

NOTICE

Decision filed 07/20/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 110382-U
NO. 5-11-0382
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
LAURA M. SCHNERINGER,)	Madison County.
)	
Petitioner-Appellee,)	
)	
and)	No. 07-D-805
)	
MICHAEL J. SCHNERINGER,)	Honorable
)	Dean E. Sweet,
Respondent-Appellant.)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court did not abuse its discretion in denying the respondent relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) because the respondent failed to demonstrate due diligence and failed to show the existence of a meritorious claim that would have precluded entry of the original judgment.
- ¶ 2 In 2008, the circuit court of Madison County entered a written judgment of dissolution of marriage, from which the respondent, Michael J. Schneringer, appealed and the petitioner, Laura M. Schneringer, cross-appealed. On June 22, 2010, this court affirmed the judgment. *In re Marriage of Schneringer*, No. 5-09-0029 (2010) (unpublished order under Supreme Court Rule 23).
- ¶ 3 Thereafter, Michael filed in the circuit court a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2010)). After a hearing, the circuit court denied Michael's petition. Michael appeals,

arguing that the circuit court erred in denying his petition on the basis that he had failed to exercise due diligence in acquiring the evidence prior to the original judgment and that his witness's testimony was not credible or material. We affirm.

¶ 4

FACTS

¶ 5 During the parties' previous dissolution proceedings, Michael contended that Laura had dissipated marital funds after a July 2004 argument that, Michael had argued, represented the irreconcilable breakdown of the marriage. The evidence presented during the previous dissolution proceedings revealed that after the July 2004 argument, the parties celebrated activities together and did not physically separate until almost three years later. On appeal, we determined that the circuit court's finding that Laura did not dissipate assets because the parties were not undergoing an irreconcilable breakdown of the marriage in 2004 was not against the manifest weight of the evidence. *In re Marriage of Schneringer*, No. 5-09-0029 (2010) (unpublished order under Supreme Court Rule 23).

¶ 6 Thereafter, on December 14, 2010, Michael filed a petition for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). In his petition, Michael asserted that after the judgment of dissolution, he learned that Laura had engaged in an extramarital affair prior to December 2006, the date the circuit court and this court held that the parties' marriage had irretrievably broken down. Michael also asserted that Laura dissipated assets to conceal and conduct the affair and that Laura lied under oath about her misuse of those funds.

¶ 7 Michael attached the affidavit of Sue Komeshak. In her affidavit, Sue asserted that Laura had lived in her home from October 2009 until August 2010. Sue asserted that Laura admitted that she had engaged in an illicit sexual affair while she was married to Michael, that she had paid for hotel rooms and restaurants during the course of the affair, and that she had planned to leave Michael as soon as she completed her education. Sue asserted that she

first informed Michael of these facts in December 2010.

¶ 8 At the hearing on Michael's petition, Sue testified that she had known Laura since 1999 or 2000, that Laura lived with her in June 2007, and that when living with her again in 2009 and 2010, Laura paid rent for a bedroom, bathroom, and living area. Sue testified that in December 2010, she saw Michael in the grocery store and told him that Laura had an extramarital affair while she was married to him. Sue testified that in 2005, Laura had admitted to having sexual relations with men during her marriage, meeting them in hotel rooms for which Laura sometimes paid. Sue testified that as early as 2003, Laura had stated that she planned to leave Michael after she finished her education.

¶ 9 Laura testified that she worked as Sue's personal assistant from September 2009 until June 2010. Laura acknowledged that she had engaged in an extramarital affair from April 2006 until August 2006, while she was married to Michael.

¶ 10 On August 16, 2011, after hearing evidence, the circuit court denied Michael's petition for relief from judgment. The circuit court found that Michael failed to show that he had exercised due diligence in bringing the claim to the court's attention, that Michael raised issues already argued on appeal, and that Sue's testimony, even if believed, would not have affected the court's previous judgment. The circuit court concluded that Michael's petition failed "to set forth specific allegations of the existence of a meritorious claim or defense which was not already presented at trial from a witness who was available to him at trial." On September 14, 2011, Michael filed a timely notice of appeal.

¶ 11

ANALYSIS

¶ 12 In the previous judgment of dissolution of marriage, the circuit court determined that the parties' marriage was irreconcilably broken in December 2006, directly prior to their separation in January 2007. Michael asserted in his petition below that the "newly-discovered" evidence showing that Laura had engaged in extramarital affairs and made

comments about leaving Michael as early as 2003 supports his previous contention that the marriage was undergoing an irreconcilable breakdown in 2004, and by extension, that Laura dissipated marital assets, obtaining control over \$14,000 of Michael's inherited funds by one subterfuge or another, during this time.

¶ 13 Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days. 735 ILCS 5/2-1401 (West 2010). "While the remedy in the statute does have its roots in common law equity, the General Assembly abolished the common law writ system and replaced it with the statutory postjudgment petition." *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). "Section 2-1401 requires that the petition be filed in the same proceeding in which the order or judgment was entered, but it is not a continuation of the original action." *Vincent*, 226 Ill. 2d at 7. "The statute further requires that the petition be supported by affidavit or other appropriate showing as to matters not of record." *Id.*

¶ 14 The purpose of the section 2-1401 proceeding is to bring before the court facts that were not known at the time the judgment was entered and that, if known, would have prevented the entry of the judgment. *S.C. Vaughan Oil Co. v. Caldwell, Troutt, & Alexander*, 321 Ill. App. 3d 447, 448-49 (2001). The aim of the court in applying this section is to achieve justice, not to give the litigant a new opportunity to do that which should have been done in an earlier proceeding or to relieve the litigant of the consequences of his mistake or negligence. *In re Marriage of Broday*, 256 Ill. App. 3d 699, 705 (1993).

¶ 15 "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Vincent*, 226 Ill. 2d at 7-8. In other words, to entitle a petitioner to relief under section 2-1401, the newly discovered evidence must meet the following requirements: (1)

it must be so conclusive that it would probably change the result if a new trial is granted, (2) it must be discovered after the trial, (3) it must be of such a character that it could not have been discovered prior to the trial in the exercise of due diligence, (4) it must be material to the issues, and (5) it must not be merely cumulative to the trial evidence. *People v. Hallom*, 265 Ill. App. 3d 896, 906 (1994). The burden of proof on these factors is with the movant, and the determination of the existence of these factors rests within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *Id.*

¶ 16 Based upon our review of the record, we are convinced that Michael failed to show by a preponderance of the evidence that he exercised due diligence in discovering the facts that he now believes entitle him to relief. See *In re Marriage of Klebs*, 196 Ill. App. 3d 472, 480 (1990). The "newly discovered evidence" consists of Sue's account of Laura's comments regarding her marriage intentions and Laura's extramarital affairs. As noted by the circuit court, even though Sue was "available for interview and/or deposition at the time of the original action, was subject to the subpoena powers of the [c]ourt, and was on friendly terms with" Michael, he failed to discover or present the grounds for relief in the original action. We thus agree with the circuit court that Michael did not show that he exercised due diligence in discovering the claim during the previous dissolution proceedings. See *Physicians Insurance Exchange v. Jennings*, 316 Ill. App. 3d 443, 457-58 (2000).

¶ 17 Further, we agree with the circuit court's conclusion that Michael's petition raises dissipation issues that were already argued and determined on appeal and that the "newly-discovered" evidence did not show that the judgment previously entered should be altered or amended. In the previous dissolution proceedings on appeal, we noted that after the July 2004 argument, the parties celebrated activities together until the end of 2006, the date the circuit court determined that the parties' marriage underwent an irreconcilable breakdown, directly prior to their physical separation in January 2007. Sue's testimony, along with

Laura's acknowledgment that she engaged in an extramarital affair in 2006, does not amount to evidence so conclusive that it would have probably changed the previous result reached by the circuit court and affirmed on appeal by this court. Accordingly, Michael has failed to show that the grounds asserted for relief would have prevented entry of the judgment had it been known by the circuit court. See *Physicians Insurance Exchange*, 316 Ill. App. 3d at 457-58.

¶ 18 Because Michael failed to demonstrate that his failure to discover or present the grounds for relief was not the result of his own lack of diligence and failed to show the existence of a meritorious claim that would have precluded entry of the judgment in the original action, the circuit court did not abuse its discretion in denying Michael relief pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)).

¶ 19 **CONCLUSION**

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Madison County.

¶ 21 Affirmed.