

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
SECOND DISTRICT

<i>In re</i> MARRIAGE OF LAURA DICOSOLA)	Appeal from the Circuit Court
)	of Du Page County.
Petitioner-Appellee,)	
)	
v.)	No. 05—D—1371
)	
DONATO DICOSOLA,)	
)	
Respondent,)	
)	Honorable
(Law Offices of Steven H. Mevorah &)	James J. Konetski,
Associates, Appellant).)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Bowman and Hutchinson concurred in the judgment.

ORDER

Held: The trial court properly denied attorney Mevorah’s section 2—1401 petition to vacate the trial court’s ruling that attorney lacked standing to bring a petition for attorney fees against petitioner.

¶ 1 The appellant, Law Offices of Steven H. Mevorah & Associates (Mevorah), represented respondent, Donato Dicosola, in his dissolution of marriage of case. Mevorah withdrew from its representation of respondent. Mevorah on its own behalf filed a petition for attorney fees against petitioner, Laura Dicosola. At the hearing on the petition, the trial court prohibited Mevorah from

proceeding, ruling that it lacked standing, as it no longer represented respondent and could not seek fees against petitioner on its own behalf. Mevorah thereafter filed a petition under section 2—1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2—1401 (West 2008)) to vacate the trial court's ruling on standing, which the trial court denied. Mevorah appeals from the denial of its section 2—1401 petition. We affirm.

¶ 2

BACKGROUND

¶ 3 Mevorah represented respondent in this dissolution of marriage litigation. On January 22, 2010, Mevorah filed a motion for leave to withdraw as respondent's attorney. Also on January 22, 2010, Mevorah filed a petition on its own behalf seeking attorney fees pursuant to sections 508(a) and 508(b) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(a) (West 2008); 750 ILCS 5/508(b) (West 2008)) from petitioner. The fee petition alleged that respondent incurred fees as a result of petitioner's contemptuous behavior. In August 2009, Mevorah had filed a petition on behalf of respondent seeking those same fees from petitioner, which was not resolved at the time Mevorah filed its own petition for fees against petitioner on January 22, 2010.¹ At a hearing on February 8, 2010, the trial court granted Mevorah's request to withdraw. Respondent thereafter appeared *pro se*.

¶ 4 On May 4, 2010, the parties appeared before the trial court for a hearing on Mevorah's fee petition against petitioner. The trial court did not allow Mevorah to proceed on its fee petition on the basis that it no longer represented respondent and could not prosecute a fee petition against petitioner on its own behalf. Instead, respondent, *pro se*, conducted an evidentiary hearing on his petition for fees against petitioner that Mevorah filed on his behalf in August 2009. At the

¹The August 2009 fee petition is not included in the record.

conclusion of the hearing, the trial court took the matter under advisement. In an order file-stamped May 6, 2010, the trial court denied respondent's fee petition on the basis that he did not produce sufficient evidence. The record does not reflect that the trial court ever entered a final order with respect to Mevorah's fee petition against petitioner.

¶ 5 On July 1, 2010, Mevorah filed a "Motion To Vacate and for Rehearing" pursuant to section 2—1401 in which Mevorah requested that the trial court allow it to proceed on its fee petition against petitioner and to vacate the order file-stamped May 6, 2010, denying respondent's fee petition "to the extent it applies to attorney fees and costs," which Mevorah alleged was necessary "to avoid potential *res judicata* and collateral estoppel issues." On September 17, 2010, the trial court denied Mevorah's section 2—1401 petition on the basis that its ruling on standing was correct. Mevorah filed a timely notice of appeal pursuant to Supreme Court Rule 304(b)(3) (eff. February 26, 2010).

¶ 6 ANALYSIS

¶ 7 Mevorah contends that the trial court erred in denying its section 2—1401 petition. Mevorah asserts that section 508(a) and section 508(b) of the Act confer standing on attorneys to pursue fees directly against an opposing party. Petitioner argues that Mevorah is not entitled to relief under section 2—1401 because it did not meet the requirement of due diligence; the judgment against respondent for the fees at issue is *res judicata*; and section 508(a) and section 508(b) allow fees to be awarded to attorneys, but do not allow attorneys to seek fees on their own behalf.

¶ 8 Section 508(a) of the Act provides that the court may order any party to pay a reasonable amount for his own or the other party's costs and attorney fees. 750 ILCS 5/508(a) (West 2008). Section 508(b) provides that in 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 the costs and reasonable attorney fees of the prevailing party. 750 ILCS 5/508(b) (West 2008). As a preliminary matter, we note that among other authorities in support of its argument that section 508(a) and section 508(b) allow an attorney on his own behalf to prosecute a fee petition against the opposing party, Mevorah cites *In re Ruehl*, a First District unpublished Rule 23 Order (see Supreme Court Rule 23(b) (eff. July 1, 1994)). Petitioner asks us to strike this argument found at pages 16 and 17 of Mevorah's opening brief as a violation of Supreme Court Rule 23(e)(1) (eff. July 1, 1994). Rule 23(e)(1) provides that an order entered pursuant to subpart (b) is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel, or law of the case. An argument that cites an unpublished order in violation of Rule 23(e)(1) should be stricken. *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1016-17 (2009). Mevorah does not cite *Ruehl* for any of the permitted exceptions. Rather, Mevorah argues both in its opening brief and in its reply brief that *Ruehl* is "persuasive" authority, as distinguished from "precedential" authority. However, Mevorah has not provided us with the *Ruehl* decision, but instead included in its appendix an article in a family law journal that discussed *Ruehl*. Even if we were permitted to consider the reasoning contained in an unpublished order, we would need to be furnished the order, not a second-hand critique. That said, the cases Mevorah cites in support of its argument that we may consider an unpublished Rule 23 Order persuasive are distinguishable. In *Osman v. Ford Motor Co.*, 359 Ill. App. 3d 367 (2005), the appellate court considered an unpublished decision of the Fourth Circuit Court of Appeals because the Fourth Circuit had a rule that allowed consideration of its unpublished decisions in circumstances similar to those in *Osman*. *Osman*, 359 Ill. App. 3d at 374. In *Nulle v. Krewer*, 374 Ill. App. 3d 802 (2007), this court

considered an unpublished decision of the Ohio appellate court, saying we were not barred from using the reasoning in an unpublished decision of another state. *Nulle*, 374 Ill. App. 3d at 806, n.2. Neither *Osman* nor *Nulle* relied on an unpublished Rule 23 order in contravention of Rule 23(e)(1), which specifically bars consideration except in the enumerated circumstances. Accordingly, we grant petitioner's motion to strike the argument based on *Ruehl* in Mevorah's opening brief. On the court's own motion, the argument based on *Ruehl* at page 14 of Mevorah's reply brief is stricken.

¶9 We now address whether the trial court properly denied Mevorah's section 2—1401 petition. Section 2—1401 of the Code outlines a procedure by which final orders and judgments may be vacated more than 30 days following their entry but within two years after entry of judgment. *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 496 (1998). To be entitled to relief, a petitioner must allege (1) the existence of a meritorious claim or defense; (2) due diligence in presenting the claim or defense; and (3) due diligence in filing the section 2—1401 petition for relief. *Vaughan*, 181 Ill. 2d at 496. The purpose of a section 2—1401 petition is to make the trial court aware of facts not appearing in the record, which, if known to the trial court at the time of judgment, would have precluded the entry of the judgment. *Prenam No. 2, Inc. v. Village of Schiller Park*, 367 Ill. App. 3d 62, 65 (2006). The petition must be supported by affidavit or other appropriate showing as to matters not of record. *Prenam*, 367 Ill. App. 3d at 65.

¶10 In our case, Mevorah argues that, because there is no factual dispute that it withdrew as respondent's attorney and the trial court did not resolve any factual disputes, our review is *de novo*. The standard of review depends upon the manner in which the trial court disposed of a section 2—1401 petition. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 946 (2009). In *People v. Vincent*, 226 Ill. 2d 1 (2007), our supreme court held that five types of dispositions are possible: dismissal of the

petition; grant or denial of the petition on the pleadings alone (summary judgment); or grant or denial of the petition after holding a hearing at which factual disputes are resolved. *Vincent*, 226 Ill. 2d at 9; *Mills*, 393 Ill. App. 3d at 946. The *de novo* standard of review applies to section 2—1401 dispositions where the trial court either dismisses the petition or grants or denies the petition based on the pleadings alone. *Mills*, 393 Ill. App. 3d at 947. In order to determine the proper standard of review, we must characterize the manner in which the trial court disposed of the petition. *Mills*, 393 Ill. App. 3d at 948. Here, the trial court did not allow argument on the petition, but stated, “Then my ruling stands.” The court said that it “went back and looked because [it was] fearful [it] was mistaken,” and determined it was not wrong. While petitioner had filed a response to Mevorah’s section 2—1401 petition, petitioner’s counsel did not make any argument at the hearing. Thus, the trial court essentially found that Mevorah’s pleading was insufficient and the court’s ruling was functionally equivalent to a dismissal on the pleadings. Accordingly, our review is *de novo*.

¶ 11 It is unnecessary to reach the merits of Mevorah’s argument because the trial court never entered a final order with respect to Mevorah’s fee petition against petitioner, and a final order is necessary for the application of section 2—1401. “Section 2—1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days.” *Vincent*, 226 Ill. 2d at 7. Here, two things occurred on May 4, 2010. Mevorah attempted to present its fee petition against petitioner and respondent, *pro se*, conducted a hearing on his fee petition against petitioner. The trial court refused to allow Mevorah to proceed with its fee petition on the basis that it lacked standing under either section 508(a) or section 508(b) of the Act. The trial court took no further action on Mevorah’s petition. At the close of respondent’s evidentiary hearing on his fee petition, the trial court took that matter under advisement. In a written order dated May 5, 2010, but file

stamped May 6, 2010, the trial court denied respondent's fee petition. Nothing more occurred with respect to Mevorah's fee petition until Mevorah filed its section 2—1401 petition on July 1, 2010. Of crucial importance, the trial court never entered an order either dismissing or denying Mevorah's fee petition. The threshold inquiry is whether the section 2—1401 petition was applicable in the first place.

¶ 12 Relief under section 2—1401 is available only from final orders and judgments. *Vaughan*, 181 Ill. 2d at 497. If an order is not final, section 2—1401 is inapplicable and does not furnish the basis for vacating the order. *Vaughan*, 181 Ill. 2d at 497. Final orders for purposes of section 2—1401 are those that resolve a separate and distinct part of the controversy, conclude the litigation on the merits, or dispose of the parties' rights in relation to all or part of the controversy. *Bank of Ravenswood v. Domino's Pizza*, 269 Ill. App. 3d 714, 721 (1995). A ruling on standing is interlocutory and not final because it does not have the effect of terminating the litigation (*In re D.J.E.*, 319 Ill. App. 3d 489, 493 (2001)), whereas the dismissal of a cause of action for lack of standing is a decision on the merits. *Hurlbert v. Brewer*, 386 Ill. App. 3d 1096, 1100 (2008); *People for use of Howarth v. Gulf, Mobile, & Ohio R. Co.*, 125 Ill. App. 2d 473, 475 (1970). Here, at the May 4, 2010, hearing, the trial court threatened to dismiss Mevorah's fee petition against petitioner, but did not do so. The record does not reflect that the trial court ever entered an order disposing of the fee petition on its merits. Consequently, relief from the ruling that Mevorah lacked standing to proceed with the hearing was not available through a section 2—1401 petition.

¶ 13 In its section 2—1401 petition, Mevorah also challenged the trial court's May 6, 2010, order denying respondent's petition for fees against petitioner insofar as that order might have a *res judicata* or collateral estoppel effect on Mevorah's fee petition against petitioner. This order was

a final order and cognizable in a section 2—1401 petition. However, putting aside the question of whether Mevorah could seek to vacate an order against a former client whom it no longer represented, the relief requested depended upon the trial court's ability to entertain the motion to vacate its ruling that Mevorah lacked standing to proceed on the fee petition against petitioner. Mevorah did not challenge the May 6, 2010, order on its merits, but asked only that it be vacated so that it would not pose an obstacle to Mevorah's petition for the same fees. Although Mevorah now contends that the trial court proceeded prematurely on respondent's fee petition against petitioner, Mevorah did not object to proceeding in that fashion at the hearing. A party forfeits his right to complain of an error where to do so is inconsistent with the position he has taken in an earlier proceeding. *Meyers v. Woods*, 374 Ill. App. 3d 440, 448 (2007). As we have determined that the issue of standing was not properly raised in a section 2—1401 petition, we hold that the trial court properly denied (or functionally dismissed) the section 2—1401 petition. We may affirm the judgment of the trial court on any basis we find in the record, regardless of whether the trial court relied upon that basis or whether its reasoning was correct. *Alpha School Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 734 (2009). Accordingly, the judgment of the circuit court of Du Page County is affirmed.

¶ 14 Affirmed.