2016 IL App (5th) 150482-U

NO. 5-15-0482

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
GARY MARVIN EHRHART,	)	Wayne County.
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 14-D-64
	)	
JUDY LYNN EHRHART,	)	Honorable
	)	David K. Overstreet,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Where a marital settlement agreement reached by the parties was not unconscionable, the trial court did not err in dismissing the petition the wife filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)).

¶ 2 FACTS

¶ 3 Gary and Judy married in 1992. On October 1, 2014, the trial court entered a judgment of dissolution ending the marriage after 22.5 years.

¶ 4 During the marriage, the couple owned a home on a family farm, and over time added tracts of land for a total of 160 acres, some of which were farmable. In 2007, Gary

started an equipment repair business called Ehrhart Machine, and obtained various pieces of machinery and tools for use in that business. Additionally Gary farmed and had equipment associated with farming. Judy had a business called Cloverhill Embroidery and had equipment related to that business. The parties also had three vehicles–a 2002 Chevrolet Silverado, a 2004 Chevrolet Silverado, and a 2012 Hyundai Santa Fe. Both parties had retirement funds. Gary and Judy also had joint checking and savings accounts, as well as a farming bank account and an Ehrhart Machine bank account.

¶ 5 On or about September 23, 2014, Gary sought counsel with attorney Richard L. Kline about dissolving his marriage to Judy. Judy was also present. At this meeting, attorney Kline explained to Judy that he was not representing her and advised her to obtain her own attorney. Thereafter, on September 24, 2014, he provided her with a letter again advising her to obtain her own attorney and explaining that he could not advise her in any respect. Judy signed the letter acknowledging receipt. Kline eventually testified in this matter about the meeting he conducted with Gary and Judy. During this meeting he obtained information about the Ehrhart assets and how the Erhharts wanted the assets divided. He testified that both Gary and Judy also provided information about the amount of money in each bank account and in each retirement account.

¶ 6 Following the meeting, attorney Kline drafted a marital settlement agreement. On September 25, 2014, Gary and Judy signed the document. This agreement contained the following two relevant provisions:

> "G. The Wife has been informed by RICHARD L. KLINE, that she has the right to employ any attorney of her choice and consult with said attorney in regard

to her rights, duties, and obligations which have arisen because of the case for dissolution of marriage which has been filed by the Husband in the Wayne County Circuit Court. The Wife hereby acknowledges that she is aware that she has the right to retain and be represented by an attorney of her choice; however, the Wife hereby states and declares that she has not consulted with any attorney or has been advised by any attorney in regard to the execution of this Marital Settlement Agreement or in regard to the case for dissolution of marriage, having been filed by the Husband in the Wayne County Circuit Court.

H. The parties acknowledge that each has been fully informed of the wealth, property, estate and income of the other. Each party also acknowledges that he and she is [*sic*] conversant with all the wealth, property, estate and income of the other, and that each has been fully informed of his or her respective rights in the premises."

¶ 7 Pursuant to the agreement, Gary was to receive his personal effects, all bank accounts in his name, life insurance policies in his name, retirement accounts in his name, the marital home and farm, any assets associated with the farm, the Ehrhart Machine business, any assets associated with the business, both of the Chevy Silverado trucks, the Ehrhart Machine checking account, and the farm checking account. Gary also assumed all debts associated with the farm and with Ehrhart Machine. Pursuant to the agreement, Judy was to receive her personal effects, all bank accounts in her name, life insurance policies in her name, retirement accounts in her name, her Cloverhill Embroidery

business, the 2012 Hyundai Santa Fe, and a $100,000 lump sum payment from Gary's retirement accounts with TransAmerica and Alliance.

¶ 8 On October 1, 2014, attorney Kline and Gary appeared in court. The petition for dissolution of marriage was filed along with Judy's entry of appearance. The trial court approved the marital settlement agreement in its judgment for dissolution of marriage noting that the agreement was entered into freely and voluntarily between the parties and that the agreement was not unconscionable.

¶ 9 Shortly after filing the *pro se* petition for rule to show cause, Judy hired an attorney who filed a motion to vacate pursuant to section 2-1401 of the Code of Civil Procedure. In this petition, Judy alleged that the marital settlement agreement was unconscionable in that she received a grossly disproportionate share of the assets. She asked the court to vacate its October 1, 2014, order that approved the agreement. Judy alleged that the total value of the real estate could be between $600,000 and $1,000,000; however, she admitted that although the 160 acres included some farm land, the acreage was mostly pasture land. She also confirmed that she did not know how much Gary's retirement accounts were worth, but suspected that they could have been worth as much as $300,000.

¶ 10 On April 10, 2015, Gary filed his motion seeking to have Judy's section 2-1401 petition dismissed. He alleged that Judy executed all of the documents reflecting her understanding that attorney Kline was not her attorney and that she had the right to consult with her own attorney. He argued that Judy could not establish the requisite due diligence necessary for a successful section 2-1401 petition both because she did not

consult with her own attorney and failed to engage in discovery before agreeing to the settlement.

¶ 11 The trial court held a hearing on Gary's motion to dismiss on September 30, 2015. Two witnesses testified–attorney Richard L. Kline and Gary. Judy did not testify. Kline testified about his verbal and written warnings to Judy about hiring her own attorney. He also testified that both parties equally provided him with information about their assets during the initial meeting. On cross-examination, he explained that he did not discuss asset value with them because he had no way of knowing that information. Gary testified that Judy had received the $100,000 from his retirement accounts. He testified that he did not know the value of the farm and house, but stated that the real estate taxes were about $3,500 annually. He testified that he purchased the house and 80 acres from his parents in 1978 for $50,000. At the time of the dissolution, the house and the property were held jointly. Gary also testified that he was uncertain about how much money was in his retirement accounts when he and Judy divorced, but guessed that there may have been as much as $280,000. He testified that he brought the paperwork regarding his retirement accounts to the attorney's office and that the account information was used in arriving at the settlement. He testified that Judy wanted the divorce process to be concluded quickly because she was getting ready to travel to New York for work, and upon her return, she intended to travel to Florida on vacation. Gary testified that Judy had remarried. At the end of the hearing, the trial court took the motion to dismiss under advisement.

¶ 12 The trial court entered its order on October 14, 2015, stating as follows:

"The court having reviewed the pleadings, sworn testimony, arguments of counsel [and] applicable law finds that the Resp. Judy Ehrhart failed to exercise due diligence and conduct any discovery or investigation into the assets [and] debts of the parties at the least [and] at worst had a full understanding of the assets [and] debts of the parties [and] elected to enter into a Marital Settlement Agreement anyway, which she could argue later was unfair to her. Resp. has now remarried [and] she was in a hurry to be divorced from the Pet. Gary Ehrhart. To allow the Resp. to proceed with her section 2-1401 petition would give her a second opportunity to do that which she should have done in the initial proceedings. She was advised that she had a right to consult with her own attorney [and] she opted not to [and] didn't do so until after the Judgment had been entered based upon her agreement with the Marital Settlement Agreement. Resp.'s Motion to Vacate Pursuant to 750 ILCS 5/2-1401 is dismissed. ***."

¶ 13 Judy appeals from this order.

¶ 14 LAW AND ANALYSIS

¶ 15 When a trial court dismisses a petition pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2012)), on review, we must determine "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." (Internal quotation marks omitted.) *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 109-10, 708 N.E.2d 1140, 1144 (1999). Our review is *de novo*. *In re Estate of Mayfield*, 288 Ill. App. 3d 534, 542, 680 N.E.2d 784, 789 (1997).

¶ 16 Illinois courts favor marital settlement agreements. A judgment that dissolves a marriage is given the same amount of finality as a judgment in any other proceeding, even when the judgment incorporates a marital settlement agreement. *In re Marriage of Lyman*, 2015 IL App (1st) 132832, ¶ 55, 27 N.E.3d 126 (citing *King v. King*, 130 Ill. App. 3d 642, 654-55, 474 N.E.2d 834, 842 (1985)). Section 502(b) of the Illinois Marriage and Dissolution of Marriage Act provides that the terms of the agreement are binding upon the court "unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties ***, that the agreement is unconscionable." 750 ILCS 5/502(b) (West 2012).

¶ 17 If a party wants to challenge the validity of a marital settlement agreement and more than 30 days have passed since the judgment was entered, the party must seek to vacate the agreement pursuant to section 2-1401 of the Code of Civil Procedure. *Lyman*, 2015 IL App (1st) 132832, ¶ 55, 27 N.E.3d 126 (citing *In re Marriage of Himmel*, 285 Ill. App. 3d 145, 149-51, 673 N.E.2d 1140, 1143-44 (1996)). Traditional grounds for asking the court to vacate a judgment pursuant to section 2-1401 include facts unknown to the trial court, fraud, duress, mutual mistake of fact, newly discovered evidence, and unconscionability. See *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 633 N.E.2d 225 (1994) (facts unknown to the trial court); *In re Marriage of Armstrong*, 255 Ill. App. 3d 844, 625 N.E.2d 1108 (1993) (fraud); *In re Marriage of Carlson*, 101 Ill. App. 3d 924, 428 N.E.2d 1005 (1981) (duress); *Groak v. Groak*, 64 Ill. App. 2d 439, 212 N.E.2d 139 (1965) (mutual mistake of fact); *National Bank of Monticello v. Doss*, 141 Ill. App. 3d

1065, 491 N.E.2d 106 (1986) (newly discovered evidence); *In re Marriage of Hoppe*, 220 Ill. App. 3d 271, 580 N.E.2d 1186 (1991) (unconscionability).

¶ 18 In filing a section 2-1401 petition, the petitioner is required to include specific factual allegations establishing that the petitioner has a meritorious claim, can demonstrate due diligence in presenting that claim to the trial court before the original judgment was entered, and must also act with due diligence in filing the section 2-1401 petition with the trial court. *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 15, 962 N.E.2d 517. The petitioner bears the burden of proof to establish her right to relief under section 2-1401. *Id.*

¶ 19 To establish a meritorious claim, the petitioner must allege facts in her petition that would have prevented entry of the judgment if the trial court had been originally made aware of those facts. *Physicians Insurance Exchange v. Jennings*, 316 Ill. App. 3d 443, 457, 736 N.E.2d 179, 191 (2000). "To prove due diligence in pursuing that claim or defense before judgment, the petitioner must allege that the failure to discover and present those facts before the judgment was not caused by his own fault or negligence." *Id.* "Due diligence is judged by the reasonableness of a petitioner's conduct under the circumstances." *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 49, 962 N.E.2d 517 (citing *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 99-101, 858 N.E.2d 1, 9-11 (2006)).

¶ 20 Judy's appeal stems from the trial court's order dismissing her section 2-1401 petition. Therefore, we must address the validity of the section 2-1401 petition in order

to determine if the trial court's order dismissing that petition was correct. Judy's basis for vacatur was that the marital settlement agreement was unconscionable.

¶ 21 Unconscionability in an agreement has been defined as an agreement being one-sided or oppressive or where there is a complete absence of meaningful choice by one party coupled with unreasonably favorable contract terms for the other party. *In re Marriage of Brandt*, 140 Ill. App. 3d 1019, 1021, 489 N.E.2d 902, 904 (1986) (citing *In re Marriage of Kloster*, 127 Ill. App. 3d 583, 587-88, 469 N.E.2d 381, 385 (1984)); *In re Marriage of Callahan*, 2013 IL App (1st) 113751, ¶ 20, 984 N.E.2d 531. "The inquiry into unconscionability requires two distinct considerations: (1) the conditions under which the agreement was made; and (2) the economic circumstances of the parties resulting from the agreement." *In re Marriage of Smith*, 164 Ill. App. 3d 1011, 1017, 518 N.E.2d 450, 454 (1987). The economic circumstances component of unconscionability relates to the party's circumstances at the time the agreement is finalized. *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 219, 633 N.E.2d 225, 232 (1994).

¶ 22 In this case, the trial court expressly found that the marital settlement agreement was not unconscionable in its October 1, 2014, judgment of dissolution. Judy contends that a mere glance at the assets listed in the agreement would have alerted the trial court to the unconscionable nature of this agreement. Judy argues that the marital settlement agreement was unconscionable because the division was unequal and because the marital settlement agreement did not include asset valuations. Her argument continues that if the trial judge had been aware of the values, the judge would not have entered the order concluding that the marital settlement agreement was fair. Essentially, Judy argues that it

was the trial court's burden *sua sponte* to look past the agreement of the parties to determine that the division of assets was not equitably balanced. She cites no authority for this argument. However, she cites to *In re Marriage of Arjmand* as general support for her case. *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, 998 N.E.2d 686. The similarities between *In re Marriage of Arjmand* and this case are as follows: the wife did not have an attorney; the husband did have an attorney; the parties agreed to a marital settlement agreement; and the wife later filed a petition seeking to vacate that agreement. However, upon a close review, the factual differences between *In re Marriage of Arjmand* and this case are striking. In *In re Marriage of Arjmand*, the wife alleged that she agreed to the terms of the agreement while under duress in that her husband threatened to take away the children and stated that the "gloves would come off" if she hired an attorney. *Id.* ¶ 8. The trial court concluded that the marital settlement agreement was unconscionable because the husband omitted assets, provided false information about his net income for child support purposes, and provided false valuations for assets. *Id.* ¶¶ 33-37, 40. In this case, Judy does not allege duress and makes no claims that Gary hid or otherwise lied about the marital assets. The duress and the falsehoods were the core of the *In re Marriage of Arjmand* court's finding that the marital settlement agreement was unconscionable. We conclude that *In re Marriage of Arjmand* is factually distinguishable and does little to support Judy's argument.

¶ 23 We also find that the conditions in existence when the trial court approved the marital settlement agreement do not support Judy's argument. The evidence at the hearing was that she sought a quick resolution of her marriage. She wanted the divorce

finalized before a business trip to New York and a subsequent vacation to Florida. She signed the September 24, 2014, document provided by Gary's attorney indicating that she had been advised to obtain her own counsel. She did not do so, and had no questions about the process. The attorney who originally represented Gary in the preparation of the marital settlement agreement testified at the hearing on Gary's motion to dismiss. He testified that both parties were knowledgeable about the marital assets and their values. Additionally, there is no evidence that Judy's economic status resulting from the agreement supports a finding of unconscionability. First, we note that Judy provided no information about her economic status at the time that she received her settlement pursuant to the marital settlement agreement. However, the record reflects that she received $100,000 as her share of Gary's retirement accounts, kept her own retirement accounts and embroidery business, and was employed. We find that these facts do not support her argument that the settlement was unconscionable. See *In re Marriage of Brandt*, 140 Ill. App. 3d at 1024-25, 489 N.E.2d at 906.

¶ 24 Furthermore, the record indicates that on the date when the trial court approved the marital settlement agreement and entered the judgment of dissolution of marriage, the court held a hearing and sworn testimony was taken. However, the record on appeal contains no transcript or other record documenting this hearing from which we can adequately assess her contentions on appeal that the approval of the marital settlement agreement was unconscionable. The appellant bears the responsibility for preparing a full and complete appellate record. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319, 789 N.E.2d 1248, 1251 (2003). When there is no complete record on appeal,

"the reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis [citations]." *Id.* at 319, 789 N.E.2d at 1252.

¶ 25 Additionally, although Judy argues that the asset distribution was unconscionable and that the trial judge would not have agreed to the marital settlement agreement if the values had been listed in the agreement, she failed to provide the trial court with asset valuations as part of her section 2-1401 petition. Judy asks this court to reverse the dismissal in order to allow her to engage in discovery to establish that the agreement was unconscionable. The purpose of a section 2-1401 petition is not to give Judy a new opportunity to obtain the discovery that she could have done before the agreement was entered and is also not to relieve Judy of the consequences of her mistake in failing to do so. *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 14, 962 N.E.2d 517, quoting *In re Marriage of Himmel*, 285 Ill. App. 3d 145, 148, 673 N.E.2d 1140, 1143 (1996)).

¶ 26 In brief, Judy does not have asset valuations to establish the validity of her claim. The intent of the section 2-1401 petition is to provide information that supports a meritorious claim. Without valuations, Judy has no facts that would have prevented entry of the judgment if the trial court had originally been aware of these facts. *Physicians Insurance Exchange*, 316 Ill. App. 3d at 457, 736 N.E.2d at 190. Here, Judy is attempting to maintain her petition in order to secure the proof needed. Therefore, Judy has not presented a meritorious claim for section 2-1401 relief. Additionally, Judy's request for time to conduct discovery also establishes her failure to act with due

diligence, as she cannot establish that the failure to obtain the asset values before entry of the marital settlement agreement was not caused by her own fault or negligence. Her opportunity to obtain this information was before she met with Gary's attorney to divide the assets and before she agreed to the resulting marital settlement agreement. As there was no basis for Judy's section 2-1401 petition, we conclude that there was no genuine issue of material fact to preclude the trial court from dismissing the petition.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Wayne County is affirmed.

¶ 29 Affirmed.