

2018 IL App (2d) 170815-U  
No. 2-17-0815  
Order filed June 25, 2018

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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CATHERINE A. RAJCAN, d/b/a Efficiency Reporting,	)	Appeal from the Circuit Court of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-SC-5699
	)	
ROBIN ZAHRAN,	)	Honorable
	)	Peter W. Ostling,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Justices McLaren and Burke concurred in the judgment.

**ORDER**

*Held:* The trial court did not err in denying Zahran’s motion for substitution of judge as of right. Zahran forfeited his claim that the trial court erred in dismissing the case as moot, and his claim additionally failed on the merits. The trial court did not err in determining that the mootness doctrine also applied to Zahran’s section 2-1401 petition, his petition to vacate the default judgment based on fraud, and his motion for leave to file a counterclaim. Therefore, we affirmed.

¶ 1 This case arose from court reporting fees allegedly owed by defendant, Robin Zahran, to plaintiff, Catherine A. Rajcan, d/b/a Efficiency Reporting. Rajcan obtained a default judgment against Zahran, which we affirmed in a prior appeal. *Rajcan v. Zahran*, 2016 IL App (2d) 150871-U. However, we remanded the case for the trial court to consider the fact-dependent

claims to vacate the default judgment that Zahran had raised in a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). Thereafter, Rajcan sought to dismiss the case as moot based on her signing a satisfaction and release of judgment with Chicago Title Insurance Company (Chicago Title). The trial court granted Rajcan's motion and additionally dismissed or denied all remaining pending motions.

¶ 2 In this *pro se* appeal, Zahran argues that the trial court erred as a matter of law in: (1) refusing to hold an evidentiary hearing on his section 2-1401 petition, as ordered by this court; (2) denying his motion for substitution of judge as of right; (3) refusing to vacate the default judgment against him, which he claims was acquired by fraud upon the court; (4) granting Rajcan's motion to dismiss her complaint as moot; and (5) dismissing his motion to file a counterclaim. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 24, 2014, Rajcan brought a *pro se* small claims complaint against Zahran. Rajcan alleged that Zahran owed her \$4,126.70 plus court costs for court reporter services rendered on January 13, 2009, and January 20, 2009. The alleged damages included pre-judgment interest totaling \$2,094.15.

¶ 5 After several unsuccessful attempts to serve Zahran, the trial court granted Rajcan leave to serve Zahran by alternate means. On April 27, 2015, the trial court entered a default judgment against Zahran for \$4,126.70, plus costs of \$429.14.

¶ 6 On June 2, 2015, Zahran filed a general, *pro se* appearance and sought to vacate the default order based on lack of service of process, alleging that he had been a Wisconsin resident for the previous two years. The trial court ruled that Zahran had been properly served. Zahran subsequently filed a petition to vacate the judgment under section 2-1301, or alternatively section

2-1401, of the Code (735 ILCS 5/2-1301, 2-1401 (West 2014)) (section 2-1401 petition). He also sought sanctions. The trial court denied Zahran's section 2-1401 petition and his request for sanctions.

¶ 7 On appeal, we concluded that Zahran was properly served with process, so the trial court did not err in denying his first motion to vacate the default judgment against him, nor in denying the portion of Zahran's section 2-1401 petition alleging improper service of process. We further affirmed the trial court's denial of Zahran's motion for sanctions. We also determined that the trial court did not err in entering the default judgment in the amount sought by Rajcan. However, we held that the trial court erred in ruling that the remainder of Zahran's claims in his section 2-1401 petition, which were fact-dependent, were forfeited. Therefore, we remanded the case for an evidentiary hearing. *Rajcan*, 2016 IL App (2d) 150871-U, ¶¶ 1, 3, 54. Our order was filed on August 5, 2016. *Rajcan*, 2016 IL App (2d) 150871-U.

¶ 8 On November 21, 2016, Zahran filed two petitions for substitution of judge, one as a matter of right and one for cause. He also filed a motion to file a counterclaim and to amend his section 2-1401 petition. Zahran attached his proposed counterclaim.

¶ 9 On February 14, 2017, Rajcan filed a motion to impose a judicial lien against Zahran. Shortly afterwards, Zahran filed a motion for sanctions against Rajcan for requesting the lien. On March 10, 2017, he filed a petition to vacate the default judgment "based on fraud upon the court."

¶ 10 On March 15, 2017, the trial court denied Zahran's motion for substitution of judge as of right. It stated that the default judgment was entered on April 27, 2015; Zahran filed a *pro se* appearance on June 2, 2015; the trial court denied his motion to vacate the default judgment on June 8, 2015; Zahran filed his section 2-1401 petition after that time; and the trial court denied

that petition and a motion for sanctions on July 27, 2015. Zahran did not file his motion for substitution of judge as of right until November 21, 2016. The trial court stated that because it had ruled on substantial issues in the case before Zahran filed his motion for substitution, the motion was untimely under section 2-1001 of the Code of Civil Procedure (735 ILCS 5/2-1001 (West 2016)).

¶ 11 Zahran withdrew his motion for substitution of judge for cause on April 24, 2017.

¶ 12 In the meantime, on April 17, 2017, Rajcan filed a motion to dismiss the case as moot, alleging as follows. After granting Rajcan a default judgment, the trial court signed a memorandum of judgment, which Rajcan filed with the recorder of deeds and recorded as a lien on property Zahran owned in Oak Brook. Zahran sold the property one month after the default judgment was entered, but Rajcan's judgment lien was not satisfied at the time of the real estate closing. On March 17, 2017, Rajcan received \$5,448.54 from Chicago Title, which was the title insurance carrier on the sale of the property. The amount was full payment of the judgment that she sought, including costs and interest. Thus, Chicago Title had satisfied the judgment lien recorded against the property, and the controversy between her and Zahran was now moot. Rajcan attached to her motion a preprinted satisfaction and release of judgment form.

¶ 13 On April 21, 2017, Rajcan executed a document showing that she assigned all of her rights, title, and interest in the default judgment to Chicago Title.

¶ 14 At some point that is not clear in the record, Zahran filed a motion for leave to carry out limited discovery.

¶ 15 The trial court held a hearing on all pending motions on September 14, 2017, and we summarize its findings. Rajcan had filed a motion to dismiss the matter as moot, in which she requested that the trial court (1) sign and enter a satisfaction and release of judgment; and (2)

dismiss as moot all of Zahran's remaining motions, including his counterclaim. In his response to Rajcan's motion, Zahran had also requested that the trial court sign the satisfaction and release of judgment. Therefore, the trial court would sign and enter the document at that time, which resulted in the judgment being vacated and the case being dismissed.

¶ 16 Based on the trial court's vacation of the judgment, Zahran's section 2-1401 petition was moot. Similarly, Zahran's petition seeking to vacate the judgment based on fraud was moot, as was his motion for leave to carry out limited discovery.

¶ 17 Zahran needed to request leave of court before filing a counterclaim. Because the trial court had not yet granted such leave, no counterclaim was pending at the time it entered the satisfaction and release of judgment. Thus, Zahran's motion to file a counterclaim was moot. Rajcan asked that the counterclaim be dismissed with prejudice based on *res judicata*, but the trial court denied this request. The trial court was not suggesting that Zahran could not file a separate complaint, and whether any such claim was barred by *res judicata* would be appropriately determined at that time. The trial court did note that *res judicata* generally required that a prior action result in a final judgment on the merits, whereas this case involved a default judgment.

¶ 18 Regarding Zahran's request for sanctions, Illinois Supreme Court Rule 137 (eff. July 1, 2013) allowed a court to sanction a party or attorney who had filed a pleading that was not well-grounded in fact or law or was interposed for an improper purpose. The rule was not intended to punish litigants for making losing arguments or for alleging facts contrary to the trial court's ultimate factual findings. The party seeking the sanction bore the burden of proof. A review of the court file, as well as consideration of the parties' conduct towards each other in open court during court appearances, "clearly [led the trial court] to reasonably conclude that there [was] a

certain sense of animus between the parties.” However, that alone was not sufficient to impose sanctions. Zahran argued that in three separate instances, Rajcan noticed up motions for the court, causing him to travel great distances at great expense and inconvenience, even though Rajcan knew that the trial court would not rule on those motions before resolving the pending motions for substitution of judge. Yet, Zahran himself noticed up the sanctions motion knowing that the trial court would not rule on it before resolving the motions for substitution of judge. Zahran essentially did “the very same thing of which he complain[ed] [Rajcan was] doing.” Therefore, the trial court found no credible basis for sanctions, and it denied Zahran’s motion.

¶ 19 Zahran timely appealed.

¶ 20 II. ANALYSIS

¶ 21 We initially note that Rajcan has not filed an appellee brief. However, as the record and issues are simple enough that we can address the claimed errors raised on appeal, we proceed to do so under the guidelines set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 22 A. Substitution of Judge as of Right

¶ 23 Turning to the merits, we first address Zahran’s argument that the trial court erred in denying his motion for substitution of judge as of right, which is an issue that we review *de novo*. *Williams by Williams v. Leonard*, 2017 IL App (1st) 172045, ¶ 9.

¶ 24 The trial court denied the motion as untimely under section 2-1001, which states in relevant part:

“An application for substitution of judge as of right \*\*\* shall be granted if it is presented before trial or hearing begins and before the judge to whom it is

presented has ruled on any substantial issue in the case, or if it is presented by consent of the parties.” 735 ILCS 5/2-1001(a)(2)(ii) (West 2016).

The trial court noted that it had made several substantive rulings before Zahran had filed his motion for substitution of judge, including denying Zahran’s motion to vacate the default judgment, denying his section 2-1401 petition, and denying a motion for sanctions.

¶ 25 Zahran does not contest that these rulings were substantive, but he instead argues that because a section 2-1401 petition is considered a new and separate cause of action (see *Price v. Phillip Morris, Inc.*, 2015 IL 117687, ¶ 23 (a section 2-1401 petition is not a continuation of the original action, but rather an initial pleading that commences a new and separate cause of action, subject to the rules of civil procedure)), the aforementioned rulings would not apply to the “new case,” in which no substantive rulings had yet been made.

¶ 26 This precise issue was addressed in *Niemerg v. Bonelli*, 344 Ill. App. 3d 459 (2003). The appellate court rejected the argument, stating that “[a]lthough a section 2-1401 proceeding may be a ‘new action’ for some purposes, such as pleading sufficiency and service of process, it is not a new case for purposes of section 2-1001(a)(2).” *Id.* at 465; see also *People v. Crenshaw*, 2017 IL App (4th) 150170, ¶ 22 (following *Niemerg*); *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 248 (2006) (same). The court noted that the purpose of requiring that the motion for substitution be presented before a ruling on a substantial issue in the case is to prevent litigants from “judge-shopping” after forming an opinion that the judge may be unfavorably disposed toward their case’s merits. *Niemerg*, 344 Ill. App. 3d at 465. The court reasoned that allowing a substitution of judge in a section 2-1401 proceeding would defeat this policy, and further, for purposes of judicial economy, it is practical that the same judge who heard the underlying case should hear

the section 2-1401 petition. *Id.* These considerations apply equally here, rendering Zahran's argument without merit.

¶ 27 Zahran further contends that the trial court demonstrated dislike and prejudice towards him, which was manifested in its defiance of our mandate and in its rulings and justifications for those rulings. However, after the trial court has made a substantive ruling, section 2-1001(a)(3) allows substitution of judge only for cause. *Bowman v. Ottney*, 2015 IL 119000, ¶ 16 (citing 735 ILCS 5/2-1001(a)(3) (West 2014)). As Zahran withdrew his motion for substitution of judge for cause, he has forfeited any related arguments.

¶ 28 B. Dismissal of Rajcan's Complaint as Moot

¶ 29 We next address Zahran's argument that the trial court erred in granting Rajcan's motion to dismiss her complaint as moot. He asserts that Rajcan's agreement with Chicago Title should not affect his pending motion to vacate the judgment based on fraud upon the court, nor is he waiving his rights to his affirmative defenses to Rajcan's original complaint, especially where Chicago Title declared in open court that it was now the judgment creditor.<sup>1</sup> Zahran argues that he does not have any control over Rajcan's agreement with Chicago Title and that his rights have not yet been adjudicated. Zahran further argues that after assignment and acquisition of the judgment by Chicago Title, Rajcan had no right to release the judgment and no right to speak or file motions on behalf of Chicago Title.

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<sup>1</sup> Zahran is apparently referring to the beginning of the proceeding on April 24, 2017. An individual stated that Chicago Title had received an assignment of the judgment and that he could advise the trial court about the situation. The trial court stated that because there was no appearance on file, the individual would be allowed to only observe the proceedings.

¶ 30 An issue is moot if no actual controversy exists, or where intervening events occur that make it impossible for the court to grant effectual relief. *Northbrook Bank & Trust Co. v. Abbas*, 2018 IL App (1st) 162972, ¶ 24. “Whether a case is moot presents a question of law, which we review *de novo*.” *People ex rel. Rahn v. Vohra*, 2017 IL App (2d) 160953, ¶ 27.

¶ 31 The trial court signed the satisfaction and release of judgment after stating that both parties had requested that it do so.<sup>2</sup> The order is on a preprinted form that states:

“**IT IS HEREBY ORDERED** that in accordance with 735 ILCS 5/12-183h Code of Civil Procedure that the judgment heretofore entered by the Court in the above entitled matter is hereby vacated and held for naught. **IT IS FURTHER ORDERED** that the above entitled matter be and the same is hereby dismissed.” (Emphases in original.)

Under the invited error doctrine, a party cannot complain of error which the party induced the court to make, or to which the party consented. *Ely v. Pivar*, 2018 IL App (1st) 170626, ¶ 43. As Zahran apparently asked that the trial court sign the satisfaction and release of judgment form, he cannot now complain that the trial court erred in dismissing the complaint, as dismissal

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<sup>2</sup> Zahran argues that the trial court misquoted his response to Rajcan’s motion to dismiss the case as moot. However, that pleading is not contained in the record, so we must accept the trial court’s characterization of the pleading as correct. See *Foutch v. O Bryant*, 99 Ill. 2d 389, 391-92 (1984) (the appellant has the burden to provide a sufficiently complete record of trial proceedings to support his claims of error, and the reviewing court will resolve any doubts that arise from the incompleteness of the record against him). Regardless, as we later discuss, we also agree with the trial court that the complaint was moot.

of the case was explicitly part of the form. Similarly, he has forfeited any argument that Rajcan was not entitled to request that the trial court enter the satisfaction and release of judgment.<sup>3</sup>

¶ 32 Even otherwise, we conclude that the trial court did not err in dismissing Rajcan's complaint as moot. Rajcan received payment on the default judgment from Chicago Title and released all of her rights in the judgment to that company, so there was no further controversy for her to litigate. Additionally, Chicago Title did not file any motion to substitute in as the plaintiff pursuant to the assignment. As there was no longer a plaintiff seeking to obtain or collect on a judgment against Zahran pursuant to the complaint, the complaint was moot. See *Baker v. Forest Preserve District of Cook County*, 2015 IL App (1st) 141157, ¶ 35 ("A case is moot when plaintiffs have secured what they basically sought and a resolution of the issues could not have any practical effect on the existing controversy.")

¶ 33 Zahran's primary concern seems to be that Chicago Title could seek to collect on the judgment as the creditor. Such a scenario is highly speculative, especially considering that Chicago Title did not ask to be substituted as the named plaintiff. It is questionable whether another party could even collect on the judgment, because "[w]hen a valid order of release or satisfaction of judgment is entered, an obligor is relieved of his duty to further satisfy the judgment." *Meyer v. First American Title Insurance Agency of Mohave, Inc.*, 285 Ill. App. 3d 330, 336 (1996); see also 735 ILCS 5/12-183 (West 2016). In any event, we need not resolve that issue, as Zahran could raise his current defenses to the default judgment if, at some future date, another party sought to hold him liable for it.

¶ 34 C. Evidentiary Hearing on Zahran's Section 2-1401 Petition

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<sup>3</sup> We further note that Rajcan did not purport to sign any motions on behalf of Chicago Title, but rather signed them on her own behalf as the named plaintiff in the case.

¶ 35 We now examine Zahran’s argument that the trial court erred in refusing to hold an evidentiary hearing on his section 2-1401 petition. Whether the trial court complied with a reviewing court’s mandate is a question of law subject to *de novo* review. *People v. Payne*, 2018 IL App (3d) 160105, ¶ 9.

¶ 36 Zahran points out that, in the prior appeal, we ordered the trial court to conduct a hearing on his fact-dependent claims in his section 2-1401 petition to vacate the default judgment. Zahran also points out that under the law of the case doctrine, questions decided in a previous appeal are binding on the trial court upon remand. See *Kreutzer v. Illinois Commerce Comm’n*, 2012 IL App (2d) 110619, ¶ 23.

¶ 37 As discussed, after we issued our order, Rajcan received payment on the default judgment from, and released all of her rights to, Chicago Title, with the result that there was no longer a party seeking to collect on the default judgment. These circumstances were “intervening events” that made it impossible for the trial court, and for us, to be able to grant any effectual relief, rendering the case moot. See *Abbas*, 2018 IL App (1st) 162972, ¶ 24. Similarly, resolving the issue of whether the default judgment was properly entered, as raised in Zahran’s section 2-1401 petition, would have no practical effect and is likewise moot.

¶ 38 D. Vacation of Default Judgment Based on Fraud

¶ 39 We next address Zahran’s argument that the trial court “erred as a matter of law in refusing to Vacate the Order of Judgment Against [Zahran] Acquired by Fraud Upon the Court.” We review questions of law *de novo*. *Urban Partnership Bank v. Chicago Title Land Trust Co.*, 2017 IL App (1st) 162086, ¶ 10.

¶ 40 Zahran provides a detailed discussion of Rajcan’s allegedly fraudulent actions that he claims led to the default judgment and her receipt of payment from Chicago Title. However,

given that there was no hearing on Zahran’s petition to vacate the default judgment based on fraud upon the court, the trial court could not have erred in refusing to grant the petition. If we construe Zahran’s argument as asserting that the trial court erred in ruling that his petition to vacate the default judgment based on fraud was moot, the argument still fails for the reasons discussed above regarding the section 2-1401 petition. Zahran argues that a judgment obtained by fraud is voidable, and the party against whom it was entered has the absolute right to move to vacate it.

¶ 41 Zahran cites *Elman v. Evanston Bus Co.*, 27 Ill. 2d 609, 615 (1963) (abrogated by *People v. Vincent*, 226 Ill. 2d 1, 15 (2007)), which held that the defendant, who had alleged fraud in his amended petition under section 72 of the Civil Practice Act (Ill. Rev. Stat. 1961, c. 119, s. 72), should have been given an opportunity to defend on the issue of damages in the default judgment. However, while a party may often be able to challenge a judgment allegedly procured by fraud, this principle does not trump the mootness doctrine when there is no practical relief the court could grant the parties. *Cf. Gilbert Bros., Inc., v. Gilbert*, 258 Ill. App. 3d 395, 400 (1994) (company’s claim of fraudulent transfer was moot because even it were true, any rights the company had in the funds would have been extinguished). Here, Rajcan has been paid by a third party and Zahran currently faces no liability from the default judgment, so resolving his petition regarding whether the judgment was obtained by fraud would have no practical effect on this case.

¶ 42 E. Counterclaim

¶ 43 Last, Zahran argues that the trial court erred in “dismissing” his motion to file a counterclaim. He maintains that a party has an absolute right to file a counterclaim in the same proceedings.

¶ 44 We note that the trial court struck Zahran's counterclaim as moot, rather than dismissing it. As stated, mootness is a question of law that we review *de novo*. *Vohra*, 2017 IL App (2d) 160953, ¶ 27. Further, a trial court's decision whether to grant leave to file a counterclaim is reviewed for an abuse of discretion. *Dallas v. Cips*, 402 Ill. App. 3d 307, 311 (2010).

¶ 45 A party does not have an absolute right to file a counterclaim at any time. *National Educational Music Co., Ltd. v. Rieckhoff*, 292 Ill. App. 3d 260, 263-64 (1997). In the instant case, Zahran had moved to file a counterclaim but had not yet been granted leave to do so at the time the trial court entered the satisfaction and release of judgment. Accordingly, we agree with the trial court's assessment that no counterclaim was pending at the time that it dismissed the case, rendering the motion seeking leave to file a counterclaim moot. Further, we find no abuse of discretion in the trial court not granting leave to file the counterclaim immediately prior to the case's dismissal, given the imminent dismissal of the case. This is especially true because the trial court denied Rajcan's motion to dismiss the counterclaim with prejudice. As the trial court noted, Zahran is free to raise his claims in a separate complaint, if he wishes.

¶ 46

### III. CONCLUSION

¶ 47 For the reasons stated, we affirm the judgment of the Du Page County circuit court.

¶ 48 Affirmed.