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2017 IL App (3d) 160447-U

Order filed August 3, 2017

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2017

KENNETH WIANS, Independent Administrator of the Estate of Clara Wians,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-16-0447 Circuit No. 14-P-122
DENNIS WIANS,)	The Honorable Jeffrey Allen, Judge, presiding.
Defendant-Appellant.)	

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The order attacked by defendant's section 2-1401 motion for relief from judgment was not void and his alternative challenge to the judgment lacks merit.

¶ 2 Plaintiff Kenneth Wians, independent administrator of the estate of Clara Wians, deceased, filed a petition for citation to discover and recover assets against defendant Dennis Wians. At the citation hearing, the trial court entered judgment against Dennis in the amount of \$196,000. Two years later, Dennis filed a motion to vacate judgment pursuant to

section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2016)), which the trial court denied. We affirm.

¶ 3

FACTS

¶ 4

This case arises out of the estate of Clara Wians, who passed away in November 2013. In 1996, Clara executed a statutory power of attorney for healthcare and, in 2011, executed a subsequent power of attorney for property and healthcare. Dennis Wians, Clara's son, was listed as the agent in both documents. In March 2012, while Clara was still living, Kenneth Wians, another of Clara's sons, filed various pleadings initiating a guardianship proceeding after \$250,000 in assets were apparently taken from Clara's estate. In re Estate of Clara Wians, No. 12-P-230 (Cir. Ct. Will Co.). In addition to pleadings seeking appointment of a guardian and a motion for preliminary injunction, Kenneth also filed a citation to discover and recover assets and a petition to terminate power of attorney, alleging Dennis had transferred Clara's assets to himself.

¶ 5

In September 2013, Dennis filed a petition for bankruptcy relief in the United States Bankruptcy Court but did not disclose that he owed money to the estate. He later amended the petition to include the estate as an unsecured creditor holding nonpriority claims totaling \$29,247.32. During this time, case No. 12-P-230 was stayed pursuant to the automatic stay provision under 11 U.S.C. § 362(a) (2012).

¶ 6

In November 2013, Clara died, and in January 2014, the bankruptcy court granted Kenneth relief from the automatic stay to investigate Dennis's transfer of assets from the estate. In February, Kenneth filed a petition for letters of administration, requesting to be nominated as administrator of the estate. Also, Kenneth, on behalf of the estate, filed a petition for citation to discover and recover assets, arguing that Dennis had breached his fiduciary duties as power of

attorney for Clara when he transferred more than \$250,000 of Clara's assets to himself. Notices were prepared for Dennis but the address listed for him on the notice of motions is different from that appearing in the petition for citation. In March, the court appointed Kenneth as administrator and Dennis was issued a citation to appear in court. During the citation hearing on April 3-4, Dennis appeared *pro se*. He requested a continuance to obtain counsel, which the trial court ultimately denied pursuant to the following colloquy:

“THE COURT: Do you have an attorney, sir?

MR. DENNIS WIANS: No, sir, I would like to ask for a continuance. Mr. Zumstein was going to represent me. When I gave him all the documentation of the citation, he reviewed it all and told me at the last minute he was too busy to take the case.

He had me call a couple of attorneys. But after calling three or four, everybody was busy. So I wasn't able to get one.

THE COURT: Miss Lynch, your position regarding a request for a continuance?

MS. LYNCH [plaintiff's attorney]: Judge, we object on the nature that the citation proceedings that are pending before Court were delayed in part, Mr. Dennis Wians had filed bankruptcy.

So we had, Mr. Abunada had gone up to the bankruptcy court, sought relief to lift the stay to allow us to proceed with the citations proceedings before you.

These proceedings do need to be completed prior to May 1st. So we are running a very short clock to get that done.

THE COURT: When did the citation issue against—

MS. LYNCH: The original citation—

THE COURT: When did we first know we were going to go to this point?

MS. LYNCH: Judge, the original petition, there is a petition for citation that led to a discovery deposition in June of last year in the guardianship proceedings.

The petition for citation in this action was filed on February 25th, 2014. He was served with the actual citation on March 25th, Judge.

THE COURT: When?

MS. LYNCH: March 25th. I do not believe Mr. Wians appeared in court on the date regarding the petition in which the citation was issued.

THE COURT: And the bankruptcy court needs to know one way or another what, if anything, is happening here that might effect [*sic*] its ultimate disposition?

MS. LYNCH: Yes.

THE COURT: By what date?

MS. LYNCH: By May 1st.

THE COURT: Okay. Mr. Wians, everybody is ready to go here. And time is of the essence. I am denying your motion for a continuance.”

¶ 7 During Dennis’s testimony, the trial court denied his request to admit Clara’s checks and bank statements into evidence after the following discussion:

“MR. DENNIS WIANS: Okay. Well, I don’t know if it is necessary to admit these, but I wanted to submit for Exhibit 2 the checks that my mother wrote to me for property taxes and bills to establish a pattern. So if Miss Lynch can look at it, that would be awesome.

MS. LYNCH: Judge, I have the same argument as to authenticity of the documents. They appear to be copies, but I don’t know that they are copies or if they have been somehow altered in any way. They appear to be property taxes, possibly paid for something, Judge. Gifts, I am not quite sure what they are for sure, Judge.

THE COURT: Are these purported to be canceled checks—

MR. DENNIS WIANS: Those are checks from, pictures images checks from the bank statements.

MS. LYNCH: Judge, they are pictures of the front of a check, not of the back of a check. I can’t even, I am not sure who signed them, who wrote them out. There is also some typewritten arguments.

MR. DENNIS WIANS: The bank—

THE COURT: Let me see.

MS. LYNCH: They are not a canceled check, Judge.

THE COURT: This is not an acceptable form, sir. If your exhibits are along this line, you are going to be very frustrated here. I can't admit that.

MR. DENNIS WIANS: Then stay here. This is probably the only thing I will be able to. Exhibit 3 or I should say 1, this is the copies from the bank when we opened up the bank accounts with my mom's signature on it and mine and the information for both on the joint tenant accounts.

MS. LYNCH: Judge, I still have an objection as to authenticity. There is nothing indicating this ever came from the bank itself. They are not verified by the bank at all. I am not, and there has been no testimony as to whether or not this may or may not be Miss Wians' signature.

THE COURT: Let me take a look. No."

On April 4, the trial court entered judgment in the amount of \$196,000 in favor of the estate and ordered Dennis to return \$5000 in his possession to the estate, determining that he and Clara had a fiduciary relationship and that he had exercised undue influence.

¶ 8 Two years later, on April 4, 2016, Dennis filed a motion to vacate judgment pursuant to section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2016)), arguing that the judgment was void. After the hearing, the trial court denied the motion, determining Dennis had failed to establish a meritorious defense and to demonstrate due diligence. Dennis appealed.

¶ 9

ANALYSIS

¶ 10 Dennis seeks to vacate the court’s judgment for the following reasons: (1) he failed to receive notice of motion; (2) the court committed fraud when it falsified the court docket; (3) in federal court, Kenneth’s attorney (i) fraudulently misrepresented the status of joint bank accounts between Dennis and Clara and (ii) fraudulently concealed power of attorney documents; (4) the court failed to follow rules of procedure about non-represented litigants; (5) Kenneth’s attorney violated Rule 8.4(a) of the Rules of Professional Conduct of 2010 (Ill. R. Prof. Conduct (2010) R. 8.4(a)-(d) (eff. Jan. 1, 2010)); (6) the trial judge did not act impartially because (i) its ruling was unreasonable, (ii) it refused to admit Dennis’s tendered checks and bank statements without explanation, (iii) it failed to review Dennis’s evidence before it was reviewed by Kenneth’s attorney, and (iv) it denied Dennis’s request for a continuance to retain counsel; and (7) the citation was “intentionally misrepresented” as an appearance.

¶ 11 “[A] section 2-1401 petition is generally used to correct errors of fact unknown to the petitioner and the court when judgment was entered, which, if then known, would have precluded its entry.” *People v. Haynes*, 192 Ill. 2d 437, 461 (2000). A section 2-1401 petition is “ ‘not designed to provide a general review of all trial errors nor to substitute for direct appeal.’ ” *Id.* (quoting *People v. Berland*, 74 Ill. 2d 286, 314 (1978)). Issues that could have been raised in a motion for rehearing or on direct appeal are *res judicata* and may not be relitigated in the section 2-1401 proceeding. *In re Marriage of Baumgartner*, 226 Ill. App. 3d 790, 794-95 (1992). To seek relief under section 2-1401, Dennis must show: “(1) the existence of a meritorious defense or claim, that is, facts that would have prevented the rendition of the original judgment if they had been of record when the judgment was entered, (2) due diligence in pursuing that claim or defense before judgment, that is, that the failure to discover and present those facts before the judgment was not the fault of the petitioner, and (3) diligence in pursuing the claim or defense

after judgment.” *OneWest Bank, FSB v. Hawthorne*, 2013 IL App (5th) 110475, ¶ 21. A section 2-1401 determination following an evidentiary hearing will not be set aside unless it is against the manifest weight of the evidence. *Domingo v. Guarino*, 402 Ill. App. 3d 690, 699 (2010) (citing *People v. Vincent*, 226 Ill. 2d 1, 15-17 (2007)).

¶ 12 When a petitioner brings a claim of voidness, the allegation substitutes for and negates the need to show section 2-1401 requirements of a meritorious defense or claim and due diligence. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). A judgment is void if the court lacks jurisdiction. *Id.* at 103. Thus, we first address Dennis’s claim of lack of jurisdiction.

¶ 13 Dennis argues that the court lacked personal jurisdiction because he did not receive notice of nine documents filed by Kenneth. Because the judgment at issue derives from the petition for citation, we focus our review on Dennis’s allegation that he did not receive notice of the petition.

¶ 14 A judgment is void if the court lacks jurisdiction over the parties or subject matter. *Id.* A claim of void judgment may be brought at any time or in any court. *Id.* “Personal jurisdiction may be acquired either by the party’s making a general appearance or by service of process as statutorily directed.” *In re Marriage of Verdung*, 126 Ill. 2d 542, 547 (1989). “Any action taken by a litigant which recognizes the case as being in court will constitute a general appearance unless such action was for the sole purpose of contesting jurisdiction.” *Weierman v. Wood Landscaping*, 259 Ill. App. 3d 300, 302 (1994). A party appearing generally waives all objections to defects in service, process, or jurisdiction. *Id.* The issue of personal jurisdiction is reviewed *de novo*. *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17.

¶ 15 Here, the notice of motion for the citation corroborates Dennis’s claim that he did not receive notice because it does not list his correct address. However, he appeared *pro se* and did not object to the court’s jurisdiction during the citation hearing. He waived his objection to service of process when he made a general appearance in court. Thus, we find the court had personal jurisdiction over Dennis. There is no challenge to subject matter jurisdiction. Thus, the judgment is not void.

¶ 16 Next, we review Dennis’s additional claims to determine whether he is entitled to relief under section 2-1401. In this case, he failed show the existence of a meritorious claim or defense. Dennis has not provided additional facts not found in the trial court record that would prevent the rendition of the judgment. In fact, his conclusory allegations of court error are inappropriate attempts “ ‘to relitigate that which had already been validly adjudicated.’ ” See *Halleck v. Trumfio*, 85 Ill. App. 3d 1051, 1054 (1980) (plaintiff’s claim that court erred when it weighed the credibility of affidavits in relief from judgment proceeding was an inappropriate attempt “ ‘to relitigate that which had already been validly adjudicated’ ”) (quoting *Meudt v. Travelers Insurance Co.*, 57 Ill. App. 3d 286, 294 (1978) (2-1401 petition is not “a substitute for appeal nor a vehicle to relitigate that which had already been validly adjudicated”)).

¶ 17 Also, Dennis failed to show due diligence in pursuing these claims before and after judgment. He had an opportunity to present his allegations in a motion to reconsider and on appeal but he failed to do so. Moreover, Dennis did not provide any reasoning for his failure to present his allegations in an earlier proceeding. As stated in ¶ 11 above, issues that could have been raised in a motion for rehearing or on direct appeal are *res judicata* and may not be relitigated in the section 2-1401 proceeding. Therefore, we find the trial court’s ruling was not against the manifest weight of the evidence.

¶ 18

CONCLUSION

¶ 19

The judgment of the circuit court of Will County is affirmed.

¶ 20

Affirmed.