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2011 IL App (3d) 100521-U

Order filed August 15, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

In re MARRIAGE OF DWAYNE NOAKES,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit
	)	Kankakee County, Illinois
Petitioner-Appellee,	)	
	)	Appeal No. 3-10-0521
and	)	Circuit No. 04-D-341
	)	
JOANNE NOAKES, n/k/a JOANNE BULAK,	)	
	)	Honorable
	)	Michael D. Kramer
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly denied respondent's petition to modify a marital settlement agreement, which was filed four years after the parties' marital settlement agreement was entered.

¶ 2 Petitioner, Dwayne Noakes, and respondent, Joanne Noakes, n/k/a Joanne Bulak, entered into a marital settlement agreement in 2004. In March 2005, the trial court entered a judgment for dissolution that incorporated the agreement. In February 2010, respondent filed a petition to modify

the marital settlement agreement. Petitioner filed a motion to dismiss, arguing that the petition was untimely. The trial court granted defendant's motion to dismiss. We affirm.

¶ 3 In 1987, petitioner and respondent were married. At the time, petitioner worked for Amtrak. In 1993, petitioner was diagnosed with carpel tunnel syndrome and filed a complaint against Amtrak for allegedly causing his condition. In 1998, petitioner voluntarily dismissed his suit and then filed a new two-count complaint against Amtrak. Count II was dismissed, but a trial was held on count I of petitioner's complaint. On May 1, 2003, the trial court granted a directed verdict in favor of Amtrak. Petitioner appealed the trial court's ruling.

¶ 4 In August 2004, while his appeal was pending, petitioner filed a petition for dissolution of marriage. In December 2004, petitioner and respondent entered into a marital settlement agreement. The agreement made no mention of petitioner's suit against Amtrak. In March 2005, the trial court entered a judgment for dissolution that incorporated the marital settlement agreement. The judgment for dissolution stated in pertinent part: "[A]ny right claim, demand or interest of the parties *** in and to the property of the other *** arising out of the marital relationship *** except as expressly set forth in the aforesaid Agreement, is forever barred and terminated."

¶ 5 In February 2006, the appellate court issued its decision in petitioner's case against Amtrak, reversing the trial court and remanding the case to the trial court. See *Noakes v. National Railroad Passenger Corp.*, 363 Ill. App. 3d 851 (2006). In August 2006, respondent received a subpoena from Amtrak for financial information.[1]

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[1] At oral argument, respondent's counsel, for the first time, denied that respondent received a subpoena in 2006. However, in her appellate brief, she wrote: "It is true that in August of 2006, Defendant was served with a subpoena from Amtrak's attorneys in the

¶ 6 In August 2009, petitioner settled his claim against Amtrak. On February 16, 2010, respondent filed a petition to modify the marital settlement agreement, alleging that 1) petitioner fraudulently concealed his claim against Amtrak, 2) by mutual mistake, the parties failed to divide the claim, and/or 3) the marital settlement agreement was unconscionable if petitioner were allowed to keep the entire Amtrak settlement.

¶ 7 Petitioner filed a motion to dismiss the petition, arguing that it was untimely, pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). The trial court granted petitioner's motion to dismiss, stating:

> "The only basis allowing jurisdiction on this petition is 2-1401 and from the record it appears [respondent] had notice of [petitioner's] claim in Aug 2006. The petition not being filed within 2 years it is hereby dismissed."

¶ 8 I. APPLICABILITY OF SECTION 2-1401

¶ 9 Respondent first argues that the trial court erred in finding that section 2-1401 of the Code applied to her petition. She contends that sections 502 and 510 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/502, 510 (West 2008)) authorized the court to set aside the marital settlement agreement without resort to section 2-1401.

Plaintiff's personal injury case. Defendant learned at that time that Plaintiff's personal injury case was reinstated." Points not raised in the appellant's brief are forfeited and cannot be raised in oral argument. Ill. S. Ct. Rule 341(h)(7) (eff. July 1, 2008). Thus, we refuse to consider respondent's claim that she did not receive a subpoena in 2006.

¶ 10 The Act requires that judgments in dissolution proceedings be accorded the same degree of finality that is accorded to judgments in other proceedings so that the integrity of judgments in dissolution actions is not subject to erosion. *King v. King*, 130 Ill. App. 3d 642, 654 (1985). A court's authority to vacate a judgment that has become final is narrowly circumscribed by the limited methods available by law to vacate or set aside final judgments. *In re Marriage of Himmel*, 285 Ill. App. 3d 145, 149 (1996).

¶ 11 Section 502(b) of the Act provides:

> "The terms of the agreement *** are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the agreement is unconscionable." 750 ILCS 5/502(b) (West 2008).

Section 510(b) of the Act provides: "The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this State." 750 ILCS 5/510(b) (West 2008).

¶ 12 Although sections 502 and 510 of the Act allow courts to set aside marital settlement agreements and judgments for dissolution, a court may do so only if a petition to modify or set aside complies with section 2-1401 of the Code. See *Himmel*, 285 Ill. App. 3d at 149 (a petition pursuant to section 502(b) of the Act must comply with section 2-1401); *In re Marriage of Hall*, 404 Ill. App. 3d 160, 164 (2010) ("Whether a trial court has jurisdiction to modify a property distribution provision pursuant to section 510(b) of the Act should be construed within the confines of section 2-1401 of the Code."); *In re Marriage of Reines*, 184 Ill. App. 3d 392, 403 (1989) (a section 2-1401 petition is the proper method by which to attack the fairness and validity of a property settlement

agreement incorporated into a judgment for dissolution); *King*, 130 Ill. App. 3d at 654 (relief "under the laws of this State" from final orders and judgments after more than 30 days pursuant to section 510(b) of the Act is provided principally under section 2-1401).

¶ 13 Respondent's petition to modify brought under the Act must still comply with section 2-1401 of the Code. Neither section 502 nor 510 of the Act provides an independent basis for relief.

¶ 14 II. COMPLIANCE WITH SECTION 2-1401

¶ 15 Alternatively, respondent argues that her petition complied with section 2-1401 because it was filed within two years of the settlement between petitioner and Amtrak.

¶ 16 The purpose of a section 2-1401 petition is to bring before the court facts not appearing of record which, if known to the court at the time judgment was entered, would have prevented its rendition. *In re Marriage of Broday*, 256 Ill. App. 3d 699, 705 (1993). This section is used by courts to achieve justice, not to give the litigant a new opportunity to do what he should have done in an earlier proceeding or to relieve the litigant of the consequences of his mistake or negligence. *Id*. "A court should not set aside a settlement agreement merely because one party has second thoughts." *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 214 (1994).

¶ 17 To be entitled to relief pursuant to section 2-1401, the petitioner must plead specific allegations supporting each of the following elements: (1) the existence of a meritorious claim; (2) due diligence in presenting the claim in the original action; and (3) due diligence in seeking relief under section 2-1401. *In re Marriage of Buck*, 318 Ill. App. 3d 489, 493 (2000). To set aside a judgment based on newly discovered evidence, the evidence must be such as could not have been discovered at the time of or prior to the entry of the judgment. *Id.* Where a petition contains no allegation that "newly discovered" evidence could not have been found prior to the judgment's entry,

a trial court may dismiss the petition. See *Jordan v. Jordan*, 38 Ill. App. 3d 781, 784 (1976). Furthermore, eligibility for relief under section 2-1401 rests in part on the requirement that a petitioner act with due diligence in availing herself of the remedy. *Buck*, 318 Ill. App. 3d at 493.

¶ 18 Section 2-1401 of the Code requires filing a petition for relief not later than two years after the entry of the order or judgment in question unless the petitioner presents evidence of fraudulent concealment. See 735 ILCS 5/2-1401© (West 2008). If a party is fraudulently induced to enter a marital settlement agreement but does not discover the fraud until the expiration of the two-year statute of limitations in section 2-1401, the party is not without a remedy as the limitations period is tolled during the time that the grounds for relief are fraudulently concealed. *Nessler v. Nessler*, 387 Ill. App. 3d 1103, 1110 (2008).

¶ 19 Although respondent filed her petition four years after the dissolution judgment was entered, she claims that it was timely because it was filed within two years of petitioner's settlement with Amtrak.

¶ 20 A claim of fraudulent concealment will toll the two-year statute of limitations only for "the time that the grounds for relief are fraudulently concealed." See *Nessler*, 387 Ill. App. 3d at 1110. Respondent became aware that petitioner's case was reinstated in 2006, when she received a subpoena from Amtrak. The two-year period for filing a petition to modify the marital settlement agreement began to run then and expired in 2008. Since respondent did not file her petition until 2010, it was untimely.

¶ 21 There is no support for respondent's position that the two-year limitation of section 2-1401 did not begin running until petitioner reached a settlement with Amtrak. As soon as respondent became aware that petitioner's lawsuit had been reinstated, any fraudulent concealment ended.

Respondent then had two years to file her petition. Because she failed to do so, the court properly dismissed respondent's petition as untimely.

¶ 22 The order of the circuit court of Kankakee County is affirmed.

¶ 23 Affirmed.