

2013 IL App (2d) 120784-U
No. 2-12-0784
Order filed September 5, 2013

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

KIMBERLY CARLYLE,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellee,)	
)	
v.)	No. 06-F-336
)	
JEREMIAH O'BRIEN,)	Honorable
)	Robert P. Pilmer,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Burke and Justice Zenoff concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly denied defendant's section 2-1401 petition, which, as substantially a reprise of his motion to reconsider, was improper as a section 2-1401 petition.
- ¶ 2 Defendant, Jeremiah O'Brien, appeals the trial court's order denying his petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). The petition sought to vacate an order requiring defendant to pay \$15,000 of the attorney fees incurred by plaintiff, Kimberly Carlyle. Defendant contends that plaintiff's petition was untimely and that the

court's finding that defendant should contribute to her attorney fees was against the manifest weight of the evidence. We affirm.

¶ 3 We note that the parties have been involved in protracted proceedings involving the custody and support of their minor child. As relevant to this appeal, the parties concluded a joint parenting agreement in February 2009. The court conducted a trial on the issue of support, with proofs closing on November 12, 2009, although a final order was not entered until April 7, 2010. On May 5, 2010, plaintiff petitioned for a contribution to her attorney fees. In response, defendant argued that the petition should have been filed before the entry of a final order and that, in any event, plaintiff was not entitled to a contribution toward her fees.

¶ 4 Following hearings, the trial court ordered defendant to pay \$15,000 toward plaintiff's attorney fees. Defendant moved to reconsider, asserting again that the petition was untimely and contending that the court's factual findings were against the manifest weight of the evidence. During this time, both parties continued to file various motions. The court denied defendant's motion to reconsider. Defendant then filed his section 2-1401 petition, asserting once again that plaintiff's petition was untimely and that the evidence did not support the court's factual findings. The trial court denied defendant's petition in an order disposing of numerous posttrial filings, finding that it was "unable" to grant relief on defendant's petition. Defendant timely appeals.

¶ 5 Defendant contends that the trial court erred when it denied his section 2-1401 petition. He contends that the petition for contribution to attorney fees was untimely and that the court's order awarding fees was against the manifest weight of the evidence. Plaintiff did not file an appellate brief. However, as the record is simple and the claimed error is such that we can easily decide it

without the aid of an appellee's brief, we proceed. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 6 In substance, defendant's section 2-1401 petition presents the appearance of a second, untimely, motion to reconsider. Most of the arguments were taken virtually verbatim from his postjudgment motion. A section 2-1401 petition is not a substitute for a timely postjudgment motion or an appeal. *Mortimer v. River Oaks Toyota, Inc.*, 278 Ill. App. 3d 597, 605 (1996). The purpose of such a petition is to bring to the court's attention facts not known to it when it rendered its judgment. *Id.* As such, a petition under section 2-1401 cannot be based solely upon matters appearing of record and known to the trial court when it entered its order. *Id.*

¶ 7 Here, as in *Mortimer*, defendant's petition contained no facts that were not already of record when the trial court entered the order granting plaintiff fees. The timing of the filing of the fee petition was raised in defendant's initial response and again in his motion to reconsider. The section 2-1401 petition, like the motion to reconsider, relied on evidence that was adduced at the hearing on the fee petition to argue that the court's factual findings were against the manifest weight of the evidence. If defendant believed that the denial of his motion to reconsider was erroneous, he should have appealed the denial, rather than filing what was essentially a second motion to reconsider. See *Lofendo v. Ozog*, 118 Ill. App. 3d 237, 242 (1983) (section 2-1401 is not intended to provide review of an order from which a party could have timely appealed). Thus, the trial court properly denied the section 2-1401 petition.

¶ 8 We affirm the judgment of the circuit court of Kane County.

¶ 9 Affirmed.