2016 IL App (1st) 152274-U

No. 1-15-2274

FIFTH DIVISION
August 19, 2016

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DENISE T. CLARETT,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Cook County.
	)	
v.	)	No. 06 D 9042
	)	
CARL CLARETT, JR.,	)	The Honorable
	)	Regina Scannicchio,
Respondent-Appellee.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court did not abuse its discretion in granting respondent's section 2-1401 petition for relief from the parties' dissolution judgment where respondent did not abandon the petition, the petition satisfied the requisite factors for garnering relief, and respondent did not forfeit review of the underlying judgment.

¶ 2 Petitioner, Denise Clarett, appeals the trial court's order granting a section 2-1401 petition for relief from the judgment for the dissolution of the parties' marriage (735 ILCS 5/2-1401 (West 2010)) in favor of respondent, Carl Clarett. Petitioner contends the trial court erred

in granting the section 2-1401 petition where respondent abandoned his petition, failed to satisfy the requisite factors for granting such relief from the underlying dissolution judgment, and forfeited review of the underlying judgment. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 On August 23, 2006, petitioner filed a petition for the dissolution of the parties' marriage. On September 27, 2006, respondent filed a *pro se* appearance and answer. According to respondent, the case was set for a number of status or progress dates that were continued by petitioner without evidence in the record demonstrating service on respondent. The case initially was set for status on January 5, 2007, but that date was stricken and reset for February 21, 2007. Next, a January 4, 2008, order appears in the record stating the case "status re. default and prove-up" was set for February 21, 2008. On the next court date, February 21, 2008, the case was set for trial on August 25, 2008. An April 7, 2008, order confirmed the previously scheduled trial date of August 25, 2008, and noted that "discovery not received within 7 days from respondent will be barred from testimony at trial." No proofs of service on respondent for any of the listed dates appear in the record.

¶ 5 On June 23, 2008, petitioner filed a request for a temporary restraining order (TRO) and a preliminary injunction seeking to enjoin respondent from disposing of his stock portfolio and retirement accounts. The trial court granted the TRO and preliminary injunction on the same date. However, in the June 23, 2008, order, it was noted that "no notice [was] sent to [respondent] fearing he would dispose of the assets if notice were given." On July 3, 2008, the trial court entered an order continuing the TRO and instructing respondent to appear on July 15, 2008. On July 15, 2008, a preliminary injunction was entered and the case was set for trial on November 3, 2008. Then, on November 3, 2008, the case was dismissed for want of prosecution.

¶ 6 Petitioner, however, filed a motion on December 2, 2008, requesting that the dismissal for want of prosecution be vacated. In that motion, petitioner requested that the case be "postponed" due to reconciliation and indicated that petitioner's attorney attempted to have the case placed on the reconciliation calendar prior to the November 3, 2008, dismissal for want of prosecution. On December 12, 2008, the dismissal for want of prosecution was vacated, but the case was not placed on the reconciliation calendar. Instead, the case was set for a March 31, 2009, trial. The December 12, 2008, order noted that "due notice served on [respondent] who failed to appear." On March 10, 2009, an order confirming the March 31, 2009, trial date was entered and the court ordered that notice of the trial date be sent to respondent by certified mail. The March 10, 2009, order again noted that "[respondent] fail[ed] to appear in person or by counsel." No proof of a certified mailing appears in the record.

¶ 7 Then, on March 30, 2009, a day prior to the scheduled trial date, the case was placed on the reconciliation call pursuant to petitioner's request. The March 31, 2009, trial date was stricken and a status date of September 17, 2009, was ordered. However, on September 17, 2009, at petitioner's request, the case was removed from the reconciliation call and a status date was set for September 24, 2009. The case was dismissed again for want of prosecution on September 24, 2009. The record does not contain any notices or proofs of service on respondent for the proceedings from the TRO and preliminary injunction through the September 24, 2009, dismissal for want of prosecution.

¶ 8 On October 7, 2009, the trial court vacated its September 24, 2009, order dismissing the case for want of prosecution. The case was assigned a pretrial date with the trial set to proceed on March 23, 2010. Yet again, no notices or proofs of service on respondent appear in the record. Nevertheless, on January 25, 2010, in response to petitioner's emergency motion to continue the

pre-trial date, the trial court entered an order confirming the scheduled court date, noting "due notice served on respondent *** who did not appear in court." On March 23, 2010, the trial was conducted as scheduled in respondent's absence. No transcript from the trial appears in the record. In a written order entered on that date, the trial court noted that the matter was heard for trial and "due notice [was] sent to Carl Clarett who failed to appear." The March 23, 2010, order provided that the trial court found sufficient evidence to sustain the grounds for dissolution of the parties' marriage based on the testimony and exhibits. The court ordered petitioner's counsel to provide a judgment for the dissolution of the parties' marriage. Then, on May 11, 2010, the trial court entered a judgment for the dissolution of the parties' marriage and awarded petitioner the value of one-half of the marital home, all of her own property, and one-half of respondent's UPS retirement and stock portfolio. The May 11, 2010, order noted that "due notice of the trial [o]rder [was] sent to Carl Clarett who failed to appear in court in his own person or by counsel." On November 30, 2010, the trial court entered a qualified domestic relations order (QDRO) detailing the distribution of the marital assets awarded in the dissolution judgment.

¶ 9 On December 15, 2010, respondent appeared *pro se* and filed a motion to vacate the QDRO. Respondent obtained a December 22, 2010, hearing date for the motion. A hearing did not occur on that date; however, on December 22, 2010, the trial court granted respondent leave to file an amended motion to vacate the QDRO, which respondent did. Then, on January 4, 2011, the trial court entered an order "on motion of respondent" ordering petitioner's attorney to appear on January 26, 2011, and providing petitioner 21 days to respond to respondent's motion to vacate the QDRO. On January 20, 2011, a hearing on respondent's motion to vacate was rescheduled to February 25, 2011.

¶ 10 Then, respondent retained an attorney who filed a motion for a TRO and a preliminary injunction. All motions were continued on February 25, 2011, March 28, 2011, and April 27, 2011. On June 8, 2011, respondent was granted leave to file another motion to vacate and petitioner was granted time to respond thereto. On June 21, 2011, respondent filed a section 2-1401 petition requesting relief from the May 11, 2010, dissolution judgment. The petition noted that "respondent does remember receiving correspondence from [petitioner's attorney at the time] after May 2010 informing him of what he believed the petitioner was asking the court to grant her in [a] judgment." The petition provided that respondent contacted petitioner in response, but petitioner said "not to worry about it and she would contact her attorney." In an affidavit attached to the petition, respondent attested that he "was inactive in this case because [he] did not receive adequate notification of the court dates." Respondent stated that he "was told by petitioner that this matter was dismissed, and not to worry about anything." According to respondent's affidavit, he did not become aware of the May 11, 2010, dissolution judgment until December 22, 2010, when he appeared in court to file a motion to vacate the QDRO. Petitioner failed to respond to the section 2-1401 petition, and a hearing was scheduled. The September 19, 2011, scheduled hearing date, however, was stricken, and no new hearing date was set.

¶ 11 No additional proceedings or motions appear in the record until September 2014. On September 9, 2014, petitioner filed a motion for turnover to execute the dissolution judgment. Respondent was provided time to respond. Then, on January 15, 2015, the trial court ordered respondent to provide petitioner with documents effectuating the dissolution judgment. On May 19, 2015, respondent re-noticed his section 2-1401 petition. On May 20, 2015, the trial court entered an order granting respondent's TRO barring any transfers of his UPS stocks or his retirement fund. The court also set a hearing for June 1, 2015, for respondent's section 2-1401

petition. In the meantime, respondent filed a supplemental affidavit in support of his section 2-1401 petition detailing the financial contributions he made to the family prior to and after the parties' separation. Also, in the affidavit, respondent attested that his section 2-1401 petition remained pending from its initial filing until 2014 because petitioner's attorney was ill and then died. According to his affidavit, respondent learned in 2014 that petitioner was attempting to obtain a portion of his retirement account, at which time he contacted a new attorney since his prior attorney was no longer licensed. In response, petitioner filed a motion to strike or dismiss respondent's June 21, 2011, re-noticed section 2-1401 petition, alleging the trial court lacked jurisdiction to consider the petition because respondent failed to provide petitioner with proper notice. On July 16, 2015, the trial court denied petitioner's motion to strike or dismiss the section 2-1401 petition.

¶ 12 Also, on July 16, 2015, the trial court conducted a hearing on respondent's section 2-1401 petition. At the hearing, respondent maintained that he first learned of the dissolution judgment after November 30, 2010, through his employer when the QDRO was issued. Respondent argued that he was diligent in defending against the dissolution judgment by filing a *pro se* motion to vacate that judgment 15 days after the QDRO was issued. Respondent additionally argued that he had a meritorious defense in that the trial court did not equitably distribute the parties' of assets. In response to petitioner's argument that respondent failed to satisfy the requirements of a section 2-1401 petition, the trial court stated:

> "Counsel, the judge at the time that the case was set for trial required [notice of a trial via certified mail by counsel of record for the petitioner]. It wasn't me on that date, but another judge sitting here in this case required that counsel for petitioner send the respondent, a *pro se* litigant, notice of the trial and

the order by regular and certified mail. And I'm not seeing any proof of service that the *pro se* litigant actually received notice to appear in court for the date of trial."

The hearing concluded with the court taking the petition under advisement.

¶ 13 Then, on July 24, 2015, the trial court issued its ruling. The court stated:

"All right. When you were last here you presented argument with respect to the motion to vacate filed on behalf of [respondent] regarding the judgment for dissolution of marriage. I went back through my notes; I went back through the case authority, as well as, the pleadings and the responses filed by counsel, and the argument that was made on behalf of the [petitioner] and [respondent]. It is troubling to report that a judgment that was entered—and I have to say so many years ago—is sought to be vacated today.

What's even more troubling, though, to the Court is the fact that the judgment was entered without proper notice to [petitioner] on the matter set for trial, and heard as a default without notice to [respondent] specifically the order that required [respondent] to have had notice of the proceeding by regular and certified mail and the record being void either by argument, by documented evidence, by affidavit that [respondent] actually received or was properly notified of the trial—the original trial date that ultimately resulted in the default.

That being said, [respondent] did timely file his motion to vacate the default judgment for dissolution of marriage. And while time passed—and there seems to be some disagreement as to what took place subsequent to that motion with [petitioner's] counsel passing away, with timeframes and orders not actually

> being properly followed and the re-noticing of the motion to vacate—this Court is finding that the motion to vacate filed on behalf of [respondent] is proper and will be vacated in the judgment, specifically with regard to the property issue of the stock and—I think that was the only issue that—I have to make sure because I'm not vacating the dissolution. I am not vacating the other allocation of property, but specifically with the stock allocation, stock distribution and retirement of both [respondent] and [petitioner.]"

In its July 24, 2015, written order, the trial court granted respondent's petition for relief of the default judgment as to the distribution of property, leaving intact only the dissolution of the marriage itself. The parties were ordered to exchange discovery regarding their relative property as of the dissolution date. This appeal followed.[1]

¶ 14 ANALYSIS

¶ 15 Petitioner contends the trial court erred in granting respondent's section 2-1401 petition for relief of the May 11, 2010, dissolution judgment where respondent abandoned his 2-1401 petition, failed to satisfy the requirements for obtaining relief, and forfeited review of the May 11, 2010, dissolution judgment that was partially executed pursuant to the QDRO.

¶ 16 We first address the parties' dispute regarding the applicable standard of review. We find that in *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, the supreme court clarified the confusion related to whether a *de novo* standard or an abuse of discretion standard should be applied when reviewing a trial court's decision regarding a section 2-1401 petition. The supreme court advised:

[1] This court has jurisdiction to consider this appeal pursuant to Illinois Supreme Court Rule 304(b) (eff. Feb. 26, 2010).

> "we hold that when a section 2-1401 petition presents a fact-dependent challenge to a final judgment or order the standards from *Airoom* govern that proceeding. Thus, the petitioner must set forth specific *factual* allegations supporting each of the following elements: (1) the existence of a meritorious defense; (2) due diligence in presenting this defense; and (3) due diligence in filing the section 2-1401 petition for relief. [Citation.] The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence, and the circuit court's ultimate decision on the petition is reviewed for an abuse of discretion. [Citation.] In addition, when the facts supporting the section 2-1401 petition are challenged by the respondent, a full and fair evidentiary hearing should be held. [Citation.] Relevant to this appeal, the trial court may also consider equitable considerations to relax the applicable due diligence standards under appropriate limited circumstances. [Citation.]" *Walters*, 2015 IL 117783, ¶ 51.

Because this case involved a fact-dependent challenge to the dissolution judgment and respondent's petition set forth factual allegations to support section 2-1401 relief, we apply the abuse of discretion standard of review. *Id*.

¶ 17 Petitioner first contends that respondent abandoned his section 2-1401 petition for relief by allowing four years to pass between the June 21, 2001, filing of the petition and the July 2015 ruling on the petition. Petitioner argues that it was respondent's responsibility to obtain a ruling on his petition, and, when he failed to do so, his actions or lack thereof resulted in abandonment of the petition. Both parties cite *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622 (2008) for support.

¶ 18 In *Gibson*, this court stated: "[a] court's failure to rule on a motion does not constitute a denial of the motion. [Citations.] Rather, 'it is the responsibility of the party filing a motion to request the trial judge to rule on it, and when no ruling has been made on a motion, the motion is presumed to have been abandoned absent circumstances indicating otherwise.' " 379 Ill. App. 3d at 628.

¶ 19 We find that the circumstances of this case indicate respondent's section 2-1401 petition was not abandoned. Respondent filed his initial motion to vacate on December 15, 2010. On the scheduled hearing date, the trial court granted respondent leave to file an amended motion to vacate, which he did on December 22, 2010. The case was continued a number of times through June 8, 2011. Then, on June 8, 2011, the court again granted respondent leave to file an amended motion to vacate, which respondent did on June 21, 2011, when he officially filed his section 2-1401 petition to vacate the May 10, 2010, dissolution judgment. The September 19, 2011, hearing date scheduled for the petition, however, was stricken and no new hearing date was assigned. Then, in response to petitioner's September 9, 2014, motion for turnover to execute the dissolution judgment, on May 19, 2015, respondent re-noticed his section 2-1401 petition. In support of the re-noticed petition, respondent filed an amended affidavit.

¶ 20 In the amended affidavit, respondent attested that the last notice he received in this case prior to learning of the QDRO was on December 2, 2008, which was a handwritten letter from petitioner stating that she wanted to postpone the dissolution proceedings. Respondent stated that he spoke to petitioner "regularly and she informed me that the case was no longer proceeding." Respondent explained that he hired an attorney after filing his initial motion to vacate, which happened only upon his learning of the QDRO through his employer. Respondent stated that the September 19, 2011, hearing date was canceled due to the health of petitioner's attorney.

Respondent was told the case "was continued until [petitioner's attorney's] poor health improved." Respondent later discovered through continued contact with his attorney that petitioner's attorney ultimately died. Then, upon learning about petitioner's September 9, 2014, motion for turnover to execute the dissolution judgment, respondent also learned that his attorney was no longer licensed to practice law. As a result, respondent was forced to find another attorney, after which time he re-noticed his section 2-1401 petition. The amended affidavit was uncontested.

¶ 21 We recognize the lengthy delay in obtaining a ruling on the section 2-1401 petition; however, based on the circumstances, we cannot find that respondent abandoned his petition. Respondent attempted to vacate the dissolution judgment *vis a vis* three different pleadings across multiple years when he initially appeared *pro se*, when he was represented by his first counsel, after time which petitioner's counsel's health caused significant delays in the proceedings, and then later when he retained his second counsel. It is clear that respondent sought relief from the dissolution judgment from the time he learned of the default judgment until when he finally obtained that relief.

¶ 22 We further find the trial court did not abuse its discretion in denying petitioner's request that respondent's section 2-1401 petition be vacated as a violation of Cook County Rule 2.3. Rule 2.3 provides:

> "The burden of calling for hearing any motion previously filed is on the party making the motion. If any such motion is not called for hearing within 90 days from the date it is filed, the court may enter an order overruling or denying the motion by reason of the delay." Cook Co. Cir. Ct. R. 2.3 (eff. July 1, 1976).

Here, the record reveals that respondent's initial motion to vacate and subsequent section 2-1401 petitions were scheduled to be heard within the requisite 90-day period. We note that the hearings on the motion and petitions were continued or rescheduled for various reasons, but they were scheduled nonetheless. We also note that Rule 2.3 is permissive, in that the court "may" deny the motion by reason of delay. In light of the convoluted proceedings in this matter, we cannot conclude that the trial court's ruling constituted an abuse of discretion.

¶ 23 Petitioner next contends that the trial court erred in granting respondent's section 2-1401 petition for relief from the May 11, 2010, dissolution judgment where respondent failed to establish the requisite elements of a section 2-1401 petition.

¶ 24 As stated, under the circumstances of this case, we must review whether the trial court abused its discretion in granting respondent's section 2-1401 petition. *Walters*, 2015 IL 117783, ¶ 51; see *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220 (1986) ("[w]hether a section 2-1401 petition should be granted lies within the sound discretion of the circuit court, depending upon the facts and equities presented"). Section 2-1401 provides a statutory method for the vacatur of final orders, judgments, and decrees "after 30 days from the entry thereof." 735 ILCS 5/2-1401 (West 2010). To be entitled to such relief, the petitioner must affirmatively set forth specific factual allegations supporting the following by a 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. *Airoom*, 114 Ill. 2d at 221.

¶ 25 Based on the record before us, we find the trial court did not abuse its discretion in granting respondent's section 2-1401 petition. With regard to the first element, respondent presented a meritorious defense. More specifically, respondent argued that the trial court failed

to properly apply the Illinois Marriage and Dissolution of Marriage Act in issuing the dissolution judgment and subsequent QDRO because the parties' marital property was not divided in just proportions. In terms of due diligence in presenting the defense, the record is clear that respondent did not have notice of the March 23, 2010, trial or any of the proceedings prior to that date. Petitioner, however, argues that respondent had notice of the trial as early as May 2010 pursuant to an admission in respondent's section 2-1401 petition. While respondent did state in his section 2-1401 petition that he recalled receiving a letter from petitioner's attorney in May 2010 regarding what petitioner sought in the dissolution judgment, the May 2010 date was two months after the trial had been conducted in respondent's absence. Accordingly, even assuming, *arguendo*, that respondent knew of the dissolution judgment in May 2010, he could not have raised the defense of an equitable distribution at the time of the trial. Respondent's section 2-1401 petition, however, further states that, upon inquiry to petitioner regarding the May 2010 letter from her attorney, respondent assured petitioner that there was nothing to worry about. In fact, in his uncontested affidavit, respondent attested that petitioner assured him that the "matter was dismissed." We, therefore, find that, based on the record, including respondent's pleadings and uncontradicted affidavits, respondent did not become aware of the QDRO until November 30, 2010, and did not become aware of the dissolution judgment until he appeared in court to challenge the QDRO on December 15, 2010. Thereafter, respondent filed two motions to vacate the QDRO on December 15, 2010, and December 22, 2010, and a section 2-1401 petition for relief from the dissolution judgment on June 11, 2011. Although the petition ultimately was not ruled upon until July 2015, we find respondent exercised due diligence in presenting his motions to vacate and section 2-1401 petition. In sum, we find respondent's section 2-1401 petition

satisfied the requisite requirements for relief and further find the trial court did not abuse its discretion in granting such relief.

¶ 26 Contrary to petitioner's argument, we additionally find that respondent did not forfeit review of the dissolution judgment. Petitioner argues that respondent failed to object and instead acquiesced in the partial execution of the dissolution judgment. We disagree. In support, petitioner relied upon orders that responded to her September 9, 2014, motion for turnover to execute the dissolution judgment. More specifically, on January 15, 2015, the trial court ordered respondent to provide petitioner with necessary documentation to effectuate the dissolution judgment. Then, on March 3, 2015, the parties' entered an agreed order for respondent's "tendering instructions and other documents necessary to convert stock of UPS" pursuant to the dissolution judgment. The March 3, 2015, order set another status date for the matter. Then, on May 19, 2015, respondent re-noticed his section 2-1401 petition and on May 20, 2015, the trial court granted respondent's TRO barring transfer of his UPS stocks or retirement fund. We find respondent's compliance with the March 3, 2015, court order and agreement to another status date did not demonstrate acquiescence in effectuating the dissolution judgment. Instead, respondent re-noticed his section 2-1401 petition requesting relief from that judgment and sought and obtained a TRO to bar the transfer of his assets to petitioner. Moreover, in granting the section 2-1401 petition, the trial court specifically vacated the distribution of marital property, expressly vacating the partial distribution that had already been made pursuant to the QDRO. We, therefore, find there was no forfeiture under the facts before us.

¶ 27 Finally, we find petitioner has forfeited review of her argument that respondent committed laches. Petitioner failed to cite any supporting authority in her appellant brief in violation of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6 2013) ("[p]oints not argued are

waived and shall not be raised in the reply brief"). Forfeiture aside, based on the foregoing, we do not find respondent committed laches here where we have concluded that he demonstrated due diligence in bringing his section 2-1401 petition. See *Renth v. Krausz*, 219 Ill. App. 3d 120, 122-23 (1991) ("[l]aches depends on whether, under all the circumstances of the particular case, plaintiff is chargeable with want of due diligence in failing to institute proceedings before he did. It has been defined to be such neglect or omission to assert a right, taken in conjunction with lapse of time of more or less duration, and other circumstances causing prejudice to an adverse party").

¶ 28 CONCLUSION

¶ 29 We affirm the trial court's July 24, 2015, order granting respondent's section 2-1401 petition for relief from the May 11, 2010, dissolution judgment.

¶ 30 Affirmed.