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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE BANK OF NEW YORK MELLON CORPORATION, f/k/a The Bank of New York, on behalf of CIT Mortgage Loan Trust 2007-1,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CH-4049
GENNADIY KRIVOPISHCHENKO,	)	
Defendant-Appellant	)	
(Mortgage Electronic Registration Systems, Inc., Webster Bank, N.A., Unknown Owners, and Nonrecord Claimants, Defendants).	)	Honorable Robert G. Gibson, Judge, Presiding.

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

**ORDER**

¶ 1 *Held:* Although the trial court erred in dismissing defendant's section 2-1401 petition as successive, it properly dismissed it for failing to sufficiently plead a meritorious defense to plaintiff's foreclosure action; defendant merely speculated that, because plaintiff's Cook County foreclosures were procured by improper affidavits, so was the foreclosure here.

¶ 2 Defendant, Gennadiy Krivopishchenko, the property owner in a foreclosure action, appeals after the court dismissed his petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)); he had sought to vacate the foreclosure and judicial sale. He asserts that court erred when it dismissed the petition on the basis that a bar exists on successive section 2-1401 petitions. We agree with defendant that no such bar exists. However, as plaintiff, The Bank of New York Mellon Corp., correctly notes, the court gave two bases for dismissal: (1) that the petition was successive; and (2) that it failed to state the elements of a section 2-1401 claim. Plaintiff asserts that the second basis was proper. We agree, holding that defendant failed to plead the existence of a meritorious defense. We therefore affirm the dismissal.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed a foreclosure complaint concerning the property at 114 South Milton Avenue, Glen Ellyn, and naming defendant, Mortgage Electronic Registration Systems, Inc., Webster Bank, N.A., unknown owners, and nonrecord claimants as defendants. The court entered a judgment of foreclosure and sale on December 21, 2009; plaintiff had submitted an affidavit in support of the judgment amount. The court entered an order confirming the sale on August 24, 2010.

¶ 5 On November 3, 2010, defendant filed a petition under section 2-1401. This petition alleged a failure of statutorily required notice and irregularities in the assignment of the mortgage. On March 25, 2011, the court granted defendant's motion to withdraw the petition; it also "dismissed [the petition] with prejudice."

¶ 6 On May 12, 2011, defendant filed a second section 2-1401 petition. This petition attached a copy of a general administrative order, entered March 2, 2011, in the chancery division of the Cook County circuit court. In this order, the division's presiding judge took notice that plaintiff's law

firm, Fisher and Shapiro, LLC, had admitted that, in about 1,700 foreclosure cases, it had altered affidavits after their signing. The order required Fisher and Shapiro to vacate all judgments (including confirmations) in its pending foreclosure cases that had used affidavits. The petition, in essence, implied that the firm had made a practice of affidavit fraud such that it was proper to infer that it had occurred in Du Page County cases as well.

¶ 7 On February 9, 2012, plaintiff moved to strike the petition. It asserted that, under Illinois Supreme Court Rule 274 (eff. Oct. 14, 2006), a party may file only one postjudgment motion, and that the rule applied to bar the second section 2-1401 petition. It further asserted that defendant “w[ould] not be able to show diligence in this matter because the Petition was filed on May 12, 2011, but never presented to the court for ruling.”

¶ 8 On August 13, 2012, the court entered an order stating that the petition “is stricken and denied.” It ruled that the dismissal with prejudice of the previous petition was a bar to filing the second one and further found “no diligence in presenting [the] petition.” At the hearing, defendant tried to get plaintiff to either authenticate or disown the prove-up affidavit. The court repeatedly asked defendant how many section 2-1401 petitions the law allowed him to file. It also stated that, “assuming arguendo that [the previous petition] didn’t constitute a bar to this \*\*\* 2-1401 petition, the Court finds there is not the requisite diligence \*\*\* nor the facts alleged which would constitute a meritorious defense; and, consequently, the petition is denied.” Defendant filed a timely notice of appeal.

¶ 9

## II. ANALYSIS

¶ 10 On appeal, defendant asserts that the court improperly struck the petition as a successive postjudgment motion. He does not argue that the court should have allowed him to amend his petition.

¶ 11 Plaintiff responds that the court also properly denied the petition on its merits. It argues, among other things, that the allegation of a meritorious defense in the petition “consists of nothing more than speculation relating to the preparation and execution of the affidavit that was filed in this action”; it asserts that defendant thus failed to plead the meritorious defense element of a section 2-1401 claim.

¶ 12 Defendant replies that he is seeking to vacate the judgment “as based upon fraud,” and that he could never know whether the affidavit is proper unless “the judgment is vacated and discovery is permitted or if Plaintiff comes forward and admits to it, as required by the Rules of Professional Conduct.” He argues that only plaintiff can know whether the affidavit is a proper one and that alteration of an affidavit “is proscribed under Rule 3.3 of the Rules of Professional Conduct” (Ill. Rs. Prof’l Conduct R. 3.3 (eff. Jan. 1, 2010)).

¶ 13 Despite the terms used by the court, the report of proceedings shows that it dismissed the petition, both because it was successive and because it did not state a claim. The first was improper, but, as plaintiff correctly argues, the second was proper.

¶ 14 The court erred in dismissing the petition as successive. In *People v. Walker*, 395 Ill. App. 3d 860 (2009), we strongly rejected the holding in *Village of Glenview v. Buschelman*, 296 Ill. App. 3d 35 (1998), a case that held that the law permits a party only a single section 2-1401 petition. The *Buschelman* court (like the trial court here) reasoned in a way that implied that a section 2-1401 petition is a postjudgment motion and that a court thus can consider only one. See *Walker*, 395 Ill.

App. 3d at 868. Several things are wrong with this idea, the most fundamental of which is treating a section 2-1401 petition as a motion. See *Blazyk v. Daman Express, Inc.*, 406 Ill. App. 3d 203, 206-07, 208 n.3 (2010) (emphasizing that a court *must* treat a section 2-1401 petition as an initial pleading, not a postjudgment motion). Thus, all authority relating to postjudgment motions is inapplicable. Further, the *Walker* court looked for any other bar to a party's filing of more than one section 2-1401 petition and found none. *Walker*, 395 Ill. App. 3d at 868-70. Note also that defendant's first petition, although dismissed with prejudice, raised a clearly different claim than the second, so that the dismissal with prejudice is not relevant. Therefore, the court here erred in dismissing defendant's petition as barred because of the first.

¶ 15 Although the court did err in the first basis it stated for denying relief, it did not err in ruling that the petition failed to state a claim under section 2-1401. In particular, the petition did not allege the existence of a meritorious defense. We review *de novo* whether the allegations of a meritorious defense are sufficient. *Blazyk*, 406 Ill. App. 3d at 206.

¶ 16 The type of section 2-1401 claim at issue here has three elements:

“To be entitled to relief under section 2-1401, the 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).

¶ 17 In the trial court, the focus was on the two diligence elements. However, the clearer failure was the failure to plead the existence of a meritorious defense. When reviewing the sufficiency of an initial pleading, “a court must accept as true all well-pleaded facts in the complaint, as well as any

reasonable inferences that may arise from them.” *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Defendant would have us infer from plaintiff’s counsel’s admitted misconduct in Cook County that plaintiff’s counsel improperly altered the affidavit supporting the judgment amount here. That is not a reasonable inference. Defendant has done nothing to link the Cook County misconduct to the affidavit in this case. To be sure, the Cook County misconduct is concerning. It is not, however, enough.

¶ 18 Defendant argues, in effect, that the pleading was as specific as was possible without discovery. However, he has not pointed to any applicable exception to the standard pleading requirements. Thus, his argument that the existing petition is the best he could do works against him by suggesting that the court ruled correctly when it denied him the opportunity to amend the petition. (As we noted, he has not argued that the denial of that opportunity was erroneous.)

¶ 19 Defendant also asserts that plaintiff’s counsel had (and has) an obligation under Illinois Rules of Professional Conduct Rule 3.3(a)(1) (eff. Jan. 1, 2010) to disclose any improper alteration of the affidavit in this case. This assertion is highly plausible; indeed, plaintiff’s description in the response brief of how the Cook County general order came to be suggests that counsel recognized such an obligation in the Cook County cases. However, plaintiff’s disclosure obligation is entirely tangential to whether defendant sufficiently pleaded a meritorious defense.

### III. CONCLUSION

¶ 17 For the reasons stated, we affirm the dismissal of defendant’s section 2-1401 petition.

¶ 18 Affirmed.