

No. 1-16-0007

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

COLIN CROWE,)
) Appeal from the
) Circuit Court of
) Cook County
 Plaintiff/Counter-Defendant-Appellant,)
)
 v.) No. 11 M1 500648
)
 SEBASTIAN MANISCALCO,)
)
) Honorable
 Defendant/Counter-Plaintiff-Appellee.) Daniel J. Kubasiak,
) Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* Affirming the judgment of the circuit court of Cook County dismissing the plaintiff’s section 2-1401 petition where the plaintiff did not establish by a preponderance of the evidence that he was duly diligent in presenting a meritorious defense to the defendant’s unjust enrichment counterclaim.

¶ 2 This matter comes before us once again after the circuit court of Cook County denied plaintiff Colin Crowe’s second section 2-1401 petition to vacate (735 ILCS 5/2-1401 (West 2014)). While plaintiff’s initial appeal was pending in this court, plaintiff filed a second petition

to vacate arguing that new evidence, discovered after the trial court had entered a judgment in favor of defendant Sebastian Maniscalco's counterclaim, provided him with a meritorious defense. On June 5, 2015, we dismissed plaintiff's initial appeal for lack of jurisdiction. *Crowe v. Maniscalco*, 2015 IL App (1st) 140542-U, ¶ 2 (unpublished pursuant to Illinois Supreme Court Rule 23). Thereafter, defendant filed a motion to dismiss the second 2-1401 petition, which the trial court granted. On appeal, plaintiff maintains the trial court erred in dismissing his second petition where: (1) he set forth a meritorious defense; (2) he was diligent in asserting the defense; and (3) he was diligent in bringing his second petition. Plaintiff further contends that his second petition was timely filed and was not barred by *res judicata* or collateral estoppel. Because we find that plaintiff did not establish by a preponderance of the evidence that he was duly diligent in asserting his meritorious defense, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 On May 27, 2011, plaintiff filed a complaint in replevin against defendant Sebastian Maniscalco. In his complaint, plaintiff alleged that in 2007 he had purchased two vintage vehicles, a 1958 Chevrolet Corvette and a 1970 Chevrolet Chevelle, for \$50,000 and \$70,000, respectively.¹ Plaintiff stored these vehicles at the home of Victor Mirales (Mirales). In 2009, plaintiff learned that Mirales, without authorization, sold the vehicles to defendant. Plaintiff requested defendant return the automobiles; however, defendant declined. As a result, plaintiff filed an action in replevin in the circuit court of Cook County seeking the return of the two vehicles. In a counterclaim, filed on June 14, 2012, defendant alleged plaintiff would be unjustly enriched by the sums defendant had paid for restoration, repair, insurance, and storage of the

¹ Plaintiff's complaint indicates that the make and model of one of the automobiles was a Chevrolet Malibu, however, the exhibits attached to the complaint, as well other documents included in the record, demonstrate it is actually a Chevrolet Chevelle.

automobiles.

¶ 5 On April 16, 2013, over two years after the complaint was filed, the matter proceeded to trial where the court found in favor of plaintiff for replevin. The matter, however, was continued to May 21, 2013, for an evidentiary hearing on defendant's unjust enrichment counterclaim. On May 21, 2013, defendant presented affidavits and invoices from the mechanics that completed work on the automobiles. These affidavits indicated the work was completed and paid for by defendant in the amount of \$32,221.54. Plaintiff did not present any evidence in rebuttal. The trial court ultimately entered judgment in favor of defendant in the amount of \$27,525.51.²

¶ 6 On August 29, 2013, plaintiff filed a motion to reconsider the May 21, 2013, judgment, which the trial court denied as untimely. Thereafter, on October 18, 2013, plaintiff filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). Plaintiff asserted the May 21, 2013, judgment should be vacated because after inspecting the vehicles for the first time on July 12, 2013, since the replevin action was filed, it was discovered that a majority of the work defendant certified was performed on the automobiles was not completed. Plaintiff argued he had a meritorious defense against defendant's unjust enrichment claim because defendant's affiants falsified their affidavits and fabricated the invoices. In support of this argument, plaintiff attached letters from two of his own mechanics. Plaintiff further asserted that he was diligent in asserting this meritorious defense because he had no reason to doubt the truthfulness of defendant's affidavits and therefore did not request to depose those individuals. In addition, plaintiff stated that he had demanded the return of the vehicles prior to filing the replevin action, but defendant declined to return them. The parties,

² Plaintiff did not provide this court with a transcript of the April 16, 2013, trial or the May 21, 2013, evidentiary hearing.

however, had agreed that defendant would store the vehicles in good condition until the matter was resolved. Consequently, plaintiff believed that the vehicles were stored in good condition during the pendency of the litigation.

¶ 7 On December 17, 2013, plaintiff's counsel failed to appear for the hearing on his initial 2-1401 petition and the matter was continued to December 20, 2013. On that date, plaintiff's counsel again did not appear and the trial court entered an order dismissing plaintiff's 2-1401 petition for want of prosecution (DWP).

¶ 8 On December 26, 2013, plaintiff filed a motion to vacate the December 20, 2013, order pursuant to section 2-1301 of the Code (735 ILCS 5/2-1301 (West 2012)); however, on January 14, 2014, the trial court denied the motion. Thereafter, plaintiff filed a motion to reconsider the order of January 14, 2014, which was denied by the trial court on February 10, 2014.

¶ 9 Plaintiff then appealed the January 14, 2014, order which denied his section 2-1301 motion to vacate. On June 5, 2015, we dismissed plaintiff's appeal for lack of jurisdiction because the DWP of plaintiff's section 2-1401 petition and the denial of plaintiff's motion to vacate that DWP were not final and appealable orders. *Crowe*, 2015 IL App (1st) 140542-U, ¶ 2.

¶ 10 While the appeal was pending, however, plaintiff filed a second section 2-1401 petition on May 22, 2015. Plaintiff's second petition was substantially identical to his initial petition. In response, defendant filed a motion to dismiss pursuant to both sections 2-615 and 2-619 of the Code. Defendant argued pursuant to section 2-619 of the Code that the second petition must be dismissed because (1) the appellate court had already ruled that he missed his opportunity to refile his section 2-1401 petition, (2) it is barred by the doctrine of *res judicata*, and (3) collateral estoppel bars the re-litigation of any of the factual issues raised in the second petition.

Defendant further contended, pursuant to section 2-615 of the Code, that plaintiff's second

petition was insufficient as a matter of law because it failed to allege sufficient facts demonstrating that plaintiff (1) had a meritorious defense, (2) asserted due diligence in presenting that meritorious defense, and (3) was diligent in presenting his second petition. Relevant to this appeal, defendant argued that plaintiff was not diligent in presenting his defense because he “could have issued a production request to investigate the vehicles, obtained testimony from his own mechanics, taken depositions of Maniscalco’s mechanics, or cross-examined and impeached Maniscalco’s mechanics at the evidentiary hearing” but, “[b]y his own admission, Crow opted not do to any of this.” After the matter was fully briefed and argued, the trial court granted defendant’s motion to dismiss and thus denied plaintiff’s second petition, but did not indicate a basis for its determination. This appeal followed.

¶ 11

ANALYSIS

¶ 12 On appeal, plaintiff asserts the trial court erred in granting defendant’s motion to dismiss and denying his section 2-1401 petition where (1) he set forth a meritorious defense; (2) he was diligent in asserting the defense; and (3) he was diligent in bringing his second petition to vacate. Plaintiff further contends that his petition was timely filed and was not barred by *res judicata* or collateral estoppel. For the reasons that follow, even if plaintiff’s petition was timely filed, we conclude plaintiff failed to establish he was diligent in presenting his meritorious defense to the original action and affirm the judgment of the trial court.

¶ 13 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. Alternatively, when the petition presents a fact-dependent challenge to a final judgment or order we review the circuit

court's determination for an abuse of discretion. *Id.* ¶ 51. In that instance, as is the case here, the standards set forth by our supreme court in *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986), govern the proceeding. *Id.*

¶ 14 Under *Airoom*, to be entitled to relief pursuant to section 2-1401, the petitioner must set forth specific factual allegations supporting: (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. The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence. *Walters*, 2015 IL 117783, ¶ 51. The purpose of a section 2-1401 petition is to bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry or to challenge a purportedly defective judgment for legal reasons. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). With this in mind, we now turn to consider the merits of the appeal.

¶ 15 We first turn to address the merits of plaintiff's claim that newly discovered evidence revealed that the work attested to by defendant's mechanics was not completed and thus the vehicles were not in the condition that defendant represented they were during the evidentiary hearing. Plaintiff maintains that this newly discovered evidence establishes a meritorious defense and the trial court erred in denying his second 2-1401 petition.

¶ 16 A petitioner establishes a meritorious defense when he alleges facts that would have prevented entry of the judgment had they been known by the trial court. *CitiMortgage, Inc. v. San Juan*, 2012 IL App (1st) 110626, ¶ 21 (quoting *Blutcher v. EHS Trinity Hospital*, 321 Ill. App. 3d 131, 136 (2001)). The purpose underlying a section 2-1401 petition is to allow the petitioner to raise in the trial court facts that are absent from the record, but, if the facts had been

known, the trial court would not have entered the judgment that it did in the underlying proceedings. *Id.*

¶ 17 Particularly pertinent to this matter, due diligence requires the petitioner to have a reasonable excuse for failing to act within the appropriate time. *Airoom*, 114 Ill. 2d at 222. Our supreme court admonished in *Airoom*, however, that section 2-1401 is not intended to relieve a litigant of the consequences of his own mistake or negligence. Thus, the petitioner is required to establish that the failure to defend against the lawsuit was the result of an excusable mistake and that the petitioner acted reasonably under the circumstances and was not negligent. *Id.* When assessing the reasonableness of the petitioner's excuse, the trial court must consider all the surrounding circumstances, including the conduct of the litigants and their attorneys. *Id.* As with other allegations in a section 2-1401 petition, due diligence must also be established by a preponderance of the evidence. *Id.* at 223.

¶ 18 Plaintiff claims that his reasonable excuse for failing to raise his defense was that he trusted the veracity of the documents provided by defendant and had no reason to question them. As a result, he declined to depose those individuals. Plaintiff maintains that he prosecuted his replevin action diligently, yet was unable to discover the true condition of the vehicles until after the unjust enrichment judgment had been entered. According to plaintiff, this was because the trial court conditioned its judgment on the vehicles being in the same condition as represented by defendant.

¶ 19 We initially observe that plaintiff failed to provide this court with a complete record on appeal. No record of proceedings was filed with this court, nor was a bystanders report or an agreed statement of facts as permitted by Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005). Because we are unaware of what occurred before the trial court we must presume that the denial

of the second 2-1401 petition was in conformity with the law and properly supported by the evidence. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 393 (1984). This tenant is particularly applicable here where plaintiff's diligence claim is a factual issue that we review for an abuse of discretion. See *Airoom*, 114 Ill. 2d at 222.

¶ 20 Our review of the limited record reveals that plaintiff was not duly diligent in asserting his defense to defendant's original action. Defendant raised the claim of unjust enrichment in his counterclaim, which was filed on June 14, 2012, and alleged he had incurred \$100,000 in expenses for storing, maintaining, and repairing the vehicles. From that time on, plaintiff was aware that defendant would have to produce evidence to support his unjust enrichment claim and that he (plaintiff) would have to defend against it. We observe that plaintiff could have requested the vehicles be produced for his inspection under Illinois Supreme Court Rule 214 (eff. Jan. 1, 1996), but, in fact, the record is devoid of any indication that plaintiff sought to inspect the vehicles prior to the evidentiary hearing on May 21, 2013, or to offer any counter-evidence to defendant's claim. We further question plaintiff's contention that he trusted in the veracity of defendant's affidavits. If plaintiff had no reason to question the veracity of defendant's affidavits then an evidentiary hearing was unnecessary and a judgment in the full amount defendant requested would have been issued. That is not the case here.

¶ 21 Plaintiff maintains that the trial court conditioned its unjust enrichment judgment on the vehicles being in a condition similar to that represented by defendant. As previously noted, however, plaintiff failed to provide this court with a record of proceedings and no order exists in the record which indicates that the court's judgment was conditional.³ Thus, based on the

³ We note that the record contains an order dated August 22, 2013, allowing plaintiff until August 29, 2013, "to file any motion related to the condition of the vehicles" and setting a briefing schedule on that issue. This portion of the order, however, does not substantiate

limited record before us, we must presume that the trial court's order granting defendant's motion to dismiss and denying plaintiff's second 2-1401 petition was in conformity with the law and properly supported by the evidence. *Foutch*, 99 Ill. 2d at 393. Consequently, we find plaintiff did not meet his burden to establish by a preponderance of the evidence that he was diligent in asserting his meritorious defense in the original action and we affirm the judgment.

¶ 22

CONCLUSION

¶ 23 For the reasons set forth above, we affirm the judgment of the circuit court.

¶ 24 Affirmed.

plaintiff's claim that the trial court conditioned its unjust enrichment judgment on the condition of the vehicles. Instead, it merely allows plaintiff to file a motion in which he may argue about the condition of the vehicles.