2018 IL App (2d) 161065-U
No. 2-16-1065
Order filed March 6, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF KATHLEEN McGUINN, Petitioner-Appellee, and STEPHEN McGUINN, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 12-D-854 Honorable Paul B. Novak, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court correctly dismissed respondent's petition to open or partially vacate the judgment of dissolution, and the record contains nothing to support a reversal of the trial court's award of attorney fees. Affirmed.

¶ 2 Respondent, Stephen McGuinn, appeals from two post-judgment orders that were entered following the dissolution of his marriage to petitioner, Kathleen McGuinn. The first order dismissed Stephen's petition to "open or partially vacate" the judgment of dissolution. The second order granted Kathleen's petition for attorney fees in connection with her earlier petition for indirect civil contempt of court. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 22, 2016, the trial court entered a judgment for dissolution of marriage. The judgment incorporated a marital settlement agreement (MSA). Relevant here, section 7.4 of the MSA concerned Sunrise Tree Service, Inc. (Sunrise), which the parties characterized as their "marital business." Pursuant to the MSA, Steven agreed to transfer 50% of his stock in Sunrise to Kathleen. The parties agreed that they would continue to own and operate the business with each of them receiving an equal amount of net income. All revenues and income from the business were to be deposited into a specific Citibank account—number 9392—with neither party having any authority to distribute the funds for their own personal benefit. Finally, a handwritten notation in the margin stated that the parties would "enter into a letter of intent relative to the operation of the business within 30 days hereafter."

¶ 5 On April 29, 2016, Kathleen filed a petition for indirect civil contempt of court. She alleged that she had tendered a proposed written operating agreement to Stephen, but that Stephen had "refused to engage in any fruitful or necessary communication." In addition, Kathleen alleged that Stephen had refused to transfer 50% of his stock interest in Sunrise, and that he had also refused to deposit certain checks from Sunrise customers into the Citibank account. Kathleen's final allegation was that Stephen had directed Sunrise employees to perform services for third parties outside the ordinary course of business. According to Kathleen, Stephen paid the employees 10% of the money collected from these outside jobs (in addition to their regular compensation) and kept the remaining 90 percent.

¶ 6 On July 18, 2016, while Kathleen's petition for indirect civil contempt was pending, Stephen filed a "Petition to Open or Partially Vacate Judgment" pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)). Stephen sought to

reform section 7.4 of the MSA. He alleged that the parties' agreement to jointly own and operate Sunrise was based on their mutual belief that they would be able to agree to the terms of an operating agreement and further cooperate in the operation of the business. However, Stephen alleged, since the entry of the judgment of dissolution, each of the parties had come to believe that they were unable to formulate an operating agreement or operate the business together. According to Stephen, "[t]he parties' former belief that they could operate [Sunrise] together was a mutual mistake of fact essential to the [MSA] provision for disposition of the business." Stephen alleged that the parties discovered this mistake during a meeting with their attorneys on June 6, 2016. To remedy this situation, Stephen requested that section 7.4 of the MSA be reformed to include a bidding process that would allow one party to buy out the other's interest in Sunrise.

¶ 7 On August 25, 2016, Kathleen filed a motion to dismiss Stephen's petition pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)). Just as she had alleged in her earlier contempt petition, Kathleen alleged in her motion to dismiss that Stephen had refused to enter into any written agreement relative to the operation of Sunrise. Kathleen stressed that the MSA had been "negotiated at great length and with the assistance of the court." She maintained that Stephen simply had a case of buyer's remorse, and argued that his dissatisfaction with the terms of the MSA did not constitute a mutual mistake of fact at the time the judgment of dissolution was entered. Finally, Kathleen argued that Stephen's petition was insufficient as a matter of law, because it failed to allege the existence of an agreement other than that expressed in writing.

¶ 8 On September 16, 2016, following a hearing that took place over the course of several days, the trial court granted Kathleen's petition for indirect civil contempt. In a written order, the trial court found that Stephen had failed to transfer 50% of the stock held in Sunrise, and that

he had "absconded" revenues of Sunrise by failing to deposit certain checks into the Citibank account. The trial court further found that Stephen's failure to comply with section 7.4 of the MSA was without compelling cause or justification. Accordingly, Stephen was ordered to repay $6,000 to Sunrise, and to pay Kathleen $1,000 per day until he executed a stock certificate transferring 50% of the stock held in Sunrise.

¶ 9 On October 3, 2016, the trial court entered a purge order stating that Stephen had satisfied the terms of the contempt order. The trial court also granted Kathleen leave to file a petition for attorney fees pursuant to section 508(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(b) (West 2016)).

¶ 10 On November 14, 2016, the trial court conducted a two-part hearing that resulted in the entry of two separate orders, both of which are contested in this appeal. The record on appeal has been supplemented with a bystander's report from these proceedings. The bystander's report has been signed by the trial court.

¶ 11 The bystander's report states that the trial court first heard evidence on Kathleen's petition for attorney fees. After Kathleen's attorney testified as to his billing statements, the contents of the related entries, and the total amount requested, the trial court entered an order granting Kathleen's section 508(b) petition and ordering Stephen to pay Kathleen $19,750.

¶ 12 The second part of the hearing concerned Kathleen's section 2-615 motion to dismiss Stephen's section 2-1401 petition. After hearing arguments, the trial court found that Stephen had failed to: (1) allege a meritorious defense; (2) exercise due diligence in presenting and filing his claim; and (3) attach an affidavit to his petition. The trial court next made factual findings that: (1) the parties had voluntarily entered the MSA and indicated that they could operate Sunrise together; and (2) Stephen's conduct after the entry of the agreement had impacted the

parties' ability to operate the business together. Finally, the trial court found that "no mutual mistake of fact could have occurred," and granted Kathleen's section 2-615 motion to dismiss, with prejudice.

¶ 13 Stephen filed a timely notice of appeal from both of the orders that were entered on November 14, 2016.

¶ 14 II. ANALYSIS

¶ 15 Stephen's primary contention on appeal is that the trial court erred in dismissing his section 2-1401 petition. He argues that he adequately alleged the existence of a mutual mistake of fact, that being the parties' mistaken belief that they could work together as co-owners of Sunrise. On that basis, Stephen maintains that his petition should have, at the very least, survived Kathleen's section 2-615 motion to dismiss. Stephen goes on to argue that his petition should be granted, that the judgment for dissolution should be vacated, and that section 7.4 of the MSA should be reformed to effectuate a bidding process for the buyout of Sunrise. For the following reasons, we reject Stephen's arguments.

¶ 16 We begin by examining the relevant statutory provisions. Section 2-1401 of the Code "creates a comprehensive statutory procedure for obtaining relief from final orders and judgments more than 30 days after their entry." *Price v. Philip Morris, Inc.*, 2015 IL 117687, ¶ 22. To be entitled to relief from a final judgment or order under section 2-1401, the petition must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220 (1986). The petition must also be supported by an affidavit or some other appropriate showing as to matters not of record. 735 ILCS 5/2-1401(b) (West 2016). The

quantum of proof necessary to sustain the petition is a preponderance of the evidence. *Airoom*, 114 Ill. 2d at 221.

¶ 17 "As an initial pleading, a section 2-1401 petition is the procedural counterpart of a complaint and subject to all the rules of civil practice that that character implies." *In re Marriage of Little*, 2014 IL App (2d) 140373, ¶ 8. Thus, a section 2-1401 petition may be dismissed pursuant to sections 2-615 or 2-619 of the Code (735 ILCS 5/2-615, 5/2-619 (West 2016)). See *Little*, 2014 IL App (2d) 140373, ¶ 8. Relevant in this case, a section 2-615 motion challenges the legal sufficiency of a pleading based on defects apparent on its face. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 19. In ruling on a section 2-615 motion, a trial court must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id*. The relevant question is whether, taking all well-pleaded facts as true, the allegations in the complaint, construed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47.

¶ 18 Before turning to the merits, we take a moment to discuss the appropriate standard of review. A section 2-1401 petition can present "either a factual or legal challenge to a final judgment or order." *Warren County Soil & Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 31. If a petition raises a purely legal issue that does not involve a factual dispute, then equitable circumstances are inapplicable, and there is no need for the petitioner to establish a meritorious defense or satisfy the due diligence requirements. *Warren County Soil*, 2015 IL 117783, ¶¶ 47, 48. Under these circumstances, if the trial court enters judgment on the pleadings or dismissal for failure to state a cause of action, then the reviewing court should apply a *de novo* standard of review. *Id*. (adhering to *People v. Vincent*, 226 Ill. 2d 1, 15 (2007)). However, if a section 2-1401 petition raises a fact-dependant challenge to a final judgment which requires a

consideration of the equities underlying the case, then the trial court's ruling should be reviewed for an abuse of discretion. *Warren County Soil*, 2015 IL 117783, ¶ 50. In "appropriate limited circumstances," the trial court may consider equitable considerations to relax the applicable due diligence standards. *Id.* ¶ 51. In the context of a section 2-1401 petition, a trial court abuses its discretion "if it fails to apply the proper criteria when it weighs the facts." *People v. Ortega*, 209 Ill. 2d 354, 360 (2004).

¶ 19 Here, Stephen's section 2-1401 petition raised factual assertions in support of a legal challenge. In turn, the trial court made both factual findings and legal rulings. However, Stephen's petition was ultimately dismissed pursuant to section 2-615, for failure state a cause of action upon which relief may be granted. See *Khan*, 2012 IL 112219, ¶ 47. In particular, the trial court found that "no mutual mistake of fact could have occurred." Because our analysis focuses on this legal determination, we apply a *de novo* standard of review.

¶ 20 Turning to the merits, Stephen contends that section 7.4 of the MSA must be reformed because the parties were mutually mistaken as to their belief "that they would be able to work together and run [Sunrise]." Stephen notes that the reformation of a written settlement agreement based on the parties' mutual mistake of fact is an appropriate remedy under section 2-1401. See *In re Marriage of Breyley*, 247 Ill. App. 3d 486, 491 (1993). Stephen argues that, because the trial court was considering his section 2-1401 petition in the context of Kathleen's section 2-615 motion to dismiss, it was required to accept Stephen's allegations as true. Thus, according to Stephen, his petition sufficiently stated a cause of action for reformation of a contract, and further satisfied all of the necessary elements under section 2-1401.

¶ 21 We disagree with Stephen. "Although a section 2-615 motion to dismiss admits all well-pleaded facts as true, it does not admit conclusions of law or factual conclusions that are

unsupported by allegations of specific facts." *McLean v. Rockford Country Club*, 352 Ill. App. 3d 229, 232 (2004). "If, after disregarding any legal and factual conclusions, the complaint does not allege sufficient facts to state a cause of action, the motion to dismiss should be granted." *Id.* As we will explain, not only does Stephen's section 2-1401 petition rely on an improper legal conclusion, it also lacks a necessary factual allegation.

¶ 22 Because marital settlement agreements are contracts, they are governed by principles of contract law. *In re Marriage of Linta*, 2014 IL App (2d) 130862, ¶ 12; *In re Marriage of Haller*, 2012 IL App (5th) 110478, ¶ 26. "Reformation of a contract based on mutual mistake should be allowed only when clear and convincing evidence compels the conclusion that the instrument does not properly reflect the true intent of the parties." *Danhauer v. Danhauer*, 2013 IL App (1st) 123537, ¶ 34. Thus, relief is available under section 2-1401 of the Code if a judgment of dissolution incorporating a written agreement fails to express the real intention of the parties because of a mutual mistake. *Breyley*, 247 Ill. App. 3d at 491.

¶ 23 "A mutual mistake is one that is common to the parties such that each labors under the same misconception. In such a case, the parties are in actual agreement, but the instrument to be reformed, in its present form, does not express the parties' real intent." *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 869 (2008). Therefore, two elements must be present for a party to reform a settlement agreement on the basis of mutual mistake: (1) the mistake must be mutual; and (2) an agreement other than that expressed in writing must have been reached. *In re Marriage of Shaner*, 252 Ill. App. 3d 146, 157 (1993).

¶ 24 Here, even accepting Stephen's allegations as true, they are still insufficient to state a claim for reformation of a written agreement. Such a claim "rests on the theory that the parties reached an agreement but then erred somehow (by mutual mistake of fact, or by mistake on one

side and fraud on the other) in reducing that agreement to writing, with the result that the writing fails to reflect the parties' agreement." (Parenthesis in original.) *CitiMortgage, Inc. v. Parille*, 2016 IL App (2d) 150286, ¶ 29. Hence, to state a cause of action for reformation of a contract, a plaintiff must assert that a variance exists between the parties' original agreement and the agreement that was reduced to writing. *United City of Yorkville*, 376 Ill. App. 3d at 25.

¶ 25 Here, Stephen's section 2-1401 petition fails to allege the existence of any agreement pertaining to the operation of Sunrise other than that expressed in section 7.4 of the MSA. See *Shaner*, 252 Ill. App. 3d at 157. This failure is fatal to Stephen's purported cause of action, as he lacks any basis for arguing that the MSA does not reflect the parties' original agreement.

¶ 26 Aside from this deficiency, we note that Stephen's allegations are insufficient for an additional reason. To obtain relief based on a mutual mistake of fact, "[t]he party asserting mutual mistake must show that both parties were mistaken as to a *material matter* at the time of the execution of the instrument." (Emphasis added.) *Cameron v. Bogusz*, 305 Ill. App. 3d 267, 272 (1999); see also *Alliance Property Management, Ltd. v. Forest Villa of Countryside Condo. Ass'n*, 2015 IL App (1st) 150169, ¶ 39 (noting that a contract may be rescinded when there is a mutual mistake of fact as to a "material term"). Generally, a mistaken prediction does not qualify as a fact that is material to a contract. *United City of Yorkville v. Village of Sugar Grove*, 376 Ill. App. 3d 9, 23-24 (2007).

¶ 27 Here, the parties' belief that they could work together as co-owners of Sunrise was not a material matter to the MSA. At best, Stephen's allegations establish that the parties reached an agreement based on their mistaken prediction as to their ability to work together. However, as we discussed above, Stephen has the burden of showing that the MSA fails to express the parties' "real intent." See *Wheeler-Dealer, Ltd*, 379 Ill. App. 3d at 869. That the parties may

have been mistaken as to their ability to work together does nothing to establish that the MSA somehow misrepresents their real intentions at the time they entered the agreement.

¶ 28 A case cited in Stephen's brief, *In re Marriage of Johnson*, 237 Ill. App. 3d 381 (1992), provides a good example of a mutual mistake of fact in a post-dissolution context. There, the judgment of dissolution incorporated a marital settlement agreement containing a provision stating that the respondent (former wife) would retain possession of the marital residence, but that the residence would be sold upon the *petitioner's* remarriage. When the petitioner remarried and sought to force a sale of the marital residence, the respondent filed a section 2-1401 petition seeking to reform the settlement agreement. The respondent alleged that the agreement contained a clerical error, as the parties had originally agreed that *her* remarriage would trigger the sale of the marital residence, not the petitioner's remarriage. *Johnson*, 237 Ill. App. 3d at 384-85. The trial court agreed with the respondent and granted her petition for relief under section 2-1401. *Id*. at 389. The appellate court affirmed, holding that the written agreement reflected something other than what the parties had agreed to during a conference with their attorneys. *Id*. at 395.

¶ 29 *Johnson* illustrates the shortcomings in Stephen's section 2-1401 petition. In *Johnson*, the parties' written settlement agreement differed from their original agreement with respect to a material matter: the event that would trigger a forced sale of the marital residence. Here, Stephen makes no allegations that section 7.4 of the MSA differs from the parties' original agreement in any way. Thus, Stephen implicitly concedes that section 7.4 of the MSA accurately reflects the parties' original agreement. The trial court was therefore correct in finding that "no mutual mistake of fact could have occurred."

¶ 30 In sum, Stephen's belief that his agreement with Kathleen was premised on the parties' false assumption that they would be able to cooperate does not entitle him to a reformation of the MSA. After disregarding Stephen's improper legal and factual conclusions, and after viewing his well-pleaded facts as true, his petition fails to state a cause of action upon which relief may be granted. We therefore affirm the trial court's order dismissing Stephen's petition pursuant to section 2-615 of the Code. See *McLean*, 352 Ill. App. 3d at 232.

¶ 31 Stephen's remaining contention is that the trial court erred in awarding Kathleen attorney fees. Stephen notes that the record on appeal contains only one section 508(b) petition, filed by Kathleen's attorney on October 28, 2016, and requesting that Stephen be ordered by pay $14,020 for attorney fees and costs related to litigating Kathleen's petition for indirect civil contempt of court. However, in the order dated November 14, 2016, from which this appeal is partly taken, the trial court awarded Kathleen attorney fees in the amount of $19,750. Stephen now argues that, because there is nothing in the record to support an increase of $5,730, the fee award should be reversed and remanded for a new hearing on the issue of attorney fees. We disagree.

¶ 32 Section 508(b) of the Act states, "[i]n every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without compelling cause or justification, the court shall order the party against whom the proceeding is brought to pay promptly the costs and reasonable attorney's fees of the prevailing party." 750 ILCS 5/508(b) (West 2016). A trial court's decision to award or deny fees will be reversed only if it constitutes an abuse of discretion. *In re Marriage of Haken*, 394 Ill. App. 3d 155, 160 (2009). A trial court abuses its discretion where its ruling is arbitrary, fanciful or unreasonable or where no reasonable person would take the view adopted by the trial court. *In re Marriage of Iqbal & Khan*, 2014 IL App (2d) 131306.

¶ 33 Here, the bystander's report (which was signed by the trial court) includes the following statements and findings with respect to attorney fees: (1) Kathleen's attorney testified as to his billing statements and the contents of the entries relating to Kathleen's petition for indirect civil contempt of court; (2) Stephen's attorney cross-examined Kathleen's attorney as to specific entries of the billing statements, as well as the total amount of the requested attorney fees; (3) the trial court found that Stephen's actions with respect to Kathleen's contempt petition were without compelling cause or justification; (4) the requested fees were reasonable and appropriate; and (5) Kathleen was awarded $19,750 in attorney fees from Stephen.

¶ 34 Stephen notes that his appellate counsel was not his trial counsel, and asserts that this has made it difficult for his appellate counsel to review the issue of attorney fees. Stephen nonetheless argues that, without supporting documentation in the record, it is unclear whether $5,730 of Kathleen's award is justified. In response, Kathleen asserts that itemized billing statements totaling the entire $19,750 were indeed provided to Stephen's trial counsel and the trial court. Kathleen argues that this is supported by the trial court's findings in the bystander's report, and further asserts that it was Stephen's burden to prepare a complete record. Thus, according to Kathleen, there is no basis in the record to support a reversal on the issue of attorney fees.

¶ 35 We agree with Kathleen. "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill. 2d at 392. Similarly, when the record lacks evidence that was

presenting at a hearing, and unless the record indicates otherwise, it is presumed that the trial court heard adequate evidence to support its finding. *Webster v. Hartman*, 195 Ill. 2d 426, 433 (2001).

¶ 36 Accepting Stephen's argument here would require a converse application of the presumptions set forth in *Foutch* and *Webster*. That is to say, because the only fee petition in the record is for $14,020, Stephen (the appellant) asks us to presume that the trial court's award of $19,750 was not in conformity with the law and lacked a sufficient factual basis.

¶ 37 However, the bystander's report indicates that the trial court awarded Kathleen $19,750 in attorney fees after considering Stephen's billing statements and determining that the requested fees were reasonable and appropriate. Under these circumstances, and applying the correct legal standards, we must presume that the trial court heard adequate evidence to support its finding. See *Foutch*, 99 Ill. 2d at 392-92; *Webster*, 195 Ill. 2d at 433.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the trial court's orders dismissing Stephen's section 2-1401 petition and awarding Kathleen $19,750 in attorney fees from Stephen.

¶ 40 Affirmed.