2017 IL App (1st) 153254-U

SECOND DIVISION
May 23, 2017

No. 1-15-3254

TONY CURTIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 L 013195
	)	
STATE FARM MUTUAL AUTOMOBILE	)	
INSURANCE COMPANY,	)	The Honorable
	)	John H. Ehrlich,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Denial of the plaintiff's section "2-1401 motion to vacate" the dismissal of his case for want of prosecution filed more than one year after his case was dismissed affirmed.

¶ 2 Tony Curtis, who was a pedestrian when Clara Perez struck him with her automobile on September 29, 2010, suffered numerous injuries and ultimately settled his claim against Perez with Allstate Insurance Company for the $100,000 policy limit. Curtis filed an underinsured motorist claim pursuant to a State Farm Mutual Automobile Insurance Company (State Farm) insurance policy. Following an arbitration award in favor of State Farm, Curtis filed a *pro se* complaint in the circuit court of Cook County seeking to vacate the award. After several years of pleading-stage litigation accompanied by intermittent representation of Curtis by counsel, the circuit court dismissed Curtis's case for want of prosecution (DWP) on July 16, 2014. More than

one year later, Curtis, acting through counsel, filed a "motion to vacate dismissal reinstate" pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). The circuit court denied the motion and dismissed the case with prejudice. Curtis filed a motion to reconsider, which the circuit court denied.

¶ 3 In this *pro se* appeal from the denial of his section 2-1401 petition, Curtis requests that this court remand his case to the circuit court to allow counsel to continue with the litigation. For the following reasons, we affirm.

¶ 4 The record reflects that when Perez struck Curtis with her automobile on September 29, 2010, he had been living with his aunt and uncle, Lisa and Brian Richardson (Richardsons), for about two months. The Richardsons had an insurance policy from State Farm, which included underinsured motorist coverage for themselves and "resident relatives." An underinsured motorist claim was filed pursuant to that State Farm policy. Curtis's mother, Jozette Greenfield, but not Curtis, was present at the November 8, 2012, arbitration which resulted in an award in favor of State Farm. A *pro se* complaint naming Curtis and Greenfield as plaintiffs and seeking to vacate the award was filed in the circuit court of Cook County on November 21, 2012. After State Farm answered the complaint, an attorney filed an appearance on behalf of the plaintiffs on April 23, 2013. The attorney filed an amended complaint alleging that the arbitration award should be vacated because one or more arbitrators were biased in favor of the defendant; the arbitrators refused to postpone the hearing despite having good cause to do so and attempts by Greenfield and Curtis to reschedule the hearing; and that the award was otherwise obtained in violation of the Uniform Arbitration Act (710 ILCS 5/12(a)(1)-(5) (West 2012)). The attorney subsequently filed a motion to withdraw as counsel, which the circuit court granted on August 1, 2013.

¶ 5 On September 30, 2013, State Farm moved to dismiss Greenfield as a plaintiff pursuant to section 2-619(a)(2) of the Code, arguing that a document purporting to grant her power of attorney was vague and that it did not confer legal capacity for her to bring a cause of action on behalf of her adult son. State Farm attached the amended complaint to its motion but did not respond to the allegations or move to dismiss the complaint as to Curtis. When the circuit court granted State Farm's motion on March 10, 2014, the order indicated, the "matter continues as to Tony Curtis v. State Farm" and "[p]laintiff Tony Curtis to file his [second] amended complaint on or before April 7, 2014."

¶ 6 Curtis filed his second amended complaint *pro se* on April 3, 2014, alleging that he was injured by an automobile on September 20, 2010, and although he was 20 years old, his "mother became power of attorney by law" due to his injuries. "[His] mother Jozette Greenfield, brought an uninsured/underinsured motorist claim against a policy issued by State Farm, which [he] [is] now Plaintiff." Although he "was unable to attend the arbitration because of tests, and, final exams *** [t]he arbitrators refused to postpone the hearing upon sufficient cause being shown therefor." The arbitrators "refused to hear evidence material, [o]r question Lisa and Brian Richardson, policy holders on there [*sic*] role in causing [him] to get hit by a car." He also alleged, "The award was produced by corruption, fraud, and other means, the arbitrators exceeded their power." Further, the complaint stated Curtis was of legal age and should have been present at the arbitration on his own behalf. Finally, Curtis alleged that he was "rightly due" $150,000 of underinsured coverage, which he cannot now collect.

¶ 7 After State Farm answered the second amended complaint on May 12, 2014, the circuit court continued the case twice without commencing discovery. On July 9, 2014, the court continued the case until July 16, 2014, and ordered, "[P]ro-se [*sic*] plaintiff AND/OR attorney

appearing for plaintiff to be present or case will be DWP'd." The court entered the DWP on July 16, 2014, and sent Curtis notice of the order. On July 22, 2014, Greenfield filed a *pro se* motion to "vacate order July 16, 2014," and requested that she be reinstated as power of attorney. In denying her "non-party" motion, the court's order indicated that "this order does not waive an attorney's right to come in to vacate the [July 16, 2014,] order pursuant to applicable law [and] time frame to vacate."

¶ 8 On March 30, 2015, Curtis and "Greenfield (P.O.A)" filed a motion for "courts appoint attorney fee waiver/also court cost attorney fees appoint an attorney or appointed attorney," which the court struck with prejudice on April 13, 2015. The record reflects that on July 22, 2015, the circuit court issued an order on "Plaintiff's motion to reinstate" striking it as improper and stating, "Plaintiff is given until August 4, 2015[,] to file his proper motion, over Defendant's objection." (Emphasis in original.) The record contains a "motion to reinstate," which is dated July 15, 2015, by the attorney who drafted it. However, the only visible file stamp is from July 30, 2015. The motion requests relief from a "June 2, 2015," case management order striking the case from the call, which does not appear in the record. The motion does not cite case law or statutory authority.

¶ 9 On July 30, 2015, Curtis, through counsel, filed a "2-1401 motion to vacate dismissal reinstate" seeking to vacate the DWP entered on July 16, 2014. The petition alleged that after Curtis was hit, an attorney negotiated a settlement offer with "two insurance companies" for $100,000 and $150,000. "The first insurance company paid $100,000 and the second insurance company reneged and has not paid." Further, the petition alleged, "it is believed that when [Greenfield] was assisting the Plaintiff, her son, she was not benefitting a resolution of the litigation, because she was not an attorney." The petition explained, "A review of the case file

shows that there were times when her representation of her son was counterproductive and caused more delay and confusion, rather than propelling the case toward an adequate resolution." In addition, the petition stated, "The reason for filing after 30 days is that the Judge gave my guardian and I a year to get an attorney during which time we did not find one until about two months ago and he was really busy."

¶ 10 The petition included an affidavit from Curtis attesting that:

> "1. I am the Plaintiff in the above entitled cause. I have reviewed the motion and belief [*sic*] the statements and allegations made therein are true and accurate to the best of my recollection, knowledge and belief.
>
> 2. I was hit by a car and injured so badly that I had to have tremendous medical attention and had to undergo surgeries, rehabilitation and doctors follow up visits in order to get back as close to normal has [*sic*] possible. I have lost the ability to play sports, especially basketball which was the love of my life.
>
> 3. One insurance company paid the settlement amount it was supposed to pay and the other insurance company did not. Further, I was never given my deposition to review and correct for accuracy and mistakes. I am not aware of the reason the insurance company did not pay the amount that they had agreed to pay in the settlement."

¶ 11 After State Farm filed a response, the circuit court denied Curtis's motion and dismissed the matter with prejudice on October 9, 2015. Curtis filed a motion to reconsider on October 27, 2015,[1] and State Farm filed a response on November 12, 2015. The circuit court denied the

[1] The motion itself is not file stamped. However, the notice of motion and notice of filing the "motion for reconsideration" were stamped filed with the Clerk of the Circuit Court of Cook County stamp on October 27, 2015.

motion to reconsider on November 13, 2015, and Curtis filed a notice of appeal on November 23, 2015.

¶ 12 In his *pro se* appeal, Curtis reiterates the allegations made in his second amended complaint described above and requests that this court remand his case to the circuit court to allow counsel to continue with the litigation.

¶ 13 As an initial matter, State Farm requests that this court strike or deny Curtis's appeal in light of procedural deficiencies in his opening brief under Illinois Supreme Court Rule 341(h) (eff. Feb. 6, 2013). State Farm is correct that Curtis's brief is deficient because it lacks a statement of the issue presented for review, a statement of jurisdiction, and a statement of facts with citations to the record as required by Rule 341(h)(3), (4), (6). Further, as State Farm notes, Curtis's argument does not comply with Rule 341(h)(7), which requires an appellant's brief to contain contentions and the reasons therefor, with citation to the authorities upon which the appellant relies.

¶ 14 As the court of review, we are entitled to the benefit of clearly defined issues with pertinent authority cited, and a cohesive legal argument. *Walters v. Rodriguez*, 2011 IL App (1st) 103488, ¶ 5. We are thus not obligated to entertain an appeal in which an appellant has dumped the entire matter of argument and research. *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986). Arguments that are not supported by citations to authority do not meet the requirements of Rule 341(h)(7) and are procedurally defaulted. *Lewis v. Heartland Food Corp.*, 2014 IL App (1st) 123303, ¶ 5. Although a *pro se* appellant's deficient brief does not affect our jurisdiction to consider the appeal (*Twardowski v. Holiday Hospital Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001)), "the rules of procedure for appellate briefs are rules, not mere suggestions." *Longo Realty v. Menard, Inc.*, 2016 IL App (1st) 151231, ¶ 18. When the

procedural violations interfere with our review of the issue, we have discretion to strike a brief for failure to comply with the rules. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 10.

¶ 15 Here, despite the lack of a cohesive legal argument, a reasoned basis for Curtis's contentions, or any citation to the record or supporting authority, with the benefit of defendant's brief, we understand the legal issues and may reach the merits of Curtis's appeal from the denial of his section 2-1401 petition to vacate the DWP. See *Twardowski*, 321 Ill. App. 3d at 511.

¶ 16 A plaintiff has several options for relief from the entry of a DWP. Section 13-217 of the Code permits a plaintiff to refile a case for one year after a DWP, even where the statute of limitations has otherwise run. 735 ILCS 5/13–217 (West 1994);[2] *Farrar*, 2016 IL App (1st) 143129WC, ¶ 11. Thus, where section 13-217 governs the proceeding, the entry of a DWP is not final and the trial court retains jurisdiction to rule on a plaintiff's section 2-1301(e) motion to vacate a DWP until the one-year statutory period has expired. 735 ILCS 5/2-1301(e) (West 2014); *Progressive Universal Insurance. Co. v. Hallman*, 331 Ill. App. 3d 64, 67-68 (2002). Once the DWP becomes final, a plaintiff may, as Curtis did here, petition the trial court to vacate the DWP under section 2-1401 of the Code. See *Paul v. Gerald Adelman & Associates, Ltd*., 223 Ill. 2d 85, 94 (2006).

¶ 17 The standard of review for a section 2-1401 petition depends on whether it presents a factual or legal challenge to a final judgment or order. *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31. Where the petition raises a purely legal challenge to a final order, the standard of review is *de novo*. *Id.* ¶ 47; see also *People v. Vincent*,

[2] " 'The version of section 13-217 in effect is the version that preceded the amendments to Public Act 89-7 (Pub. Act 89-7, eff. March 9, 1995), which our supreme court found unconstitutional in its entirety.' " *Farrar v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 143129WC, ¶ 11 n.2 (quoting *Domingo v. Guarino*, 402 Ill. App. 3d 690, 698 n.3 (2010)).

226 Ill. 2d 1, 18 (2007) (*de novo* review applied to trial court's *sua sponte* dismissal of a section 2-1401 petition on the face of the pleading, which asserted that the defendant's sentence was void). Alternatively, "a section 2-1401 petition that raises a fact-dependent challenge to a final judgment or order must be resolved by considering the particular facts, circumstances, and equities of the underlying case." *Walters*, 2015 IL 117783, ¶ 50. In such instances, as is the case here, we review the circuit court's order for abuse of discretion under the standards set forth by our supreme court in *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986). See *id.* ¶¶ 51, 52 (recognizing the continued validity of its determination in *Paul*, 223 Ill. 2d at 96-99, that the trial court's grant of a section 2-1401 petition to vacate a DWP without conducting an evidentiary hearing should be reviewed for abuse of discretion).

¶ 18 Under *Airoom*, a petitioner is not entitled to relief pursuant to section 2-1401 unless the petition sets forth specific factual allegations to support: (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 220-21. A section 2-1401 petition requires proof by a preponderance of the evidence (*Walters*, 2015 IL 117783, ¶ 51) and "must be supported by affidavit or other appropriate showing as to matters not of record" (720 ILCS 5/2-1401(b) (West 2014); see also *Domingo v. Guarino*, 402 Ill. App. 3d 690, 699 (2010)). "A trial court abuses its discretion 'when it acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted.' " *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367, 377 (2001) (quoting *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 941 (1999)).

¶ 19 State Farm argues that Curtis failed to plead sufficient facts to establish, by a preponderance of the evidence, that he had a meritorious claim for vacating the arbitration award under the Illinois Arbitration Act (710 ILCS 5/12(a) (West 2012)). Thus, according to State Farm, Curtis failed to satisfy the first prong of the section 2-1401 analysis because his underlying claim for relief in the circuit court lacked merit. We agree that Curtis's petition was deficient under the first prong, but for different reasons.

¶ 20 The purpose of a section 2-1401 petition under *Airoom* is to bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry. *Paul*, 223 Ill. 2d at 94. Thus, in ruling on a section 2-1401 petition seeking vacatur of a DWP, our supreme court has held, "The central facts which [the] plaintiff was required to plead and prove in connection with her petitions are not those facts which would establish her entitlement to damages in the underlying actions, but those facts which would establish her entitlement to have the DWP orders vacated." *Id.* at 107-08 (appellate court improperly addressed the underlying damages and federal preemption claims in reviewing the circuit court's grant of the plaintiff's section 2-1401 petitions to vacate two DWPs where the merits of the underlying claims "were not germane to the section 2-1401 proceeding"). Accordingly, to satisfy the first prong of the section 2-1401 analysis, Curtis had to plead facts that, by a preponderance of the evidence, established his entitlement to have the DWP vacated. See *id.* at 106, 107-08.

¶ 21 In evaluating the plaintiff's entitlement to vacatur of the DWP under the meritorious claim or defense prong, the *Paul* court considered her section 2-1401 petitions and supporting documents, which outlined the history of the litigation, her efforts to advance the cases, whether the delay was not attributable to the plaintiff, the difficulty in obtaining her litigation files, and other related matters. *Id.* at 106, 108. We find that Curtis's section 2-1401 petition and

supporting documents, unlike those in *Paul*, were not sufficient to establish his entitlement to vacatur of the DWP by a preponderance of the evidence. Although we do not have the benefit of the circuit court's section 2-1401 analysis, we may affirm on any basis supported by the record. *Knott v. Woodstock Farm & Fleet, Inc.*, 2017 IL App (2d) 160329, ¶ 32.

¶ 22 Here, the history of the litigation reflects that after years of pleading-stage litigation and intermittent representation by counsel, Curtis filed a second amended complaint *pro se* and the circuit court repeatedly continued the case without commencing discovery. A July 9, 2014, order continued the case until July 16, 2014, stating, "*pro-se* [*sic*] plaintiff AND/OR attorney appearing for plaintiff to be present or case will be DWP'd." (Emphasis in original.) On July 16, 2014, the circuit court entered the DWP and sent notice to Curtis. In striking Greenfield's July 22, 2014, *pro se* "non-party" motion to "vacate order July 16, 2014," and to be reinstated as power of attorney, the circuit court indicated that "this order does not waive an attorney's right to come in to vacate the [July 16, 2014,] order pursuant to applicable law [and] time frame to vacate." However, Curtis did not file a section 2-1301(e) motion to vacate the DWP or seek to refile the case under section 13-217 within the one-year statutory period. Accordingly, the above litigation history does not establish that the circuit court acted "arbitrarily or without the employment of conscientious judgment" in declining to exercise its discretionary authority under section 2-1401 to vacate the DWP more than one year after its entry.

¶ 23 The allegations in Curtis's petition similarly fail to support a finding in his favor under the first prong of the section 2-1401 analysis. Curtis's petition alleged that when Greenfield "was assisting the Plaintiff, her son, she was not benefitting a resolution of the litigation, because she was not an attorney." The petition further stated, "A review of the case file shows that there were

times when her representation of her son was counterproductive and caused more delay and confusion, rather than propelling the case toward an adequate resolution."

¶ 24 Neither of these allegations are contained within Curtis's affidavit attached to his petition and they do not constitute "new facts," which if known at the time of judgment, may have prevented its entry. Rather, the record reflects that the circuit court was aware of Greenfield's involvement. The initial complaint filed on November 21, 2012, named Greenfield and Curtis as plaintiffs. When the circuit court dismissed Greenfield for lack of standing on March 10, 2014, the order clarified that the "matter continues as to Tony Curtis v. State Farm" and allowed "[p]laintiff Tony Curtis to file his [second] amended complaint." In addition, when Greenfield, and not Curtis, moved to vacate the July 16, 2014, DWP, the circuit court struck her "non-party" motion and expressly advised that "this order does not waive an attorney's right to come in to vacate the [July 16, 2014,] order pursuant to applicable law [and] time frame to vacate." Because the circuit court entered the DWP with knowledge of Greenfield's involvement in the proceedings, Curtis's allegation in his petition that she caused "delay and confusion" is not a "new fact" unknown to the court at the time of judgment and it therefore does not support the first prong.

¶ 25 Curtis's petition also alleged, "The reason for filing after 30 days is that the Judge gave my guardian and I a year to get an attorney during which time we did not find one until about two months ago and he was really busy." Although this allegation was a "new fact" that may have supported his "entitlement to have the DWP order[] vacated," it was not included in his affidavit. "In order to be legally sufficient a request for relief under section 2-1401, based on matters outside the trial record, must be supported by the sworn allegations of the party or parties having personal knowledge of the relevant facts, set forth either by verified petition or by

attached affidavit." *Storcz v. O'Donnell*, 256 Ill. App. 3d 1064, 1069 (1993). Even if this allegation was properly pled, the petition failed to describe any of Curtis's efforts to obtain an attorney, or any facts to explain why being "really busy" precluded the attorney he ultimately retained from filing a legally sufficient motion to vacate the DWP during the two months before the one-year period expired. Moreover, the petition is devoid of any explanation for why Curtis did not seek vacatur of the DWP prior to obtaining an attorney. "Section 2-1401 does not afford a remedy to relieve a litigant of the consequences of his own mistakes or his counsel's negligence." *Id.*

¶ 26 In sum, although we lack the benefit of the circuit court's reasoning, we may affirm its determination on any basis supported by the record. Under the first prong of the section 2-1401 analysis, we find that the circuit court could reasonably have concluded that the well-pled facts in Curtis's section 2-1401 petition did not establish his entitlement to have the DWP vacated by a preponderance of the evidence. Because we cannot say that the circuit court's decision to deny Curtis's section 2-1401 petition exceeded the bounds of reason and ignored principles of law, we find no abuse of discretion and we affirm the circuit court's judgment without addressing the second and third prongs of the section 2-1401 analysis.

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.