, *i.e.*, receiving maintenance from the pension income.

¶ 42 As to the trial court's comments, the record belies respondent's suggestion that the court exerted undue influence. First, during the prove-up, the judge stated, "I'd *probably* do the same thing," after a hearing, not that he would. Indeed, the court qualified its recommendations by stating that, after a hearing, it would probably rule in a manner consistent with its oral recommendations unless the evidence at the hearing substantially differed from what was discussed at the settlement

conference. And, despite the court's repeated statements that "You can have the hearing if you want" and "You don't have to accept what I've just said," neither party requested a hearing. Second, despite respondent's assertion that she did not realize that she was agreeing to something different from the court's recommendations, respondent testified that she was present to hear the court's recommendations and then, after a recess and "a couple of adjustments," wished to resolve the case as testified to by petitioner.

¶ 43 Respondent relies on *In re Marriage of Moran*, 136 Ill. App. 3d 331 (1985). There, the appellate court affirmed the trial court's decision that the settlement agreement should be vacated, where the ex-wife had no input in the agreement, the ex-wife had objected to the terms of the agreement, the trial court misled the ex-wife about the law, and trial court erroneously warned the ex-wife that the agreement was the "best she could do" and that she would lose if the case went to trial. *Id.* at 336-39. We find *Moran* distinguishable. Here, at the prove-up, the trial court did not tell respondent that the agreement was the "best she could do," instead informing the parties that it tried to recommend a settlement that was fair to both parties. The court did not tell respondent she would lose if she went to trial; rather, the court informed the parties that they could have a hearing and that it would probably rule in a manner consistent with its oral recommendations, unless the evidence at the hearing was substantially different. Finally, respondent testified that she participated in the negotiations regarding maintenance and property issues and, in contrast to the objections expressed by the ex-wife in *Moran*, respondent here agreed "to resolve the case on all issues in a manner consistent with the testimony given here" by petitioner. That respondent did, in fact, negotiate to resolve the case in the manner testified to by petitioner was corroborated by the trial

court, who recollected that respondent originally wanted both the pension and maintenance, but then agreed to accept the pension in maintenance form.

¶ 44 C. Mistake of Fact and Ambiguity

¶ 45 Respondent argues that the court was mistaken in its computations during the prove-up (stating that 32% was the equivalent of \$1,750 per month), which confused respondent and led to a judgment that favored petitioner. She further argues that the judgment failed to provide for the equal division of the estate because the maintenance to respondent will cease upon petitioner's death. Instead, respondent argues, the pension could have been divided as a marital asset or provisions made to protect her future with a life insurance policy.

¶ 46 A mutual mistake of fact exists when the settlement agreement has been written in terms that violate the understanding of both parties. *In re Marriage of Breyley*, 247 Ill. App. 3d 486, 491 (1993). Relief is available under section 2-1401 if a dissolution judgment fails, because of a mutual mistake, to express the real intention of the parties. *Id.* Nevertheless, the record reflects that the court's comments at the prove-up hearing regarding \$1,750 and 32% (instead of the alleged-accurate computation that \$1,750 is 31% of the monthly pension payment) were merely suggestions by the court, whereas, at the prove-up, respondent agreed to each stipulation as testified to by petitioner; namely, that he would pay her \$1,750 per month and 31% of any cost-of-living allowance. As such, respondent agreed to the calculations reflected in the final written settlement agreement, *i.e.*, \$1,750 per month and 31% of any cost of living allowance. Thus, although respondent claims that there was a mistake in the judgment because she received only 31% of the monthly pension income and 50% of the marital estate, the judgment reflects no mistake of fact because it memorializes the percentages that the parties agreed upon during the prove-up. Moreover, we note that, despite the fact that this

alleged mistake (that \$1,750 was not 32% but, rather, 31%) would have been known immediately if the parties had intended that the percentage, as opposed to the monthly amount, govern, neither party objected during the prove-up or within the month between the prove-up and written agreement.

¶ 47 As to the pension being used as maintenance instead of divided as an asset, and no insurance being provided to respondent in case of petitioner's death, these claims, again, go the process of negotiation, what the parties agreed to after that process, and whether the agreement is unconscionable, which we rejected above. They do not reflect mutual mistakes of fact. Respondent's mistake-of-fact contention is unfounded.

¶ 48 Respondent also claims that the settlement agreement is ambiguous. When interpreting settlement agreements, the reviewing court adheres to the ordinary rules of contract construction. *In re Marriage of Marquardt*, 110 Ill. App. 3d 271, 273 (1982). The parties' intentions are determined by the language in the settlement agreement, unless the instrument is ambiguous, in which case parole evidence may be introduced. *Id.* at 273-74. If the agreement can be reasonably interpreted in more than one way, it is then ambiguous. *Id.* at 274.

¶ 49 Respondent argues that the judgment is ambiguous because it does not specify how the accounts should be divided, does not specify the accounts to be divided, and it did not address the parties' household goods. Again, the judgment contradicts respondent's contentions. The judgment reflects that the parties agreed to equally split the accounts (marital savings accounts, annuities and cash value of insurance policies), and it awarded respondent all of the household goods and furnishings in the marital residence. Although the accounts were not specified by name or balance in the written judgment, petitioner testified that the parties would meet to assess the values of the

fluctuating accounts, that the accounts would then be divided in half, and respondent agreed to this arrangement, which was then memorialized in the written judgment.

¶ 50 Respondent also argues that, because the court told her she would receive \$200,000 to invest, but the judgment only awarded her \$90,000, this was an ambiguity. This was not an ambiguity because the judgment can only be interpreted as awarding petitioner a credit against the marital accounts for one-half of the value of the marital residence, leaving respondent with the marital residence and \$90,000 in liquid assets, which creates an equal division of the marital estate. The judgment was not susceptible to being interpreted in more than one way, and was, therefore, unambiguous.

¶ 51 In sum, we conclude that the trial court did not err in dismissing the section 2-1401 petition because the petition did not allege meritorious claims or defenses. *Vincent*, 226 Ill. 2d at 8.

¶ 52 D. Due Diligence

¶ 53 Although we can affirm the court's dismissal of the section 2-1401 petition on the basis that it did not allege meritorious claims, we can also affirm due to an absence of due diligence. *Id.* In other words, here, even if respondent can establish that one of the aforementioned claims might be meritorious, her petition was properly dismissed because it was not brought in a diligent manner. Due diligence requires the party bringing the section 2-1401 petition to demonstrate a reasonable excuse for failing to act within an appropriate time. *Smith v. Airoom*, 114 Ill. 2d 209, 222 (1986). In assessing the reasonableness of the excuse, all circumstances "attendant upon entry of the judgment must be considered, including the conduct of the litigants and their attorneys." *Id.* Section 2-1401 does not afford a remedy to relieve a litigant of the consequences of his or her own mistake or negligence. *Id.* Accordingly, the movant must show that his or her failure to initially resist the

judgment was the result of an excusable mistake and that, under the circumstances he or she acted reasonably and not negligently.⁵

¶ 54 Respondent asserts that she was diligent in bringing her section 2-1401 petition, noting her psychological condition after the dissolution and her counsels' numerous efforts to ascertain the marital accounts and their values. Considering all of the circumstances attendant upon entry of the judgment, we disagree that respondent's failure to initially resist the judgment was reasonable. More than one month passed between the prove-up and entry of the written judgment. In that period, respondent made no objections to what transpired at the hearing, even though many of her claims (such as her argument that the pension should have been awarded as property, instead of maintenance, that the \$1,750 is not equal to the 32% figure mentioned by the trial court, or that she experienced duress or coercion during the prove-up hearing and immediately thereafter and that she

⁵Respondent, citing Smith, asserts that due diligence is not mandatory. However, "rigorous application" of the due-diligence standard is only relaxed where unfair, unjust, or unconscionable conduct (such as one party intentionally withholding knowledge of facts from another party) reflect that, even though the requirement of due diligence has not been satisfied, justice and good conscience require vacating the judgment. Smith, 114 Ill. 2d at 225-26; see also American Consulting Assoc., Inc. v. Spencer, 100 Ill. App. 3d 917, 923 (1981) ("an exception to the due diligence requirement is recognized when it is clear from all the circumstances that a party has procured an unconscionable advantage through the extraordinary use of court processes"). Here, the petition does not with any specificity allege, and the record does not reflect, unfair, unjust, or unconscionable conduct on the part of petitioner, the attorneys, or the court. Thus, relaxing "rigorous application" of the due diligence standard is not warranted.

did not truly participate in the hearing because she did not know anything about their finances) were known before the judgment was even entered.

¶ 55 Further, after the written judgment was filed, respondent waited 22 months, just two months shy of section 2-1401's general limitations period, before filing the petition. Certainly, most of her claims, including that the written judgment reflected mistaken numbers or percentages, that it was ambiguous and did adequately address the pension, division of household property, or even identify marital accounts, were known earlier than 22 months after the judgment's entry. Respondent asserts that her efforts to consult financial advisors and her attorneys' efforts to obtain financial information on her behalf demonstrate that she was concerned about the judgment and that she acted reasonably. In our view, however, regardless of any actions to obtain specific financial information, the basis of her claims (the alleged errors regarding pension distribution, duress, mistakes, etc.) already existed despite the specifics of those finances. And, given respondent's apparent concern about the judgment, those claims could have and should have been presented earlier. Significantly, in waiting this undue amount of time, respondent failed to uncover facts unknown at the time of judgment that would have precluded the entry of judgment. *Johnson*, 339 Ill. App. 3d at 241. Accordingly, we conclude that the trial court did not err in dismissing the section 2-1401 petition because it was not presented with diligence.

¶ 56

III. CONCLUSION

¶ 57 The judgment of circuit court of Winnebago County is affirmed.

¶ 58 Affirmed.