

No. 1-17-3040

**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 DISTRICT

ALBERTA THOMAS,	)	Appeal from the
	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	No. 13 M1 301551
	)	
	)	
JUAN CARLOS BELLO, GUADALUPE BELLO, and	)	
HERBERTO TORRES,	)	
	)	Honorable
	)	John A. O’Meara,
Defendants-Appellees.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Connors and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* We find that the circuit court did not abuse its discretion when it entered an order denying the plaintiff’s section 2-1401 petition (735 ILCS 5/2-1401 (West 2010)) because of her failure to both diligently present her original claim and diligently file her section 2-1401 petition.

¶ 2 The plaintiff, Alberta Thomas, appeals from circuit court orders denying her section 2-1401 petition (735 ILCS 5/2-1401 (West 2010)) to vacate the dismissal of her negligence action and denying her motion to reconsider. On appeal, Thomas argues that this court should reverse the circuit court's orders because: (1) she had a meritorious cause of action; (2) she was diligent in prosecuting her original action; and (3) she was diligent in filing her section 2-1401 petition. For the reasons that follow, we affirm.

¶ 3 Thomas was involved in a motor vehicle accident on June 16, 2011. On June 14, 2013, Thomas filed a *pro se* complaint against State Farm Insurance and Truman Bell alleging that: (1) she was injured in an automobile accident with “the owner or driver of a car with license plate no. 9110241;” and (2) “State Farm’s refusal to settle was \*\*\* unreasonable and unjust.”

¶ 4 On October 24, 2013, State Farm and Truman Bell filed a motion to dismiss Thomas’s complaint arguing that: (1) because State Farm only insured Herberto Torres and Juan Carlos Bello, it had no common law or contractual duty to Thomas to settle her claim against its insureds, Torres and Bello; and (2) Illinois public policy prohibits direct actions against an insurance company based on the negligence of its insureds prior to obtaining a judgment against the insured parties. On November 6, 2013, the circuit court granted State Farm and Truman Bell’s motion to dismiss, dismissing Truman Bell as a defendant with prejudice. On January 23, 2014, the circuit court dismissed State Farm as a defendant with prejudice.

¶ 5 On December 18, 2013, Thomas filed her *pro se* amended complaint against Juan Carlos and Guadalupe Bello, and Torres (collectively, the defendants), alleging that she was injured as a result of an automobile accident with the “driver of [a] Dodge [with] license plate [no.] 911241” and seeking damages of “30,000 with the stipulation to pay any former, current, and future surgeries, medical and hospital bills, physical therapy, home care, medicines, etc.”

¶ 6 On January 23, 2014, Thomas filed her second *pro se* “Amended Complaint” against the defendants making the same allegations as those in her December 18, 2013 amended complaint. Two failed attempts to serve the defendants with summons and the complaint were made by the sheriff on February 3, 2014, and February 5, 2014. On April 4, 2014, the circuit court granted Thomas leave to serve the defendants via the Illinois Secretary of State. On August 15, 2014, the defendants filed a motion to quash service, arguing that service through the Secretary of State was improper because they lived in Illinois on the date of the accident and still reside in this state. Each defendant submitted affidavits averring the same and provided their mailing addresses.

¶ 7 On August 27, 2014, the defendants’ motion to quash was granted. That same day, Thomas was granted leave to issue alias summonses to be served by a special process server, and the matter was set for a progress call on October 10, 2014. On October 10, 2014, the circuit court entered another progress call order, giving Thomas until December 19, 2014, “as a final date for service upon any as yet unserved defendant” and indicating that “the case may be dismissed for want of prosecution as to such unserved defendant unless counsel appears with an affidavit showing diligence in attempting service.” On December 19, 2014, the matter was dismissed for want of prosecution<sup>1</sup>.

¶ 8 On March 24, 2015, Thomas filed a motion to reinstate the case, arguing that the “order by Judge James E. Snyder was not filed by clerk for \*\*\* Thomas to acquire service by Secretary of State. On 6/13/2014, filing and service were accepted in compliance with the provisions of

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<sup>1</sup> The actual dismissal order is missing from the record on appeal. The date of the dismissal was derived from the docket entry, and this court takes judicial notice that an order was entered. *May Department Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159 (1976).

625 ILCS 5/10-301 or Provisions of 735 ILCS 5/2-203.1 as applicable.” On April 20, 2015, the circuit court struck Thomas’s motion<sup>2</sup>.

¶ 9 On January 3, 2017, Thomas filed an untimely motion to vacate the dismissal order of December 19, 2014. See *Progressive Universal Insurance Co. v. Hallman*, 331 Ill. App. 3d 64, 67-68 (2002) (the circuit court loses jurisdiction to entertain a motion to vacate a dismissal for want of prosecution one year after its entry). On January 13, 2017, the circuit court denied the motion without prejudice and allowed Thomas to “file a section 2-1401 petition.”

¶ 10 On March 23, 2017, Thomas’s attorney filed an appearance and a section 2-1401 petition, which was not supported by an affidavit, requesting that the circuit court vacate the December 19, 2014 dismissal for want of prosecution, as well as the April 20, 2015 order striking Thomas’s motion to reinstate the case. In her section 2-1401 petition, Thomas argued that she: (1) had a meritorious cause of action since she was injured in an automobile accident “that the Defendant caused;” (2) was diligent in prosecuting her action because she filed her complaint in a timely manner, filed motions, amended her complaint, attended every court date, and filed the summonses and complaint with the Secretary of State (which she maintains was permitted by the circuit court); and (3) was diligent in filing her section 2-1401 petition which was evinced by “filing the March 24, 2015 motion to vacate, seeking out information to understand why the court would not vacate the dismissal, seeking out an attorney, and \*\*\* filing her petition to vacate while enduring serious injury and substantial medical care.” On July 27, 2017, the circuit court conducted a hearing and denied Thomas’s section 2-1401 petition. In denying the petition, the circuit court reasoned:

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<sup>2</sup> The actual order is missing from the record on appeal. The date of the order was derived from the docket entry, and this court takes judicial notice that an order was entered. *May Department Stores Co.* 743, 64 Ill. 2d at 159.

“Thomas has not done anything from March of 2015 until the filing of this 1401 petition in March of 2017. And \*\*\* I can’t see anything that would lead me to believe that she was diligent \*\*\* and \*\*\* unfortunately I think she was not diligent and it’s not supported by an affidavit.”

¶ 11 On August 28, 2017, Thomas filed a motion to reconsider the circuit court’s denial of her section 2-1401 petition, maintaining that a series of medical appointments affected her ability to “file the Petition to Vacate before January 3, 2017.” She also maintained that the circuit court can consider “any misapplication of law and new facts” regarding motions to reconsider and that the circuit court should consider the facts surrounding the extent of her illness as they were not submitted to the circuit court previously. On October 6, 2017, the defendants filed a response to Thomas’s motion to reconsider, arguing that she failed to explain how the circuit court misapplied the law in its decision to deny the section 2-1401 petition and arguing that Thomas’s “new facts” about her health condition were available and were “presented to the Court in her original motion and affidavit,” that the circuit court considered and denied. On November 1, 2017, the circuit court denied Thomas’s motion to reconsider. In denying the motion, the circuit court reasoned:

“[U]nfortunately, there’s several issues here. The accident happened in 2011. There was an amendment made in 2013 which is about a year, six months, and two days after the accident naming the correct defendants. There was a motion to quash about nine months later which was granted, and, unfortunately, I just don’t see the diligence – I mean, there’s a statute of limitations issue on the

underlying lawsuit itself. There's a motion to quash that was granted. There's been a DWP. There's been several attempts to vacate the DWP incorrectly, \*\*\* I think she made several missteps here.

So, respectfully, I'm going to deny the motion to reconsider."

On November 30, 2017, Thomas filed her timely notice of appeal.

¶ 12 On appeal, Thomas maintains that the circuit court erred when it denied her section 2-1401 petition because she: (1) had a meritorious cause of action; (2) was diligent in prosecuting her action; and (3) was diligent in filing her section 2-1401 petition. We disagree.

¶ 13 Section 2-1401 of the Illinois Code of Civil Procedure (Code) provides a comprehensive scheme for obtaining relief from final judgments more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2010). In order to be entitled to relief under this section, a party must demonstrate: (1) a meritorious claim; (2) due diligence in presenting the claim in the original action; and (3) due diligence in filing the petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986). The petitioner has the burden of establishing a right to relief by a preponderance of the evidence. *Id.* The decision whether to grant or deny relief under section 2-1401 lies within the sound discretion of the circuit court and its decision will not be disturbed on review absent an abuse of that discretion. *Id.* A reviewing court may affirm the circuit court for any basis that appears in the record. *Father & Sons Home Improvement II, Inc. v. Stuart*, 2016 IL App (1st) 143666, ¶ 27.

¶ 14 Thomas first maintains that she was diligent in presenting her claim because she "filed her complaint in a timely manner, filed motions, amended her complaint, attended every court

date, and filed the summons and complaint with the Secretary of State as allowed by the court.” The record reflects, however, that Thomas was anything but diligent in prosecuting her action against the defendants. Thomas filed her original complaint on June 14, 2013, two days before the expiration of the statute of limitations, and named the wrong defendants. It was not until December 18, 2013, six months after the statute of limitations had expired, that Thomas filed an amended complaint, naming the proper defendants. After the sheriff failed to obtain service on the defendants, Thomas improperly attempted to serve the Illinois resident defendants through the Illinois Secretary of State. On August 27, 2014, Thomas was granted leave to serve the defendants by means of a special process server. However, as of December 19, 2014, when the action was dismissed for want of prosecution, the defendants still had not been served. On March 24, 2015, the plaintiff filed a motion to reinstate the action which was stricken by the circuit court. The record does not contain a transcript of the March 24, 2015 proceedings or a copy of the written order striking Thomas’s motion. It only contains a docket entry. Consequently, we presume that the motion was stricken in conformity with the law and was supported by a sufficient factual basis. *Foutch v. O’Bryant*, 99 Ill. 2d 389, 394 (1984). On January 3, 2017, Thomas filed an untimely motion to vacate the December 19, 2014 order dismissing the matter for want of prosecution, over which the circuit court lacked jurisdiction. See *Progressive Universal Insurance Co.*, 331 Ill. App. 3d at 67-68. Although, we recognize that Thomas was proceeding *pro se* during the pendency of her underlying action, she was bound to follow the same rules as any other litigant represented by counsel (*Multiut Corp. v. Draiman*, 359 Ill. App. 3d 527, 534 (2005)), including the exercise of diligence in prosecuting her claim and serving process on the defendants.

¶ 15 Thomas also argues that she was diligent in filing her section 2-1401 petition. Again, we disagree.

¶ 16 Section 2-1401 provides, in relevant part, that a petition brought under that section must be filed no later than two years after the entry of the order or judgment to which it is addressed. 735 ILCS 5/2-1401(c) (West 2010). In this case, the dismissal order was entered on December 19, 2014, but the plaintiff's section 2-1401 petition was not filed until March 23, 2017, more than 2 years later.

¶ 17 Based on the foregoing analysis, we conclude that Thomas failed to both diligently prosecute her action against the defendants and diligently file her section 2-1401 petition to vacate the December 19, 2014 order dismissing her action for want of prosecution within the 2-year period set forth in the Code. We find, therefore, that the circuit court did not abuse its discretion in denying Thomas's section 2-1401 petition.

¶ 18 Affirmed.