2012 IL App (2d) 110738-U
No. 2-11-0738
Order filed June 28, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES *ex rel.* CAROLINE MATTHEWS,	)	Appeal from the Circuit Court of Du Page County.
Petitioner-Appellee,	)	
v.	)	Nos. 09-F-414 09-F-415 10-OP-336
TYRONE LATTIMORE,	)	Honorable Mary E. O'Connor,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Bowman and Schostok concurred in the judgment.

ORDER

Held: The trial court properly dismissed respondent's section 2-1401 petition, which asserted that the court would have deviated downward from the statutory child-support guidelines had it known that respondent had custody of four other children: respondent evinced a near-total neglect of the original action and thus could never show diligence therein, notwithstanding any alleged equitable considerations.

¶ 1 The parties in this matter are the petitioner, the Department of Healthcare and Family Services *ex rel*. Caroline Matthews (Department), and respondent, Tyrone Lattimore. After the

Department sought and obtained a default judgment for child support against respondent, he filed a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) seeking partial vacatur of the award; the court dismissed the petition on the Department's motion under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010) (motion to dismiss for failure to state a claim upon which relief can be granted)); and respondent appealed. He now contends that, allowing for equitable considerations, his petition properly alleged a meritorious defense and due diligence both in raising the defense and in bringing his petition, so that the court's grant of the section 2-615 motion was improper. We hold that respondent's allegations failed as a matter of law--regardless of the interposition of equitable considerations--to set out the element of diligence in raising the defense. We therefore affirm the petition's dismissal.

¶ 2 I. BACKGROUND

¶ 3 Because of the nature of our analysis, the relevant procedural history here is primarily that leading up to the original judgment. We therefore focus our delineation on that portion of the history.

¶ 4 The original child-support order arose out of three cases concerning two children of respondent's and Matthews's, L.T.M. and L.M.: a parentage action concerning each child and an order-of-protection action. The order-of-protection action is of no relevance here. The court consolidated all three cases under the heading of one parentage case, case No. 09-F-414.

¶ 5 Case No. 09-F-414 began when, on June 17, 2009, the Department filed a petition seeking to determine that respondent was the father of L.T.M., born December 12, 2004, and seeking child support for L.T.M. from respondent. The Department simultaneously filed a similar petition concerning L.M. that became case No. 09-F-415. For both cases, a return of service certifies

substitute service on respondent by the Cook County sheriff. A deputy served respondent through his 14-year-old son on June 20, 2009. The form specified that the summonses and petitions had also been mailed to respondent's address. Respondent did not appear in either matter. He has not denied receiving the summons in either case.

¶ 6 On August 10, 2009, a hearing officer filed a recommendation that the court enter a "Default Order for Declaration of Parentage" in both parentage cases. The officer calculated that respondent would pay guideline child support of $201 a week, an amount that the offer stated to be 28% of respondent's income, which is the guideline percentage for two children. See 750 ILCS 5/505(a)(1) (West 2010) (setting guideline percentages). The officer also calculated an arrearage of $31,356 and recommended delinquency payments of $48.25 a week and retroactive support of $40 a week. The proposed order stated that the court had continued the matter until November 23, 2009, for entry of the court's default order.

¶ 7 The record contains "Notice[s] of Default" in both cases. According to the certificates of mailing, the Department mailed these to respondent on August 27, 2009. The notices advised respondent that he had 14 days to file objections to the proposed orders. They stated that the next hearing date was November 16, 2009. According to the certificates, the Department sent the notices to respondent via regular and certified mail. Respondent has not contested his receipt of these notices.

¶ 8 On November 16, 2009, the court entered "Default Order[s] for Declaration of Parentage" concerning L.T.M. and L.M. Child support was as recommended by the hearing officer. The court also consolidated the two parentage cases.

¶ 9 On March 10, 2010, respondent filed a *pro se* motion that stated that, because he was the single father of four children other than L.T.M. and L.M., he could not afford the child support that the court had ordered him to pay. The Department responded to this as a petition to modify child support, stating that respondent had not provided sufficient information. (On March 12, 2010, Matthews filed a petition for an order of protection against respondent. This became case No. 10-OP-0336. The petition is based on allegations of respondent's conduct when he served Matthews with his motion. On March 17, 2010, the court entered an order consolidating the matter with Case No. 09-F-0414. However, nothing in that proceeding otherwise relates to the matter on appeal.)

¶ 10 On May 13, 2010, counsel appeared for respondent. On November 19, 2010, the court entered an order allowing respondent to file an amended motion, ruling that respondent had not given adequate notice of intent to seek a downward deviation from the guideline level of child support, and that any modification could be effective only as of the filing date of an amended petition.

¶ 11 On January 27, 2011, respondent filed an affidavit stating that (1) he was not aware of the support order until deductions from his paycheck started in February 2010 and (2) the support amount was a hardship because respondent had permanent custody of his four older children and was not receiving support from their mothers. He averred that Matthews had told him that she was going to tell the court that the informal support that she was receiving was satisfactory.

¶ 12 On January 28, 2011, the respondent filed a section 2-1401 petition. He reasserted that he did not receive a copy of the child support judgment and learned of it only when wage deductions began. He noted that the court's decision regarding notice of a downward deviation had created years of support that was beyond modification by anything other than a section 2-1401 proceeding.

¶ 13 The Department filed a combined section 2-615 and section 2-619 motion to dismiss respondent's petition (735 ILCS 5/2-615, 2-619 (West 2010)). It asserted that the record showed that a copy of the final order had been sent to respondent via certified mail. It further contended that respondent had not acted diligently. The court granted the section 2-615 portion of the Department's motion. It ruled that respondent had failed to present any "new facts" and had failed to adequately plead due diligence. Respondent moved to reconsider, and the court denied the motion. Respondent timely appealed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, respondent argues that the standard of review for any dismissal under section 2-615, is *de novo*. He argues that his circumstances—that he has custody of four of his children—are a fact that, if the court had known it at the time of the original judgment, would have led the court to enter a different support judgment. He further argues that his allegations of diligence were sufficient that, taking into account the equitable principles inherent in section 2-1401, the court erred in granting the Department's section 2-615 motion to dismiss. The Department responds that, under the rule in *People v. Vincent*, 226 Ill. 2d 1, 15-16 (2007), equitable considerations are not applicable in a section 2-1401 proceeding.

¶ 16 "To be entitled to relief under section 2-1401, [a] petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). "Due diligence requires the section 2-1401 petitioner

to have a reasonable excuse for failing to act within the appropriate time." *Airoom*, 114 Ill. 2d at 222.

¶ 17 The parties agree that review is *de novo*. That has always been the standard of review for a dismissal under section 2-615. *E.g.*, *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). Further, the supreme court in *Vincent* concluded that section 2-1401 petitions are equivalents to complaints and that the applicable standards of review for the various dispositions of section 2-1401 petitions ought to be consistent with those for complaints, so that dismissals, implicitly including those under section 2-615, should get *de novo* review. *Vincent*, 226 Ill. 2d at 15. When we review a section 2-615 dismissal, the "proper inquiry is whether the well-pleaded facts of the [initial pleading], taken as true and construed in a light most favorable to the [party filing the initial pleading], are sufficient to state a cause of action upon which relief may be granted." *Loman*, 229 Ill. 2d at 109. Application of a *de novo* standard here does not conflict with our holding in *Rockford Financial Systems v. Borgetti*, 403 Ill. App. 3d 321, 326-27 (2010), namely that, despite *Vincent*, a judgment on the pleadings relying on a ruling on a petitioner's diligence must be reviewed for an abuse of discretion. Section 2-615 requires a court to decide only whether, on the favorable assumptions described, the allegations *could be* sufficient, a question that can take into account any discretion the court will have to apply the standards flexibly in the interests of equity. Of course, to decide that question--one of law--one must nevertheless know how much flexibility the trial court will later have.

¶ 18 The parties here do not agree whether the court would have any. Respondent cites *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 95 (2006), which stated that a "[section 2-1401] petition invokes the equitable powers of the circuit court [citation]," powers that are "to be exercised for the prevention of injury and [for the] furtherance of justice. [Citations.]" (Internal quotations

omitted.) The Department cites *Vincent*, which describes the "belief that a section 2-1401 petition 'invokes the equitable powers of the court' " as "erroneous." *Vincent*, 226 Ill. 2d at 15 (quoting *Elfman v. Evanston Bus Co.*, 27 Ill. 2d 609, 613 (1963)).

¶ 19 On the record here, we conclude that respondent failed to plead diligence in presenting the defense in the original action and that the trial court was therefore correct to grant the Department's section 2-615 motion. This is so regardless of how much flexibility was available to the trial court; the allegations are insufficient even under the more flexible standard.

¶ 20 Respondent knew that the cases were in progress, yet his only effort to respond was to talk to Matthews before a hearing. He has never denied receiving the summonses or the recommended support orders. Respondent knew, or should have known, from the summonses that the Department (not just Matthews) was a part of the proceedings, so he had no reason to think that Matthews had full control of the outcome. His allegations imply that he was on close enough terms with Matthews to speak with her about the action and accept her assurance that she would seek to have the matter dropped. Nevertheless, despite having made her what amounted to his representative, he was not curious enough to ask her after the hearing what had happened. "[S]ection 2-1401 does not afford a litigant a remedy whereby he may be relieved of the consequences of his own mistake or negligence." *Airoom*, 114 Ill. 2d at 222. Here, respondent all but completely neglected the case until wage deductions began.

¶ 21 Respondent argues that his alleged nonreceipt of the final default order is a basis to conclude, using the more flexible standard, that he adequately pleaded his diligence. We have considered a party's failure to provide notice of a judgment as *a factor* supporting diligence (*Skrypek v. Mazzocchi*, 227 Ill. App. 3d 1, 9 (1992)). However, given that respondent here had already received

summonses *and* notices of default with instructions for making an objection, the failure to mail the final order does not significantly lessen respondent's negligence in the matter.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the dismissal of respondent's section 2-1401 petition.

¶ 38 Affirmed.