

NOTICE
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2018 IL App (5th) 170223-U

NO. 5-17-0223

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
DEBRA J. MAJEWSKI,)	Perry County.
)	
Petitioner-Appellee,)	
)	
and)	No. 14-D-35
)	
KENNETH R. MAJEWSKI,)	Honorable
)	Daniel J. Emge,
Respondent-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Moore and Overstreet concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in denying respondent's amended motion to vacate the corrected judgment of dissolution of marriage.
- ¶ 2 Respondent, Kenneth R. Majewski, appeals from an order of the circuit court of Perry County denying his amended motion to vacate the corrected judgment of dissolution filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)). Respondent sought to vacate (1) the trial court's assigned value of farm equipment awarded to him and (2) the trial court's finding of indirect civil contempt against him with regard to temporary maintenance and attorney fees awarded to

petitioner, Debra L. Majewski. The single issue raised in this appeal is whether the trial court erred in denying respondent's motion to vacate the corrected judgment of dissolution of marriage. We affirm.

¶ 3

BACKGROUND

¶ 4 The parties were married on March 19, 1977. Three children were born during the marriage. All three are emancipated. Petitioner is a homemaker and has been a teacher's aide since 1999. Petitioner's income from her job as a teacher's aide is approximately \$13,700 per year. Respondent is a farmer. Much of the parties' assets are tied to real estate in conjunction with respondent's farming operations.

¶ 5 On May 14, 2014, petitioner filed for dissolution of marriage. On May 19, 2014, petitioner filed a petition for temporary relief in which she requested an award of temporary maintenance. On July 22, 2014, the trial court entered an order awarding petitioner temporary maintenance in the amount of \$1500 per month for the months of June, July, and August and \$1000 per month for the months of September 2014 through and including May. No year was specified for when temporary maintenance would end. Payments were due the first of each month and were to be paid by respondent through the office of the circuit clerk.

¶ 6 On August 3, 2015, respondent filed a motion seeking clarification of the award of temporary maintenance and further instruction with regard to the length of time he was to pay the temporary maintenance. The record does not show that this motion was ruled upon by the trial court. On September 23, 2015, the case went to trial.

¶ 7 The evidence adduced at trial included a farm machinery schedule signed by respondent. It was introduced by petitioner and marked as petitioner's exhibit 14. The schedule showed the farm equipment held a value of \$161,000. The trial court noted that when itemized, the equipment totaled \$92,600. Neither party gave any explanation as to the discrepancy between the two amounts. Further evidence showed an outstanding loan in the amount of \$21,468.96 on a tractor. Respondent testified he disagreed with the value of the equipment, but failed to offer evidence as to any alternative values.

¶ 8 On October 30, 2015, the trial court entered a memorandum of judgment in which it valued the farm equipment at \$139,531.04 and awarded that amount to respondent. That amount was determined by taking the value of the farm equipment listed in petitioner's exhibit 14 (\$161,000) and reducing it by the amount of the tractor loan (\$21,468.96). The farm equipment was awarded to respondent.

¶ 9 In its original memorandum of judgment entered on October 30, 2015, the trial court held respondent in indirect civil contempt for willful failure to pay petitioner temporary maintenance as outlined in its July 22, 2014, order and for willful failure to pay petitioner's attorney fees as directed by an order entered on June 17, 2015. On April 29, 2016, the trial court entered a corrected judgment of dissolution. On May 12, 2016, the trial court entered an order in which it distributed the net proceeds from the sale of the parties' real estate holdings as set forth in its previous order. \$550,060.08 was awarded to petitioner and \$222,225.67 was awarded to respondent. These amounts reflect the farm equipment awarded to respondent, as well as the temporary maintenance arrearage and

attorney fees. The trial court determined that, pursuant to its previous order, temporary maintenance continued until the final hearing.

¶ 10 On March 15, 2017, respondent filed a motion to vacate the corrected judgment of dissolution pursuant to section 2-1401 of the Code. Petitioner responded by filing a motion to dismiss respondent's motion to vacate on the basis that respondent did not allege diligence in pursuing his claim after judgment and failed to affirmatively state any allegations supporting a claim of diligence. After a hearing on the parties' motions, the trial court granted petitioner's motion to dismiss and also granted respondent leave to file an amended motion to vacate. A few days later, respondent filed an amended motion to vacate the corrected judgment of dissolution.

¶ 11 The motion alleged that (1) the value assigned to the farm equipment by the trial court is incorrect, (2) the trial court incorrectly read the July 22, 2014, order for temporary maintenance when it ruled the temporary maintenance continued until the final hearing, (3) by objecting to the value at trial and filing a motion for clarification respondent demonstrated due diligence in presenting a defense, and (4) respondent was diligent in filing a section 2-1401 motion. Petitioner filed a response to the motion in which she *inter alia* denied the existence of due diligence and raised affirmative defenses. The trial court denied respondent's amended motion to vacate the corrected judgment of dissolution by docket entry on May 19, 2017. Respondent filed a timely notice of appeal.

¶ 12

ANALYSIS

¶ 13 The issue on appeal is whether the trial court erred in denying respondent's amended motion to vacate the corrected judgment of dissolution. Respondent asserts he was diligent in pursuing challenges to the issues of excessive valuation of the farm equipment and the duration and amount of temporary maintenance, but even if we find him to be lacking in diligence, the corrected judgment should still be vacated pursuant to the principles of justice, good conscience, and equity. We disagree.

¶ 14 Initially, respondent argued that the standard of review is *de novo*, but conceded in his reply brief that the standard of review is abuse of discretion. A trial court has discretion in determining whether to grant or to deny a section 2-1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986). A reviewing court should not disturb the trial court's judgment unless the record shows the trial court abused its discretion. *Id.* A court abuses its discretion only where its ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the same view. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 15 Section 2-1401 of the Code provides a comprehensive procedure by which final orders, judgments, and other decrees may be vacated "after 30 days from the entry thereof." 735 ILCS 5/2-1401(a) (West 2016). Petitions filed pursuant to section 2-1401 of the Code must meet several requirements. By a preponderance of the evidence, the petition is required to: (1) allege and prove due diligence in defending the original action; (2) plead due diligence in bringing the petition to vacate the order in question; and

(3) plead a meritorious defense. *Airoom*, 114 Ill. 2d at 221; *In re Marriage of Hoppe*, 220 Ill. App. 3d 271, 282 (1991).

¶ 16 "The petition must be supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2016). Respondent is not entitled to relief under section 2-1401 unless he shows that, through no fault of his own, the trial court was unaware of the error of fact or the existence of a valid defense. *Airoom*, 114 Ill. 2d at 222. The purpose of section 2-1401 is to bring facts before the court which the trial court did not know when entering judgment and had the trial court known such facts, it would have entered a different judgment. *Manning v. Meier*, 114 Ill. App. 3d 835, 838 (1983); *Hoppe*, 220 Ill. App. 3d at 282.

¶ 17 Respondent claims he was diligent in bringing the alleged errors to the trial court's attention by objecting to the valuation of the farm equipment during trial and by filing a "Clarification of Order" on August 3, 2015, asking the trial court to clarify his temporary maintenance obligation. However, as to valuation, the record fails to show that respondent ever offered any proof as to the actual value of the farming equipment. The record is void of any testimony or evidence by respondent regarding the value of the farm equipment.

¶ 18 Furthermore, petitioner offered a valid affirmative defense in her response to respondent's amended motion to vacate the corrected judgment for dissolution, which accounts for the \$68,400 discrepancy of which respondent complains. Petitioner pointed out that two property lists were attached to respondent's motion. The first was dated

February 15, 2016, and the second was a "machinery schedule" identical to page 2 of petitioner's exhibit 14. After comparing the two, a discrepancy arises with regard to a combine. The combine is valued at \$76,000 on the "machinery schedule" attached to respondent's motion, but only \$7600 on the attachment to exhibit 14. ($\$76,000 - \$7600 = \$68,400$.) When the combine is valued at \$76,000, the total equipment value equals \$161,000 as valued by the trial court. It is obvious a scrivener's error occurred on exhibit 14.

¶ 19 As to the issue of temporary maintenance, we agree with petitioner that in finding respondent in indirect civil contempt, the trial court supplied respondent with the clarification he was seeking, namely that temporary maintenance was required to be paid until the final hearing date. And while we agree the original order said maintenance should be paid through "May," we point out that the order did not specify a year such as May 2015 or May 2016.

¶ 20 In its original memorandum of judgment entered on October 30, 2015, the trial court held respondent in indirect civil contempt for willful failure to pay petitioner temporary maintenance previously ordered. The trial court found that respondent failed to pay petitioner the court-ordered temporary maintenance for August and September 2015, as well as the attorney fees ordered on June 17, 2015. In the corrected judgment of dissolution filed on April 29, 2016, the trial court again stated that because respondent failed to pay maintenance through the date of trial and petitioner incurred attorney fees in enforcing the temporary maintenance order, respondent was in indirect civil contempt.

¶ 21 Respondent did not file his motion to vacate pursuant to section 2-1401 until March 15, 2017. Respondent, who initially appeared *pro se*, contends he was diligent in pursuing his challenge to the corrected judgment by seeking and eventually retaining counsel in September 2016. However, even a delay of three months from the entry of judgment until the filing for relief under section 2-1401 of the Code has been found to constitute lack of diligence. *Department of Public Works & Buildings v. O'Hare International Bank*, 44 Ill. App. 3d 934, 937 (1976). Accordingly, under the circumstances presented here, where respondent did not file his section 2-1401 motion until March 15, 2017, the trial court acted within its discretion in finding that respondent did not act with due diligence in filing a section 2-1401 petition.

¶ 22 In determining whether a lack of diligence results in an excusable mistake for the purpose of a motion to vacate under section 2-1401, a court should consider all the circumstances surrounding the entry of judgment. *Community 1st Credit Union v. Boswell*, 302 Ill. App. 3d 739, 744 (1999). Relaxation of the due diligence requirement thereby entitling a defendant to a motion to vacate judgment is justified only under extraordinary circumstances. *All-Steel Employees Credit Union v. Singh*, 345 Ill. App. 3d 1005, 1008 (2004). Such circumstances are not present here where respondent failed to establish that the trial court was unaware of the facts relating to his arguments at the time it entered the judgment dissolving the parties' marriage.

¶ 23 By the time the amended judgment of dissolution was entered, the trial court was well aware of respondent's arguments regarding both the valuation of farm equipment and the award of temporary maintenance after May 2015. Respondent did not bring any

new facts to the attention of the trial court that had the trial court known would have caused the trial court to enter a different judgment. Nor has respondent shown us any error that offends our notions of justice, good conscience, or equity. Accordingly, we find the trial court did not abuse its discretion in denying respondent's motion based upon section 2-1401 of the Code.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Perry County.

¶ 26 Affirmed.