2016 IL App (1st) 161058-U

SIXTH DIVISION
December 16, 2016

No. 1-16-1058

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

COLUMBIA COLLEGE CHICAGO,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Petitioner-Appellant,	)	Cook County.
	)	
v.	)	No. 2014 M1 101633
	)	
CHEESECAKE FACTORY, INC.,	)	
	)	
Third-Party Respondent-Appellee	)	Honorable
	)	Daniel J. Kubasiak,
(Brittany Smith, Defendant).	)	Judge Presiding.

ORDER

JUSTICE ROCHFORD delivered the judgment of the court.
Justice Cunningham concurred in the judgment.
Justice Delort concurred, in part, and dissented, in part.

¶ 1 *Held*: We affirmed the denial of plaintiff's section 2-615 motion to dismiss third-party respondent-appellee's section 2-1401 petition, where the petition adequately alleged the existence of a meritorious defense to plaintiff's action against it, as well as due diligence in presenting the defense and in filing the petition. We also affirmed the summary grant of the section 2-1401 petition where the uncontradicted affidavits and exhibits attached thereto established third-party respondent-appellee's right to relief under section 2-1401.

¶ 2 Plaintiff-appellant, Columbia College Chicago (Columbia), appeals both the denial of its section 2-615 motion to dismiss the section 2-1401 petition of third-party respondent-appellee Cheesecake Factory, Inc. (CFI), and the order summarily granting the petition. We affirm.

¶ 3 On February 19, 2014, Columbia filed this action against, defendant, Brittany Smith, who is not a party to this appeal, for her failure to make payments on her student account. A judgment was entered against Ms. Smith in the amount of $12,979.57 on October 27, 2014. On December 19, 2014, the circuit court entered an order setting forth an agreed plan for Ms. Smith to make installment payments on the judgment and providing that Columbia would not execute on the judgment "[w]hile [Ms. Smith] makes timely payments."

¶ 4 On April 15, 2015, however, Columbia served a third-party citation to discover Ms. Smith's assets on CFI. The citation alleged that Ms. Smith was employed by CFI, Columbia had a judgment against her which then totaled $13,761.77, and Columbia was seeking to garnish her wages to satisfy that judgment. The citation included interrogatories to be answered by CFI as to Ms. Smith's wages to determine whether her wages could be garnished. Columbia mailed a copy of the citation to CFI at 26901 Malibu Hills Road, Calabasas, California, 91301. The record includes a receipt showing delivery of the citation to CFI at that address on April 25, 2015, by certified mail. The citation was set for a hearing on May 22, 2015.

¶ 5 On that date, the circuit court entered a conditional judgment of $13,963.08 against CFI for its failure to respond to the citation. On May 29, 2015, Columbia filed a summons after conditional judgment, which set the matter for hearing on June 19, 2015. Columbia mailed the summons to CFI at the Calabasas, California address. A certified mail receipt in the record shows delivery of the summons on June 3, 2015.

¶ 6 On June 19, 2015, the circuit court entered a default order confirming the conditional judgment against CFI, in the amount of $14,068.09. CFI was not present in court.

¶ 7 Thereafter, in response to the citation, CFI filed its "Answers to Interrogatories/Wage Deduction Proceedings" (answers) on July 21, 2015. The answers showed Ms. Smith was paid biweekly, her gross wages as of June 25, 2015, were $507.32, and that, based on the requested calculations, there were no wages available for garnishment to satisfy Columbia's judgment.

¶ 8 CFI filed amended answers on August 5, 2015, and August 12, 2015. Those amended answers showed that Ms. Smith's employment had terminated.

¶ 9 On August 14, 2015, Columbia served a third-party citation to discover assets belonging to CFI on American Express Travel Related Services Company, Inc. (American Express). American Express informed CFI of its receipt of this citation by a letter dated August 25, 2015. CFI received the letter on August 31, 2015.

¶ 10 CFI filed an appearance on September 25, 2015. With leave of court, on September 30, 2015, CFI, under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)), filed a petition seeking to vacate the default order confirming the conditional judgment. The petition was supported by exhibits, including: the August 25, 2015, letter to CFI from American Express; records from the office of the Illinois Secretary of State; affidavits of Jineene Adler, senior specialist, legal services, from CFI's corporate office; Tammy Davis, CFI's senior garnishment technician; Laura Helgeson, CFI's senior manager of office services; and Kathleen M. Klein, an attorney at the firm representing CFI in this matter.

¶ 11 The petition and supporting documents explained CFI's delay to appear in the citation proceeding. CFI maintained that it uses Illinois Corporation Services Company to accept service as reflected in its registration with the office of the Illinois Secretary of State. However,

Columbia served the citation and the summons to confirm conditional judgment by certified mail to CFI's address in California. Ms. Helgeson attested in her attached affidavit that all mail sent to that address is delivered to a post office box. A courier picks up the mail from the post office box, signs any certified mail receipts, and delivers the mail to the CFI mailroom. The mail is then sorted and distributed to the proper department.

¶ 12 Ms. Adler attested that CFI first became aware of the citation on June 12, 2015. Ms. Davis attested that on June 12, 2015, she faxed the citation to ADP, the company which manages CFI's payroll, to complete the responses to the citation's interrogatories relating to Ms. Smith's available wages.

¶ 13 After receiving ADP's responses on June 25, 2015, CFI filed the answers on July 21, 2015, and, later, filed amended answers on August 5, 2015, and August 12, 2015.

¶ 14 Ms. Adler attested that CFI "had no actual knowledge of the Summons After Conditional Judgment until American Express sent a letter dated August 25, 2015, which was received in the legal department on August 31, 2015. American Express forwarded a copy of the citation they received from [Columbia's] firm following the entry of judgment against [CFI]."

¶ 15 CFI asserted in its petition that it was "not aware of any document evidencing service of" the default order confirming the conditional judgment and first learned of the default order on August 31, 2015, after receiving the August 25 letter from American Express.

¶ 16 Ms. Klein, the attorney for CFI, attested that she received an email from CFI regarding the default order on August 31, 2015, and accepted the matter and opened a file on September 1, 2015. Immediately thereafter, Ms. Klein commenced investigation into the matter which included: determining which employee the garnishment action related to; obtaining the court file;

determining the debtor employee's status with CFI; investigating service; researching law; and corresponding with CFI, payroll, ADP and with opposing counsel.

¶ 17 Ms. Adler attested that she was CFI's liaison to outside counsel, and she indicated that Ms. Klein's investigation was prolonged because Ms. Adler was on a three-week sabbatical during September 2015.

¶ 18 Ms. Klein completed the investigation within the month of September 2015 and filed the section 2-1401 petition on September 30.

¶ 19 The petition asserted that Ms. Smith had been employed as a server by Grand Lux Café Chicago; CFI's counsel explained during the hearing that Grand Lux Café is a "different chain under the umbrella of the Cheesecake Factory." CFI's attached answer to the citation interrogatories showed that in June 2015, CFI issued a biweekly paycheck to Ms. Smith in the amount of $507.32. CFI argued that it had a meritorious defense to the wage garnishment action because Ms. Smith's wages were insufficient to garnish during her employment with Grand Lux Cafe, and that according to Ms. Adler's affidavit, Ms. Smith's employment was terminated on July 8, 2015. CFI also argued that it acted diligently in presenting this defense to the circuit court and in filing the section 2-1401 petition and, therefore, the circuit court should grant the petition and vacate the June 19 default order confirming the conditional judgment.

¶ 20 On October 30, 2015, Columbia filed a motion to dismiss the petition pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2016).

¶ 21 On January 15, 2016, after briefing and a hearing, the circuit court denied Columbia's motion to dismiss the petition, summarily granted the petition, and vacated the June 19, 2015, default order confirming the conditional judgment against CFI. On March 18, 2016, the circuit court denied Columbia's motion to reconsider. Columbia has appealed.

¶ 22 On appeal, Columbia argues that the circuit court erred in denying its motion to dismiss the petition as the petition failed to sufficiently allege due diligence and a meritorious defense. Columbia also argues that the court erred in summarily granting the petition.

¶ 23 Section 2-1401 allows the filing of a petition seeking relief from judgment after 30 days from the entry thereof. 735 ILCS 5/2-1401 (West 2016). A petition under section 2-1401 serves either to present facts that if known to the circuit court at the time would have prevented the entry of the judgment at issue (*In re Marriage of Little*, 2014 IL App (2d) 140373, ¶ 9), or to challenge the judgment as defective on purely legal grounds (*Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31 (citing *People v. Lawton*, 212 Ill. 2d 285, 297 (2004)). To obtain relief under section 2–1401 on a fact-dependent challenge to a judgment, a petitioner "must affirmatively set forth specific factual allegations supporting: (1) the existence of a meritorious defense or claim against the judgment; (2) due diligence in presenting the defense or claim to the trial court in the original action; and (3) due diligence in filing the petition." *Marriage of Little*, 2014 IL App (2d) 140373, ¶ 9. No bright-line rule exists for judging whether a petitioner has acted with due diligence; rather, due diligence is judged by the reasonableness of the petitioner's conduct under all of the circumstances. *Paul v. Gerald Adelman & Associates, Ltd*., 223 Ill. 2d 85, 99-100 (2006).

¶ 24 If the petition alleges facts not contained in the record, those allegations must be supported by affidavits. *O'Malley v. Powell*, 202 Ill. App. 3d 529, 533 (1990). "Where affidavits support the petition, the court may enter judgment if those affidavits are uncontradicted." *Id*. In deciding whether the petition should be granted, a court must treat as true the facts of the petition and its supporting affidavits that have not been controverted. *Id*.

¶ 25 "The quantum of proof necessary to sustain a [fact based] 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." *Walters*, 2015 IL 117783, ¶ 51 (citing *Smith v. Airoom, Inc*., 114 Ill. 2d 209, 221 (1986)).

¶ 26 Section 2-1401 proceedings are subject to the rules of civil practice. *People v Vincent*, 226 Ill. 2d 1, 8 (2007) (citing *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 279 (1982)). Thus, a petition under section 2-1401, as the initial pleading and "the procedural counterpart of a complaint," may be challenged by a motion to dismiss under section 2-615 of the Code. *Marriage of Little*, 2014 IL App (2d) 140373, ¶ 8. We review *de novo* an order granting or denying a section 2-615 motion attacking a section 2-1401 petition. *Id*. ¶ 9 (citing *Vincent*, 226 Ill. 2d at 14-18).

¶ 27 We first consider whether the circuit court erred in its denial of Columbia's motion to dismiss the petition. A section 2-1401 petition is subject to dismissal pursuant to a section 2-615 motion to dismiss where it "either fails to state a cause of action or shows on its face that the petitioner is not entitled to relief." *Id*. ¶ 9 (citing *Ostendorf*, 89 Ill. 2d at 279-80). In determining whether a petition should be dismissed under section 2-615, all well-pleaded facts must be taken as true. *In re Marriage of Van Ert*, 2016 IL App (3d) 150433, ¶ 14. Exhibits that are attached to the petition become part of the petition and control over conflicting allegations in the petition. *Id.*

¶ 28 By issuance of the citation, Columbia sought to garnish Ms. Smith's wages pursuant to the wage deduction provisions of the Code. Those provisions allow a judgment creditor to serve a citation on the employer of the judgment debtor commanding that the employer appear and answer written interrogatories as to the wages of the debtor. 735 ILCS 5/12-805(a) (West 2016).

If the employer fails to appear and answer the interrogatories the court may enter a conditional judgment against the employer for the amount due by the judgment creditor as to the original judgment. 735 ILCS 5/12-807(a) (West 2016). The conditional judgment may be confirmed if the employer fails to respond to a request to show cause as to why the conditional judgment should not be made final. *Id*.; see also *Aurora National Bank v. Simpson*, 118 Ill. App. 3d 392, 395 (1983).

¶ 29 The uncontroverted facts of the petition and its supporting affidavits and exhibits when taken as true show the existence of a meritorious defense to the wage garnishment action as those facts show Ms. Smith's wages during her employment with Grand Lux Café were insufficient to be garnished under the applicable statute. Specifically, section 12-803 of the Code provides in pertinent part that the amount of wages that may be deducted is the lesser of 15% of gross weekly wages or the amount by which disposable earnings for a week exceed the total of 45 times the state minimum hourly wage. 735 ILCS 5/12-803 (West 2016). CFI's answers to the interrogatories attached to the petition revealed that, in June 2015: (1) 15% of Ms. Smith's gross wages was $76.10; and (2) her disposable biweekly earnings of $426.10 were $316.40 *less* than the total of 45 times the state minimum hourly wage. As Ms. Smith's disposable biweekly earnings while she was working at Grand Lux Café in June 2015 were less than 45 times the state minimum hourly wage, her earnings fell below the statutory threshold for withholding during her employment. In addition, the uncontradicted affidavit of Ms. Adler, CFI's senior specialist, legal services, indicated that Ms. Smith's employment had been terminated in July 2015.

¶ 30 The uncontroverted facts of the petition and its supporting affidavits when taken as true also show due diligence by CFI in presenting the defense and in filing the section 2-1401

petition. Specifically, taken together, Ms. Helgeson's and Ms. Adler's affidavits indicated that Columbia's act of sending by certified mail a copy of the citation and summons after conditional judgment to CFI's California address, instead of to its agent's Illinois address, prevented CFI from learning of the citation until June 12, 2015. Ms. Davis attested that upon learning of the citation on June 12, 2015, CFI immediately faxed the wage interrogatories to ADP, its payroll company. After receiving ADP's responses on June 25, 2015, CFI filed the answers on July 21, 2015, showing that Ms. Smith's wages were insufficient to be garnished, and filed amended answers on August 5 and August 12, 2015, indicating that Ms. Smith's employment had been terminated.

¶ 31 We cannot say the circuit court erred in finding that CFI acted with due diligence in presenting its defense where the uncontradicted facts in CFI's petition and affidavits show that: (1) Columbia's failure to send a copy of the citation to CFI's Illinois agent prevented CFI from learning of the citation until June 12, 2015; and (2) CFI did not delay in responding to the citation upon learning of its existence but, instead, immediately faxed the wage interrogatories to its payroll company and, within four weeks of receiving the payroll company's response, filed the answers showing Ms. Smith's wages were not subject to garnishment.

¶ 32 Nor did the circuit court err in finding that CFI acted with due diligence in filing the section 2-1401 petition to vacate the default order confirming the conditional judgment. CFI asserted in its petition that Columbia never informed CFI of the default order; rather, CFI learned of this default order from American Express on August 31, 2015. Columbia does not dispute that it failed to serve a copy of the default judgment on CFI. Ms. Klein's uncontradicted affidavit indicated that upon learning of the default order, CFI retained counsel the next day on September 1, 2015, and within 30 days counsel had conducted an investigation of the matter (which was

prolonged because CFI's liaison to outside counsel was on a three week sabbatical) and filed its section 2-1401 petition. The 30-day timeframe in which CFI learned of the default order, hired counsel, conducted an investigation, and filed its section 2-1401 petition was not so lengthy as to run afoul of the due diligence requirement. See *In re Marriage of Buck*, 318 Ill. App. 3d 489, 497 (2000) (petitioner acted with due diligence in filing her section 2-1401 petition to reform the marital settlement agreement approximately two months after learning of respondent's economic interest in certain property).

¶ 33 As CFI pleaded sufficient facts to obtain relief under section 2-1401, specifically, the existence of a meritorious defense and due diligence in presenting the defense and in filing the section 2-1401 petition, the circuit court did not err in denying Columbia's section 2-615 motion to dismiss.

¶ 34 Next, we consider whether the circuit court erred in summarily granting CFI's section 2-1401 petition. Columbia argues that the circuit court should not have summarily granted the petition, but instead should have allowed further discovery and then an evidentiary hearing on the petition. We disagree, as the uncontroverted facts of the petition, affidavits, and attached exhibits sufficiently indicated CFI's right to relief under section 2-1401. Specifically, Columbia does not dispute the following pertinent facts relevant to the grant of the section 2-1401 petition that: Ms. Smith did not earn enough wages to allow for garnishment thereof and, thus, that CFI had a meritorious defense to the garnishment proceedings against it; Columbia served the citation and summons to confirm conditional judgment to CFI's address in California instead of to CFI's Illinois agent; CFI did not learn of the citation until June 12, 2015; CFI faxed a copy of the citation and wage interrogatories to ADP on June 12, 2015, received ADP's responses on June 25, 2015, and filed the answers on July 21, 2015, and, later, filed amended answers on

August 5 and August 12, 2015; CFI did not learn of the default order until August 31, 2015, when it received the letter from American Express; and CFI contacted its attorney on August 31, 2015, who accepted the case the next day, conducted an investigation, and filed the section 2-1401 petition within the month.

¶ 35 Further discovery and an evidentiary hearing would not change any of these relevant, undisputed facts surrounding how CFI was notified of the citation and default order and of how CFI responded thereto, nor would there be any change in the undisputed fact that Ms. Smith did not make enough money during her employment to allow for garnishment of her wages. Accordingly, the circuit court properly granted CFI's section 2-1401 petition.

¶ 36 For the foregoing reasons, we affirm the circuit court.

¶ 37 Affirmed.

¶ 38 JUSTICE DELORT, concurring in part and dissenting in part:

¶ 39 I join the portion of the majority's analysis and disposition regarding the circuit court's denial of the section 2-615 motion to dismiss CFI's section 2-1401 petition. However, I respectfully disagree with the majority as to whether the circuit court acted properly by summarily granting the section 2-1401 petition, itself.

¶ 40 On October 2, 2015, the circuit court entered an order reciting that the case was before it "on status & filing of 2-1401 petition." The court: (1) granted plaintiff until October 30, 2015 to answer or otherwise plead to the section 2-1401 petition, (2) stated "discovery to issue"; and (3) set the case for status on November 6, 2015, "to apprise court as to discovery or briefing schedule or set evidentiary hearing date." Plaintiff timely responded to the section 2-1401 petition by moving to dismiss it for failure to state a cause of action pursuant to section 2-615.

On November 6, the court set a briefing schedule on a "motion," presumably the section 2-615 motion, and entered and continued that motion to January 15, 2016 "for hearing."

¶ 41 On January 15, the court entertained lengthy arguments from the parties regarding the section 2-615 motion. In the course of these arguments, the parties and the court frequently cited various affidavits and evidentiary material which had been attached to the section 2-1401 petition. At the conclusion of the arguments, the court stated:

> "I am going to deny your 2-615 motion. I am going to vacate the judgment. *** I believe that given the arguments made in the briefs that have been filed, the arguments that have been made on the record that the Cheesecake Factory did, in fact, respond in a timely fashion and have a meritorious defense based upon the answer that has been filed. And as such I'm going to grant their 2-1401 motion [*sic*]. And it's a combination of all that."

The court's written order of that day indicates that the case came before the court on both the section 2-615 motion (which was denied) and the section 2-1401 petition (which was granted).

¶ 42 Plaintiff moved to reconsider, arguing, among other things, that the court erred by summarily granting the section 2-1401 petition "as the only legal issue then before the [c]ourt on 01-15-16 was whether or not the Petition was legally sufficient to proceed upon." Plaintiff further argued that a "[s]ection 2-1401 petition is not, and cannot, be treated as a motion. It is a new case subject to all the rules of civil procedure, and Cheesecake's Petition is not yet ripe for consideration." Plaintiff asked for time to answer or, otherwise, plead to the section 2-1401 petition. The court denied the motion to reconsider.

¶ 43 "Section 2–1401 petitions are essentially complaints inviting responsive pleadings." *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). A court can deny a section 2-1401 petition "as a

matter of law" before providing the respondent an opportunity to answer or plead to it. *Id.* at 12. This is because a court may dispose of a matter on its own motion "when it is clear on its face that the requesting party is not entitled to relief as a matter of law." *Id.* However, the converse is not necessarily true, because summarily *granting* a section 2-1401 petition can deprive the opposing party of its day in court.

¶ 44 A section 2-1401 petition is the functional equivalent of a complaint, so, once the court denied plaintiff's section 2-615 motion, it should have given plaintiff time to answer or, otherwise, plead to the section 2-1401 petition. In *Vincent*, our supreme court explained that a court may resolve a section 2-1401 petition by one of five methods. The court may: (1) dismiss the petition; (2-3) "grant or deny the petition on the pleadings alone (summary judgment);" (4-5) "grant or deny relief after holding an evidentiary hearing at which factual disputes are resolved." *Id.* at 9. None of these options provide for summarily *granting* the petition based merely on the record developed on a section 2-615 motion. When it decided *not* to dismiss the petition pursuant to the section 2-615 motion, the circuit court determined that the petition did state a valid cause of action on its face. The record contains no indication that the parties stipulated to proceed based merely on the documentary materials contained in the petition and the motion to dismiss pleadings. While the section 2-1401 petition might eventually prove to be meritorious, the circuit court should have resolved it, either through summary judgment, or an evidentiary hearing.

¶ 45 For these reasons, I would vacate the portion of the January 15, 2016, order which granted the section 2-1401 petition, and remand the case, with instructions, to permit plaintiff to answer or, otherwise, plead to the petition.