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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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|--------------------------|---|-------------------------------|
| <i>In re</i> MARRIAGE OF | ) | Appeal from the Circuit Court |
| MICHELLE CICINELLI,      | ) | of Kane County.               |
|                          | ) |                               |
| Petitioner-Appellee,     | ) |                               |
|                          | ) |                               |
| and                      | ) | No. 12-D-811                  |
|                          | ) |                               |
| THOMAS CICINELLI,        | ) | Honorable                     |
|                          | ) | Kevin T. Busch,               |
| Respondent-Appellant.    | ) | Judge, Presiding.             |

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JUSTICE ZENOFF delivered the judgment of the court.  
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly treated petitioner, Michelle Cicinelli's, section 2-619 motion to dismiss as one brought pursuant to section 2-615; the trial court properly dismissed respondent, Thomas Cicinelli's, section 2-1401 petition for relief from the judgment of dissolution of marriage where the petition failed to allege that Thomas had a meritorious defense or claim and failed to allege that Thomas was diligent in the original proceeding; however, Thomas was allowed to amend his petition, and that part of the court's order denying the section 2-1401 petition on the merits was vacated.

¶ 2 Respondent, Thomas Cicinelli, filed a section 2-1401 petition (735 ILCS 5/2-1401 (West 2014)) to vacate the judgment of dissolution of marriage (JDOM) that was entered in the parties'

dissolution case. Petitioner, Michelle Cicinelli, brought a motion to “strike and dismiss” pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)). The trial court entered a written order that both denied the 2-1401 petition and granted the motion to “strike.” Thomas appealed. We affirm in part, vacate in part, and remand for further proceedings.

¶ 3

### I. BACKGROUND

¶ 4 Michelle filed a petition for dissolution of marriage on June 6, 2012. Two minor children were born to the parties: Brittany, born August 29, 2000, and Vito, born August 24, 2002. On January 16, 2014, the parties entered into a final custody judgment and parenting order. Thereafter, the trial on property division centered on the valuation of the marital business, Best Firewood and Mulch, Inc. (the business). After considering expert testimony, the parties’ testimony, and the testimony of various witnesses, the court awarded 100% of the business to Michelle<sup>1</sup> and found that the value of the business was \$685,951. The court awarded Thomas other property to offset the award of the business to Michelle. Thomas directly appealed from the JDOM. In that appeal, Thomas did not contest the property division or the court’s valuation of the business, but argued that the court’s impatience and hostility toward him denied him a fair trial. This court affirmed the judgment in part and vacated it in part<sup>2</sup> in *In re Marriage of Cicinelli*, 2015 IL App (2d) 140657-U (*Cicinelli I*).

¶ 5 At trial, the evidence showed that both parties participated in a scheme to hide business and personal income from the Internal Revenue Service (IRS). Thomas collected cash receipts

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<sup>1</sup> Michelle inherited the firewood and mulch business from her father and subsequently gave Thomas a 49% interest in the business.

<sup>2</sup> This court vacated the award of attorney fees and remanded for a hearing on that issue.

from the business and bundled the cash into a safe in the basement of the marital home. Michelle never logged the cash receipts until the court ordered her to do so during the dissolution proceedings. At trial, Michelle produced original income tax returns and amended returns. Thomas had refused to sign the amended returns, contending that they underreported the business's and parties' true income. Michelle presented an expert to value the business, and the court appointed its own expert. Thomas did not present his own expert, but relied on his counsel's cross-examination of the other experts at trial to show that the business was worth more than either of their valuations showed. Thomas's theory at trial was that Michelle had hidden additional, unaccounted-for cash. The court found that Thomas presented no evidence to support his theory.

¶ 6 During the trial, an IRS audit of the parties' business and personal tax returns was underway. The audit concluded after the court's entry of the JDOM. On September 25, 2015, Thomas filed his section 2-1401 petition for relief from the JDOM. In the section 2-1401 petition, Thomas alleged that the IRS determined that the business income far exceeded that claimed in the original and amended tax returns. The section 2-1401 petition was in four counts, but the core of each was that the results of the IRS audit proved that Michelle committed a fraud on the court in representing that the amended tax returns were truthful. Thomas alleged that the court relied on the false tax returns in valuing the business and requested that the court vacate the JDOM.

¶ 7 Michelle filed an amended motion to dismiss the petition "and for other relief." Michelle designated the amended motion to dismiss as a section 2-619 motion but did not assert any of the nine grounds enumerated in subsection (a). Instead, the basis for dismissal, recited in paragraphs 13 through 15, was the legal insufficiency of the section 2-1401 petition. Specifically, Michelle

argued that Thomas failed to plead a meritorious defense or claim. She also argued that Thomas failed to exercise diligence in presenting a meritorious defense or claim at trial or in filing the section 2-1401 petition.

¶ 8 On November 16, 2015, the court conducted a hearing on Michelle's amended motion to dismiss. Michelle focused particularly on Thomas's lack of diligence. Michelle asserted that, before and at trial, Thomas had the same information that was furnished to the IRS, yet he failed to present his own expert.

¶ 9 Thomas responded that, by virtue of moving to dismiss pursuant to section 2-619, Michelle admitted that the petition stated a cause of action. The court then asked Thomas's counsel how the IRS audit was significant to the court's valuation of the business. Counsel stated that Michelle signed IRS Form 4605, admitting that the IRS's determination of the business's income was correct. Thomas argued that this admission affected both the validity of the court's ruling and Thomas's interest in the marital estate. Form 4605 was not attached as an exhibit to the section 2-1401 petition.

¶ 10 In its oral ruling, the court effectively treated the section 2-619 motion to dismiss as a section 2-615 motion (735 ILCS 5/2-615 (West 2014)) and noted that Thomas and Michelle compromised with the IRS to avoid imprisonment. The court found, under those circumstances, that Michelle's statements to the IRS were not admissions that constituted newly discovered evidence. Also, the court noted that Thomas stipulated at trial to the amount of unreported income that the court's expert used at trial in formulating his opinion, and that the purpose of the stipulation was to avoid having the parties admit to felonies while testifying. The court further found that Thomas was not diligent in presenting a claim or defense at trial, noting that he could have hired his own expert but opted instead to conduct a "very weak and ineffective cross-

examination” of the two experts who testified. The court observed that the amended tax returns introduced at trial had “no impact” on the court and “very little” impact on the experts. The court indicated that it had trouble at trial believing either Thomas or Michelle, because both of them had admitted to engaging in fraud. The court, therefore, relied on the experts’ testimony. The court further indicated that nothing would change the result that Michelle was entitled to 100% of the business, as she inherited it. The question was what it would cost her to “buy out” Thomas. The court found that Thomas’s claim that the IRS audit proved that Michelle committed fraud at trial was insufficient to allow a new trial where “from the beginning, this trial was all about whose fraud was bigger than the other [*sic*].” The court found that Thomas could have conducted “the same audit that the IRS conducted.” The court then granted the motion “for the reasons indicated.”

¶ 11 Following the court’s oral ruling, it entered a typewritten order. In paragraph 1, the order incorporated the court’s oral ruling, and in paragraph 2, the order provided that the section 2-1401 petition was “denied.” A handwritten comma followed the word “denied,” with the words “and Michelle’s motion to strike same is granted” written in cursive after the comma. Thomas filed a timely notice of appeal. With leave of court, Thomas filed an amended notice of appeal on January 25, 2016.

¶ 12

## II. ANALYSIS

¶ 13 Thomas argues that the trial court erred in failing to grant an evidentiary hearing on the amended section 2-619 motion to dismiss and instead “engaged in its own section 2-615 hearing on the sufficiency of the complaint.” Thomas also contends that the court impermissibly resolved questions of fact.

¶ 14 Judgments of dissolution of marriage are afforded the same finality as judgments in other proceedings. *In re Marriage of Lyman*, 2015 IL App (1st) 132832, ¶ 55. To challenge the validity of such a judgment beyond 30 days after its entry, a party must bring a section 2-1401 petition or pursue some other method of postjudgment relief. *Lyman*, 2015 IL App (1st) 132832, ¶ 55.

¶ 15 Section 2-1401 establishes a comprehensive procedure to vacate or modify final orders and judgments more than 30 days after their entry. *Robinson v. Ryan*, 372 Ill. App. 3d 167, 172-73 (2007). A section 2-1401 petition is a new action based on matters that were not of record in the original action and that were not considered by the appellate court. *Price v. Philip Morris, Inc.*, 2015 IL 117687, ¶ 26. Relief is premised on the notion that the new matters would have changed the result in the original action. *Price*, 2015 IL 117687, ¶ 26. A section 2-1401 petition must be supported by affidavit or other appropriate showing as to matters not of record. *Lyons Lumber & Building Center, Inc. v. 7722 N. Ashland, LLC*, 2016 IL App (3d) 140487, ¶ 21.

¶ 16 To obtain relief under section 2-1401, a petition raising a fact-dependent challenge to a final judgment or order must affirmatively allege specific facts to support each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting the defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition seeking relief. *Robinson*, 372 Ill. App. 3d at 173. The purpose of a section 2-1401 petition is to alert the court to facts which, had they been known at the time of the original proceeding, would have precluded entry of the judgment. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 50; *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 14. To set aside a judgment based on newly discovered evidence, the petitioner must demonstrate that the new evidence was not known to him or her at the time of the

original proceeding and could not have been discovered by the exercise of reasonable diligence. *Goldsmith*, 2011 IL App (1st) 093448, ¶ 15. A section 2-1401 proceeding is not intended to give the petitioner a new opportunity to do that which he or she should have done in an earlier proceeding or to relieve the petitioner of his or her mistake or negligence. *Goldsmith*, 2011 IL App (1st) 093448, ¶ 14.

¶ 17 Proceedings under section 2-1401 are subject to the rules of civil procedure. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 946 (2009). A section 2-1401 petition is essentially a complaint inviting responsive pleadings. *Mills*, 393 Ill. App. 3d at 946. Five types of dispositions are possible: dismissal of the petition; grant or denial of summary judgment; or grant or denial of relief after an evidentiary hearing. *Mills*, 393 Ill. App. 3d at 946.

¶ 18 Here, Michelle brought a section 2-619 motion to dismiss the petition. Section 2-619 provides for the involuntary dismissal of a complaint based on certain enumerated defects or defenses. 735 ILCS 5/2-619 (West 2014); *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004). The section 2-619 movant admits the legal sufficiency of the complaint but asserts an affirmative defense or other affirmative matter that avoids or defeats the claim. *Becker v. Zellner*, 292 Ill. App. 3d 116, 122 (1997). In ruling on a section 2-619 motion, the court accepts as true all well-pleaded facts and any reasonable inferences that may arise from them. *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 35. The court also construes the motion and the supporting documents in the light most favorable to the nonmovant. *Piser v. State Farm Mutual Auto Insurance Co.*, 405 Ill. App. 3d 341, 345 (2010). In contrast, a section 2-615 motion does not raise affirmative factual defenses but alleges defects on the face of the complaint. *Becker*, 292 Ill. App. 3d at 122. Meticulous practice dictates that parties

specifically, and properly, designate whether their motions are brought pursuant to section 2-615 or section 2-619 of the Code. *Becker*, 292 Ill. App. 3d at 121.

¶ 19 Nevertheless, Michelle's misdesignation of the proper section under which she brought her motion to dismiss is not dispositive. The misdesignation of a motion to dismiss is not fatal to the movant's right to prevail if the nonmovant is not prejudiced by the improper motion practice. *Becker*, 292 Ill. App. 3d at 121. Here, Thomas was not prejudiced, having recognized the true nature of the motion, and responding to it appropriately. See *Borowiec*, 209 Ill. 2d at 383 (no prejudice from improper designation of a motion to dismiss where the respondent responded appropriately). Accordingly, we will consider the motion as though it were brought pursuant to section 2-615 of the Code.

¶ 20 The question presented by a section 2-615 motion is whether the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Borowiec*, 209 Ill. 2d at 382. In ruling on a section 2-615 motion, the court can dismiss a cause of action only if it is apparent that no set of facts can be proved that will entitle the plaintiff to recovery. *Borowiec*, 209 Ill. 2d at 382. The appellate court reviews *de novo* whether the dismissal was proper. *Borowiec*, 209 Ill. 2d at 383.

¶ 21 Thomas argues that the court erroneously relied upon its own interpretation of the facts, viewing them in the light most favorable to Michelle, in dismissing the petition. Specifically, Thomas asserts that the court impermissibly weighed the evidence when it (1) asked of what significance IRS Form 4605 was to its determination; (2) inquired how Thomas intended to prove the business's actual income; and (3) opined that the results of the IRS were not binding on the court. In contrast, Michelle contends that the court did not engage in fact finding but simply pointed out that the section 2-1401 petition asked for a "do over" on the basis of the same



evidence that was produced at trial. Ruling on a section 2-615 motion to dismiss does not require the court to weigh facts or to determine the credibility of witnesses. *MacDonald v. Hinton*, 361 Ill. App. 3d 378, 381-82 (2005).

¶ 22 Thomas argues that the result of the IRS audit, standing alone, constitutes newly discovered evidence that entitles him to relief. The IRS audit was completed after the entry of the JDOM, and could not have been discovered sooner. However, that, by itself, does not require the court to grant the section 2-1401 petition. To merit relief under section 2-1401, the petitioner is required to demonstrate a meritorious defense to the judgment or final order challenged. *Northern Illinois Gas Co. v. Midwest Mole, Inc.*, 199 Ill. App. 3d 109, 119 (1990). Significantly, Thomas did not plead facts establishing a correlation between the IRS's determination of the business's income and what a proper valuation of the business would be based upon that determination.

¶ 23 Nor did Thomas plead that the IRS based its determination on documents that were unavailable to Thomas before trial. Without that allegation, Thomas cannot demonstrate due diligence, because he neglected to present his own expert at trial. Even though the result of the IRS audit may demonstrate that the amended tax returns understated the business's income, it does not mean that Thomas could not have independently discovered what the IRS found. Thomas could not take a wait-and-see-what-the-IRS-does approach at trial and then move to vacate the judgment.

¶ 24 Thomas relies on *In re Marriage of Van Ert*, 2016 IL App (3d) 150433, for the proposition that the only relevant question is whether he was diligent in filing the section 2-1401 petition. *Van Ert* is inapposite, because in that case the wife's lack of diligence in the original action was excused. *Van Ert*, 2016 IL App (3d) 150433, ¶ 19. That is not the situation in the

present case. Consequently, we affirm that part of the judgment dismissing the petition. Nevertheless, if Thomas can in good faith amend his petition in accordance with this court's Order, he should be allowed to do so. Because we agree with Thomas that the court exceeded the proper scope of a motion to dismiss and ruled on the merits of his claim, we vacate that part of the order denying the section 2-1401 petition.

¶ 25

### III. CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part, vacated in part, and the cause is remanded for further proceedings consistent with this Order.

¶ 27 Affirmed in part; vacated in part; cause remanded.