

No. 1-09-2577

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 JUDICIAL DISTRICT

MARLENE DAVIS, MARVIN CABELL, and)	Appeal from the Circuit Court of
MAYA CABELL,)	Cook County
)	
Plaintiff-Appellant,)	
)	No. 01 CH 4326
v.)	
)	
CRAIG M. ROBINSON, JANIS L. ROBINSON,)	Honorable Bill Taylor,
METROPRO, INC., an Illinois Corporation,)	Judge Presiding.
DONNA S. JACKSON, MARGARET A.)	
SMIGEL, JAMES D. JACKSON, and AMY)	
GELMAN,)	
)	
Defendants-Appellees.)	

Justice Murphy delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

ORDER

HELD: Where plaintiff files a 2-1401 petition to vacate a final order beyond the two-year statute of limitations, alleging fraudulent acts by defendants, dismissal was proper for the order was not void but, at most, voidable.

Plaintiffs, Marlene Davis, Marvin Cabell and Maya Cabell, leased a condominium unit from defendants Craig and Janis Robinson. The Robinsons entered into an exclusive listing agreement with defendant Metropro, Inc., a real estate brokerage firm, to sell the condominium

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unit and had plaintiffs evicted. Plaintiffs filed a complaint alleging conversion, intentional infliction of emotional distress and negligence. On January 25, 2006, following a seven-day trial, defendants' motion for directed verdict was granted. Plaintiffs appealed and this court affirmed. *Davis v. Robinson*, No. 1-06-0272 (September 29, 2006) (unpublished order under Supreme Court Rule 23).

Plaintiffs filed a petition to vacate that order in this court pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)) on March 12, 2008. This court denied the petition and plaintiffs filed the instant 2-1401 petition in the circuit court on June 23, 2008. Defendants filed a motion to dismiss the petition pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2008)) for plaintiffs' failure to file the petition within two years as required by section 2-1401. The trial court granted the motion to dismiss. Plaintiff Marlene Davis appeals *pro se*, claiming that the trial court erred in not holding an evidentiary hearing on her claim that the order was void and the two-year period did not apply by law. For the following reasons, the trial court's dismissal of the petition to vacate is affirmed.

I. BACKGROUND

Plaintiffs, Marlene Davis, Marvin Cabell and Maya Cabell, leased a condominium unit from defendants Craig and Janis Robinson. The Robinsons entered into an exclusive listing agreement with defendant Metropro, Inc., a real estate brokerage firm, to sell the condominium unit. On April 18, 2001, Janis Robinson received a trial court order granting possession of the condominium to her. Plaintiffs were evicted and their property was removed. Plaintiffs filed a complaint alleging conversion, intentional infliction of emotional distress and negligence.

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Following a seven-day trial, defendants' motion for directed verdict was granted on January 25, 2006.

Plaintiffs appealed that decision and this court affirmed the judgment. *Davis v. Robinson*, No. 1-06-0272 (September 29, 2006) (unpublished order under Supreme Court Rule 23).

Plaintiffs raised three issues on appeal: (1) that the trial court erred in granting the motion for directed verdict because factual disputes remained; (2) the trial court erred in striking plaintiffs' supplemental answers to defendants' Rule 213 interrogatories; and (3) the trial court erred in denying plaintiffs' request to amend their complaint to add punitive damages. *Davis*, slip op. at 2. This court affirmed the trial court's directed verdict. Citing plaintiffs' failure to supply any record of the trial proceedings to provide a factual basis for the claims asserted, it was presumed the trial court's judgment conformed with the law and facts of the case. *Davis*, slip op. at 3-5. Our supreme court subsequently denied plaintiffs' petition for leave to appeal on January 24, 2007. *Davis v. Robinson*, No. 103712 (2007).

On March 12, 2008, plaintiffs filed a motion in this court pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)) to vacate this court's ruling. That motion was denied. Plaintiffs filed their 2-1401 petition to vacate in the circuit court on June 23, 2008. Plaintiffs challenged the same orders previously appealed. Plaintiffs again asserted that the trial court erred in striking supplemental answers to interrogatories that were filed after the court-ordered due date, in denying plaintiffs' request to file a fifth amended complaint, and that the trial court erred in granting the motion for directed verdict. Plaintiffs claimed that defendants misquoted and misrepresented case law and the trial court failed to follow proper statutory

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procedures for discovery and pleading punitive damages. They argued that these constituted fraud, fraud on the court and due process violations rendering the order void. Plaintiffs then provided numerous quotations of case law from courts of various jurisdictions to state that a void order is a nullity and may be attacked at any time.

Plaintiffs moved for substitution of judge as a matter of right. While the motion was denied based on the trial judge's having made substantial rulings relating to the merits of the case, the matter was reassigned after the judge recused himself. On June 15, 2009, the trial court issued a written order granting defendants' motion to dismiss the petition to vacate. The court conceded that void orders fall outside the two-year limitation pursuant to rule 2-1401(f) (735 ILCS 5/2-1401(f) (West 2008)); however, the trial court determined that plaintiffs did not allege that the fraud committed was "extrinsic in nature" thereby divesting the original court of jurisdiction. See *In re M.B.*, 235 Ill. App. 3d 352, 377-78 (1992). Therefore, the trial court found that the statute of limitations applied and the matter was dismissed. On September 1, 2009, plaintiffs' motion to reconsider the dismissal order was denied. Plaintiff Marlene Davis filed the instant appeal.

II. ANALYSIS

Plaintiff seeks reversal of the trial court's dismissal order. Section 2-619 of the Code of Civil Procedure allows a party to move for summary disposition of issues of law or easily proved issues of fact. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-117 (1993). Section 2-619(a)(5) allows for a party to move for dismissal based on the action not being commenced within the time limited by law. 735 ILCS 5/2-619(a)(5) (West 2008). Such a motion admits the legal sufficiency of the complaint but raises defects, defenses or other affirmative matter

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appearing on the face of the complaint which defeat the plaintiff's claim. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120 (2008). This court, under a *de novo* standard of review, must determine whether a material issue of fact should have precluded dismissal or, absent a question of fact, whether the dismissal was proper as a matter of law. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 116-117. This court may uphold a trial court's decision on any basis appearing in the record. *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 359-60 (1999).

Under section 2-1401, a petitioner must affirmatively set forth specific factual allegations that support, by a preponderance of the evidence, the following three elements: (1) the existence of a meritorious claim; (2) due diligence in presenting this claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986). Specifically, the petition must be filed not later than two years after the entry of the order or judgment. 735 ILCS 5/2-1401(c) (West 2006). However, despite these requirements, a party may attack a void order at any time through the filing of a 2-1401 petition. *Capital One Bank, N.A. v. Czekala*, 379 Ill. App. 3d 737, 741 (2008). Our supreme court has held that the provision in subsection (f) of section 2-1401, which provides, "Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief," provides an exception to the general rules requiring filing a petition within two years or alleging a meritorious defense. 735 ILCS 5/2-1401(f) (West 2006); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). A voidness allegation "substitutes for and negates" these requirements. *Sarkissian*, 201 Ill. 2d at 104.

A judgment is void and may be collaterally attacked only where there is a total lack of

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either subject matter or personal jurisdiction in the court. *Johnston v. City of Bloomington*, 77 Ill. 2d 108, 112 (1979). Where there is simply an erroneous judgment, and the trial court is not divested of jurisdiction an order is not void, but voidable. A voidable order is not subject to collateral attack, but only to direct appeal. *In re Marriage of Mitchell*, 181 Ill. 2d 169, 175 (1998).

We agree with the trial court that the allegations in this case do not negate the trial court's jurisdiction to render the underlying order void. Plaintiff has alleged the same claims as her direct appeal. Taken as true, plaintiff's allegations present claims of some fraudulent actions and concealment by the opposing parties. There is no allegation that the trial court lacked jurisdiction, or these allegedly fraudulent actions worked to divest that court of jurisdiction. No facts were alleged to support a claim that the trial court lacked jurisdiction at the outset of the underlying matter. At best, the allegations demonstrate that the alleged fraud rendered the orders voidable.

The petition to vacate was filed two years and five months after the final order in the underlying matter was filed. Because of this, the trial court correctly concluded that the allegations of fraud did not operate to suspend the statute of limitations as provided in section 2-1401. The trial court did not commit error by resting on these facts in dismissing plaintiff's 2-1401 petition and that order is affirmed.

III. CONCLUSION

For the foregoing reasons, the trial court's grant of summary judgment to defendant is affirmed.

Affirmed.