

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).

2014 IL App (4th) 140302-U

NO. 4-14-0302

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 23, 2014
Carla Bender
4th District Appellate
Court, IL

STEVEN LUKER,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Macon County
BARBARA A. COLE,)	No. 12SC1766
Defendant-Appellee.)	
)	Honorable
)	Albert G. Webber,
)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting defendant's motion for a directed verdict or dismissing plaintiff's petition for postjudgment relief.

¶ 2 In October 2012, plaintiff, Steven Luker, *pro se*, filed a two-count small-claims complaint against defendant, Barbara A. Cole, alleging negligence and defamation. In August 2013, plaintiff filed an amended complaint, again alleging negligence and defamation. The trial court dismissed the negligence count. The case proceeded to a jury trial on the defamation count of the complaint. At the close of plaintiff's case, the court granted defendant's motion for a directed verdict. Plaintiff filed a posttrial motion, arguing the court erred in granting defendant's motion for a directed verdict. On March 7, 2014, the court denied plaintiff's posttrial motion. Later that same day, plaintiff filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2012)). On April 4,

2014, plaintiff filed a notice of appeal with regard to the court's denial of his posttrial motion. On April 15, the trial court, in effect, dismissed plaintiff's section 2-1401 petition because of his pending appeal. Plaintiff filed a second notice of appeal with regard to that ruling. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On October 17, 2012, plaintiff filed a complaint against defendant, alleging negligence and defamation and seeking \$249 plus costs. According to plaintiff's complaint, defendant told her manager plaintiff was watching pornography and masturbating in the restroom of the McDonald's restaurant. (Defendant worked at McDonald's.)

¶ 5 On July 30, 2013, defendant filed a motion to dismiss plaintiff's complaint, arguing neither count stated a cause of action. On August 12, 2013, plaintiff asked for leave of court to file an amended complaint and filed an "objection" to defendant's motion to dismiss.

¶ 6 On August 13, 2013, the trial court dismissed plaintiff's complaint with leave to replead. Plaintiff filed his amended complaint and the court dismissed with prejudice count I, which again alleged negligence, and set count II for jury trial. Count II alleged defendant defamed plaintiff by telling her manager and another McDonald's employee plaintiff was watching pornography in the men's restroom.

¶ 7 On December 16, 2013, a jury trial was held. In his opening, plaintiff, proceeding *pro se*, stated, "the evidence will show that the defendant made false statements to her co-workers, to customers." Plaintiff called defendant as his only witness. Defendant testified "one of [her] co-workers said that he saw [plaintiff] looking at pornography in the men's room." Defendant did not personally see plaintiff looking at pornography. Defendant denied telling her coworker, Tiffany Stone, about plaintiff looking at pornography. According to defendant, Stone had heard about plaintiff from someone else. Defendant also denied telling her boss about

plaintiff looking at pornography. Instead, defendant testified her boss was the one who informed her plaintiff "was caught in the men's room watching pornography and asked to leave." When plaintiff asked defendant whether she believed the allegations plaintiff was watching pornography in the bathroom, defendant responded, "Well I've never seen anybody else take their laptop into the men's room. And you did that repeatedly." Plaintiff rested without testifying himself, calling any other witnesses, or presenting additional evidence.

¶ 8 At the close of plaintiff's case, defendant moved for a directed judgment. The following colloquy then took place:

"THE COURT: Anything else you want to say?

[PLAINTIFF]: Without the rest of the witnesses, we've only heard her testimony.

THE COURT: I'm sorry, sir?

[PLAINTIFF]: We've only heard her testimony.

THE COURT: Well it's your evidence at this point. It is up to you to produce whatever witnesses or evidence you thought was relevant to the case in your case [in] chief. You chose to call [defendant] only, you said you were not going to testify yourself, so that's all your evidence. Anything else you wish to say on [defendant's] motion?

[PLAINTIFF]: No.

THE COURT: We'll show then finding by the Court *** plaintiff has failed to make a *prima facie* case. On motion of the

defendant, judgment entered in favor of the defendant and against the plaintiff."

¶ 9 On January 8, 2014, plaintiff filed a posttrial motion to vacate the directed verdict, arguing (1) "defendant made a false statement/perjury to the jury when she testified that she 'told nobody' and claimed that she only repeated what others had said," (2) it is "within the province of the jury and not the judge to determine the truthfulness of testimony," and (3) "[t]he question is not whether her statement is actionable but whether the defendant told the truth to the jury."

¶ 10 In late January 2014, plaintiff issued a subpoena seeking a transcript or audio recording of an October 16, 2012, call from the Decatur police department.

¶ 11 On February 14, 2014, plaintiff filed a motion for leave to file an amended complaint, seeking to add Andrew Birschbach and Tiffany Cole as defendants to the original complaint under the relation-back doctrine.

¶ 12 On February 18, 2014, plaintiff filed a motion for a new trial.

¶ 13 At a March 7, 2014, hearing, the trial court told plaintiff it could not consider his motion for a new trial or his motion to file an amended complaint because they were filed more than 30 days after verdict. As a result, the court struck those motions. The court heard arguments on plaintiff's posttrial motion to vacate the directed verdict.

¶ 14 Plaintiff argued he should be able to bring forth evidence showing defendant lied in her testimony. The trial court pointed out plaintiff had only called defendant at trial. Defendant testified she was told plaintiff was looking at pornography in the restroom. Plaintiff failed to present any evidence defendant told anyone he was looking at pornography. As a result, plaintiff failed to establish a prima facie case defendant defamed him. Plaintiff argued the 911 call would show defendant called the police and said plaintiff was looking at pornography in the

McDonald's restroom. The court responded plaintiff could have presented that evidence at trial but failed to do so. As a result, the court denied his posttrial motion to vacate the directed verdict.

¶ 15 That same day, plaintiff filed a petition for relief from judgment pursuant to section 2-1401 of the Procedure Code (735 ILCS 5/2-1401 (West 2012)), arguing the 911 audio recording he now had in his possession established a *prima facie* case defendant made statements about plaintiff looking at pornography which defendant knew were false. According to plaintiff, "[t]his evidence is in direct conflict [with defendant's] sworn testimony claiming that she told no one when asked by the plaintiff in cross-examination."

¶ 16 On April 4, 2014, plaintiff filed a notice of appeal from the trial court's denial of his posttrial motion to vacate the directed verdict. On April 15, the court held a hearing on plaintiff's motion to stay judgment pending appeal filed on March 13 and plaintiff's petition for relief pursuant to section 2-1401 of the Procedure Code. The court found defendant had no costs in the case and denied the motion for a stay. As for the petition for relief from judgment, the court found it could not act on that motion because plaintiff had already filed his notice of appeal in the case.

¶ 17 On April 15, 2014, plaintiff filed another notice of appeal with regard to the trial court's denial of his petition for relief from judgment and his motion to stay judgment.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 We first note defendant failed to file a brief with this court. However, this does not require automatic reversal. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-32, 345 N.E.2d 493, 494-95 (1976). As this court has noted, the appellant still

has the burden of establishing error. *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173, 890 N.E.2d 1220, 1223 (2008).

¶ 21 We first address plaintiff's argument the trial court erred in granting defendant's motion for a directed verdict. Directed verdicts are to be entered only when the evidence, viewed in the light most favorable to the nonmovant, is so overwhelmingly favorable to the movant that no contrary verdict could have been reached. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967). A trial court's ruling on a motion for a directed verdict is reviewed *de novo*. *Buckholtz v. MacNeal Hospital*, 337 Ill. App. 3d 163, 167, 785 N.E.2d 162, 166 (2003).

¶ 22 The trial court did not err in granting defendant's motion for a directed verdict. The jury could not have ruled in plaintiff's favor based on the evidence he presented in this case. Plaintiff based his defamation claim on defendant allegedly making statements plaintiff was looking at pornography in the McDonald's restroom. However, plaintiff put forth no evidence defendant made any statement with regard to plaintiff looking at pornography inside McDonald's. Instead, plaintiff only put forth evidence defendant was told plaintiff was looking at pornography in the restroom.

¶ 23 Defendant did not testify she never told anyone plaintiff was looking at pornography in the McDonald's. Plaintiff never directly asked her whether she ever told anyone he was looking at pornography at McDonald's. Defendant was under no obligation to volunteer information to assist plaintiff in establishing his *prima facie* case.

¶ 24 We next address plaintiff's argument the trial court erred in denying his section 2-1401 petition for relief. From our review of the record, it does not appear the court denied plaintiff's section 2-1401 petition. While the court denied plaintiff's motion to stay enforcement

of judgment pending appeal, it told plaintiff it could not rule on his section 2-1401 petition because plaintiff had already filed an appeal in the case. In essence, the court dismissed his section 2-1401 petition because it believed it lacked jurisdiction to rule on the petition.

¶ 25 According to plaintiff, we have jurisdiction over the trial court's action with regard to his section 2-1401 petition pursuant to Illinois Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010). However, we have an independent duty to verify our jurisdiction to hear this appeal. *Bale v. Barnhart*, 343 Ill. App. 3d 708, 711, 798 N.E.2d 750, 752 (2003). As we stated earlier, the trial court did not deny his petition and so it does not appear we have jurisdiction pursuant to Rule 304(b)(3).

¶ 26 The Second District was faced with an analogous situation in *People v. Walker*, 395 Ill. App. 3d 860, 918 N.E.2d 1260 (2009). In that case, the appellate court had to determine whether a trial court's ruling it lacked jurisdiction to consider a plaintiff's section 2-1401 petition because of a pending appeal constituted a final order for purposes of Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). *Id.* at 864, 918 N.E.2d at 1264. The Second District noted:

"The dismissal here was not on the merits and was not precisely a dismissal with prejudice—defendant could have refiled after this court issued its mandate in the pending appeal. Those factors hint at a lack of finality. However, a dismissal based on a lack of jurisdiction that might not be permanent is, nevertheless, a final order, at least if the dismissal significantly affects the ability to raise the claims in the original court. Defendant's ability to raise his claims was so affected, so the order here was final.

* * *

Here, because a holding that requires indefinite postponement of a filing is likely to be prejudicial, the court's order was final and appealable. A full appeal may take several years. For a litigant with a time-sensitive claim, being told to wait several years to file the claim anew does not provide true recourse for that litigant. Further, a would-be litigant who must wait to refile might face statute-of-limitation problems, and the litigant cannot wait to see whether his or her new filing will be so affected. This type of dismissal has great potential for prejudice to the delayed litigant." *Id.* at 864, 866, 918 N.E.2d at 1264-65.

Based on the Second District's reasoning, we find we have jurisdiction over the trial court's dismissal of plaintiff's section 2-1401 petition.

¶ 27 We next turn to the merits of the trial court's decision to dismiss the claim for lack of jurisdiction. A petition for postjudgment relief pursuant to section 2-1401 is a collateral attack on a judgment. *People v. Partee*, 125 Ill. 2d 24, 35, 530 N.E.2d 460, 465 (1988).

"Since a collateral attack upon a judgment is a case separate and apart from the case in which the judgment has been attacked, it has been held that the availability or pendency of a direct appeal will not affect the ripeness of a claim for post-conviction or post-judgment relief [citations]; conversely, the pendency or availability of the collateral remedy will not affect the jurisdiction of the appellate court over a direct appeal [citations]." *Id.* at 35-36, 530 N.E.2d at 465.

As a result, the trial court erred in finding it lacked jurisdiction to address plaintiff's section 2-1401 petition for relief from judgment because of the pending appeal. However, we need not agree with the court's reasoning to affirm the dismissal. *Wright v. City of Danville*, 174 Ill. 2d 391, 399, 675 N.E.2d 110, 115 (1996).

¶ 28 After reviewing the record, plaintiff clearly is not entitled to relief pursuant to section 2-1401 based on the arguments presented in his brief and his section 2-1401 petition. Section 2-1401 is not intended to give a litigant a second opportunity to do what should have been done in an earlier proceeding or to relieve a litigant of the consequences of his mistake or negligence. *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 14, 962 N.E.2d 517. "[A] section 2-1401 petition may not be used to obtain relief for issues previously raised at trial or in other collateral proceedings." *People v. Kane*, 2013 IL App (2d) 110594, ¶ 17, 5 N.E.3d 737.

¶ 29 Plaintiff's claim in his section 2-1401 petition is that defendant lied when she testified she did not tell anyone plaintiff was looking at pornography at McDonald's. Plaintiff's petition claimed he had evidence, a recording of defendant's 911 call and a police report, showing defendant reported plaintiff was looking at pornography at McDonald's and, thereby, establishing defendant provided false testimony at trial. Plaintiff argues he did not have access to this 911 call or police report prior to trial. However, assuming this is true, this evidence does not establish defendant lied during the trial. As stated earlier, plaintiff never asked defendant the simple question whether she ever told anyone he was looking at pornography at McDonald's. As a result, she never testified whether she made a statement to anyone regarding plaintiff viewing pornography in the restaurant. Had the question been asked, defendant may very well have admitted she called the police and reported plaintiff was looking at pornography.

¶ 30 Plaintiff is attempting to use his section 2-1401 petition as a second opportunity to establish an element of his defamation claim. His failure to offer any evidence on this element of the defamation claim led to the directed verdict in this case. As stated earlier, section 2-1401 is not intended to give a litigant a second opportunity to do what should have been done in an earlier proceeding or to relieve a litigant of the consequences of his mistake or negligence. *Goldsmith*, 2011 IL App (1st) 093448, ¶ 14, 962 N.E.2d 517. As a result, the court did not err in dismissing this petition.

¶ 31 Plaintiff also argued the trial court abused its discretion in not granting his request for a continuance to find a witness, Rodney George, who could not be located by the sheriff for service of a subpoena. According to plaintiff's brief, his complaint alleged this witness had heard another McDonald's employee, Tiffany Stone, make slanderous statements about plaintiff. Because plaintiff does not allege George heard defendant making slanderous statements about plaintiff, it is difficult to see how the trial court erred in not granting plaintiff a continuance.

¶ 32 Plaintiff also argues the trial court erred by not demanding the City of Decatur comply with his subpoena for the 911 call record which was served on January 28, 2014, approximately 1 ½ months after plaintiff lost at trial. We find this issue forfeited because plaintiff makes no argument regarding why the trial court erred. *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 521-22 (2001).

¶ 33 Plaintiff also argues the trial court erred by not granting his motion for a new trial and his motion to file an amended complaint adding defendants, both of which were filed in February 2014. At the March 7, 2014, hearing on plaintiff's posttrial motion, the court found it could not consider motions filed by plaintiff more than 30 days after the December 16, 2014, verdict in this case. Both of plaintiff's motions mentioned above fall into this category. We find

these arguments forfeited because plaintiff makes no argument regarding why the trial court erred in finding these motions untimely. *Id.*

¶ 34 We note this is the twenty-fourth appeal filed by plaintiff since 1995. Plaintiff is dangerously close to running afoul of Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994). Plaintiff should be on notice this court will not hesitate to impose sanctions in the future pursuant to Rule 375(b) should he file another frivolous appeal.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated above, we affirm the trial court's order granting defendant's motion for a directed verdict and the court's dismissal of plaintiff's section 2-1401 petition for postjudgment relief.

¶ 37 Affirmed.