

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).

2013 IL App (4th) 121073-U

NO. 4-12-1073

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 30, 2013
Carla Bender
4th District Appellate
Court, IL

SUSAN IRWIN,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
SHANNON C. SHYMANSKY,)	No. 10MR77
Defendant-Appellee.)	
)	Honorable
)	Leo J. Zappa,
)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and Holder White concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed, concluding that the trial court neither (1) erred by striking the plaintiff's petition for relief from judgment nor (2) abused its discretion by awarding the defendant attorney fees.
- ¶ 2 In February 2010, plaintiff, Susan Irwin, sued defendant, Shannon C. Shymansky, seeking a declaratory judgment that the written agreement she entered into with Shymansky was a contract for deed. Shymansky later filed a motion for summary judgment, claiming that the agreement was a lease with an option to purchase.
- ¶ 3 In May 2010, the trial court granted Shymansky's summary judgment motion, finding, in part, that based on the plain, unambiguous meaning of the contractual language, the parties entered into a lease agreement with an option to purchase that had since expired. That contractual agreement also included a fee-shifting provision regarding attorney fees, which later

resulted in the court ordering Irwin to pay \$20,000 of Shymansky's attorney fees.

¶ 4 Irwin appealed, and this court affirmed, rejecting her claims that the trial court's decisions to grant summary judgment and award attorney fees in Shymansky's favor were erroneous and, alternatively, that the \$20,000 attorney fee award was excessive. *Irwin v. Shymansky*, 2011 IL App (4th) 110159-U. In May 2012, the Supreme Court of Illinois denied Irwin's petition for leave to appeal. *Irwin v. Shymansky*, No. 113878, 968 N.E.2d 1066 (table) (May 30, 2012).

¶ 5 In August 2012, Shymansky filed a petition for attorney fees, seeking an additional \$26,012 in attorney fees from Irwin. In September 2012, Irwin filed a "response to petition for fees *** and petition for relief from judgment" under section 2-1401 of the Code of Civil Procedure (Civil Procedure Code) (735 ILCS 5/2-1401 (West 2010)). Later that month, Shymansky filed a motion to strike Irwin's response and petition. Following an October 2012 hearing, the trial court granted Shymansky's motion to strike and took the attorney-fee petition under advisement. The court later entered a written order, outlining the factors the court considered before ordering Irwin to pay \$26,012 to satisfy Shymansky's attorney fees.

¶ 6 Irwin appeals, arguing that the trial court (1) erred by striking her petition for relief from judgment and (2) abused its discretion by awarding Shymansky attorney fees. We disagree and affirm.

¶ 7 I. BACKGROUND

¶ 8 The controversy between the parties arises from an August 2006 real-estate contract involving a condominium unit owned by Shymansky. The details of that agreement required Irwin to pay off the balance owed on the condominium or obtain financing for that

purpose by September 2009. When Irwin failed to do so, the parties attempted unsuccessfully to negotiate a new agreement. In January 2010, Shymansky terminated the contract by providing Irwin written notice and shortly thereafter, served Irwin with an eviction notice.

¶ 9 In February 2010, Irwin filed a complaint for declaratory judgment, requesting that the trial court find that the August 2006 written agreement she entered into with Shymansky was a contract for deed—that is, a contract to sell the condominium—instead of a lease with an option to purchase, as Shymansky claimed.

¶ 10 In March 2010, Shymansky filed a motion for summary judgment, requesting, in part, that the trial court find (1) the contractual agreement was a lease with an option to purchase that had since been terminated and (2) Irwin was obligated to reimburse her for the attorney fees she incurred based on a contractual fee-shifting provision.

¶ 11 Following a May 2010 hearing, the trial court granted summary judgment in Shymansky's favor. In so doing, the court entered a written order, finding that based on the plain, unambiguous meaning of the contractual language, Irwin and Shymansky entered into a lease agreement with an option to purchase that had since expired. In addition, the court, noting the contractual fee-shifting provision, reserved ruling on Shymansky's request for attorneys fees.

¶ 12 In August 2010, Irwin filed, in part, a motion for ruling on attorney fees. In September 2010, Shymansky filed a petition for attorney fees, requesting that the trial court enter an order requiring Irwin to pay \$26,645. Following an October 2010 hearing, the court awarded Shymansky \$7,000 in attorney fees. Shymansky later filed a motion to reconsider the court's attorney fee award. Following a December 2010 hearing on that motion, the court ordered Irwin to pay \$20,000 of Shymansky's attorney fees.

¶ 13 Irwin appealed, and this court affirmed, rejecting her claims that the trial court's grant of summary judgment and award of attorney fees in Shymansky's favor were erroneous and, alternatively, that the \$20,000 attorney fee award was excessive. *Irwin*, 2011 IL App (4th) 110159-U.

¶ 14 Justice Appleton specially concurred in part and dissented in part, explaining as follows:

"I agree that summary judgment for [Shymansky] was proper. I dissent from the majority's decision with regard to attorney fees. I note that for a mere fraction of the attorney fees spent in this case, an easily construed contract for a lease with an option to purchase could have been created, which would have obviated the need for this litigation and the fees accrued by both parties.

As the litigation was necessitated by defendant's poor drafting of the agreement, I would have considered that fact in the award of attorney fees." *Irwin*, 2011 IL App (4th) 110159-U, ¶¶ 43-44 (Appleton, J., specially concurring in part and dissenting in part).

In May 2012, the Illinois Supreme Court denied Irwin's petition for leave to appeal.

¶ 15 On August 9, 2012, Shymansky filed a petition for attorney fees, seeking an additional \$26,012 in attorney fees parsed into the following categories: \$8,904 for posttrial proceedings, \$16,729 for appellate proceedings, and \$379 for legal research and filing charges. In September 2012, Irwin filed a combined "response to petition for fees filed [August 9, 2013,]

and petition for relief from judgment" under section 2-1401 of the Civil Procedure Code. Appended to that filing were minutes from an August 19, 2009, homeowners association meeting, documenting the parties' representations to the association that their condominium agreement was a contract for deed instead of a rental agreement. Also appended to her filing was the affidavit of Irwin's counsel, (1) claiming that based on his experience and training, the attorney fees requested by Shymansky were excessive and (2) urging the court to reinstate its original \$7,000 attorney fee award. Later that month, Shymansky filed a motion to strike Irwin's September 2012 filing.

¶ 16 Following an October 2012 hearing, the trial court (1) granted Shymansky's motion to strike and (2) took the issue of attorney fees under advisement. (The record does not contain a transcript of that hearing.) On the issue of attorney fees, the court later entered the following written order:

"This court has considered the following factors in making a determination regarding attorneys' fees and they include (a) the work involved; (b) the complexity of the work involved; (c) the skill evidenced by the work; (d) the time expended (the success of the efforts[]); ([e]) the presence of good faith[;] and ([f]) the efficiency with which the work was done.

In the absence of any cogent and or legally sufficient objections to the amount of attorneys' fees petitioned for based on the above-cited factors, Shymansky's request for attorneys' fees in the amount of \$26,01[2,] which Shymansky incurred successfully

defending Irwin's post-trial motions, appeal[,] and leave to appeal are hereby *granted*." (Emphasis in original.)

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Irwin argues that the trial court (1) erred by striking her petition for relief from judgment and (2) abused its discretion by awarding Shymansky attorney fees. We address Irwin's arguments in turn.

¶ 20 A. Irwin's Motion for Relief from Judgment

¶ 21 1. *The Statutory Provision at Issue and the Standard of Review*

¶ 22 In *People v. Vincent*, 226 Ill. 2d 1, 7-8, 871 N.E.2d 17, 22 (2007), the Supreme Court of Illinois provided the following analysis, outlining the purpose of section 2-1401 of the Civil Procedure Code:

"Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days. [Citation.] *** Section 2-1401 requires that the petition be filed in the same proceeding in which the order or judgment was entered, but it is not a continuation of the original action. [Citation.] The statute further requires that the petition be supported by affidavit or other appropriate showing as to matters not of record. *** Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that

would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition."

¶ 23 "When a trial court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, that order is reviewed on appeal *de novo*." *MB Financial Bank, N.A. v. Ted & Paul, LLC*, 2013 IL App (1st) 122077, ¶ 12.

¶ 24 *2. Irwin's Petition*

¶ 25 As previously explained, in September 2012, Irwin filed a "response to petition for fees filed [August 9, 2013,] and petition for relief from judgment" under section 2-1401 of the Civil Procedure Code, claiming that by filing a "new application for [attorney] fees," Shymansky "reopened the issue of fees." Irwin then shifts focus from her initial attorney fee claim, contending that "although the contract was adjudicated to be a 'lease with option to purchase,' it is undisputed that [Shymansky] represented it to be a contract for deed or a purchase contract at all times[.]" Relying on Justice Appleton's dissent, Irwin combines her attorney fee claim with her contentions that Shymansky misrepresented the parties' contractual agreement, positing that the trial court's "initial ruling [of \$7,000] was on solid ground and correct regarding the amount of [attorney] fees which, but for [Shymansky's] misrepresentation, should have been but a 'mere fraction' of the fees claimed." In her prayer for relief, Irwin requests that the court "vacate the award of fees and deny all fees, or, in the alternative, reinstate the initial award [of \$7,000] as the final award."

¶ 26 *3. Irwin's Brief to This Court*

¶ 27 In her brief to this court, Irwin supports her argument that the trial court erred by

striking her petition for relief from judgment by renewing the contentions she raised regarding Shymansky's misrepresentations. Specifically, Irwin noted her "unrefuted affidavit," which contained the aforementioned minutes of the August 2009 homeowners association meeting, documenting the parties' representations to the association that their condominium agreement was a contract for deed instead of a rental agreement. Within this context, Irwin then posits "[w]hat we are left with is the outrageous and preposterous result that 1) [Shymansky] draws a contract, 2) misrepresents it as a contract for deed, 3) asserts before the court, under oath, that it is a lease with an option, [and] 4) *** then is rewarded for her misconduct by outrageous fees necessitated by her own wrongdoing."

¶ 28 *4. The Trial Court's Dismissal of Irwin's Petition
for Relief from Judgment*

¶ 29 Irwin argues that the trial court erred by striking her motion for relief from judgment under section 2-1401 of the Civil Procedure Code. We disagree.

¶ 30 We first note that this court quotes Irwin's petition for relief from judgment—as well as her brief to this court—to show that those filings conveyed, at best, that Irwin believed the trial court's initial attorney fee award of \$7,000 was reasonable in light of Shymansky's misrepresentations.

¶ 31 Given the statutory guidance provided by *Vincent*, 226 Ill. 2d at 7-8, 871 N.E.2d at 22, we conclude that Irwin's petition was insufficient in that she failed to show "proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action."

¶ 32 In this case, Irwin's proof was her affidavit, which contained a synopsis of the

August 2009 homeowners association meeting. We note, however, that in her May 2010 affidavit in support of her response to Shymansky's summary judgment motion, Irwin conveyed the circumstances of that meeting to the trial court. See 735 ILCS 5/2-1401(b) (West 2010) (a section 2-1401 petition "must be supported by affidavit or other appropriate showing as to matters not of record").

¶ 33 As Irwin correctly conveys in her brief to this court, when the trial court found that the parties' agreement was a lease with an option to purchase, "[t]he court determined that no extrinsic evidence was necessary to 'construe' the contract prepared by [Shymansky] and [the appellate] court affirmed." Thus, even if Irwin had presented the minutes of the homeowners meeting at the May 2010 hearing on Shymansky's summary-judgment motion to bolster her claim against Shymansky, the court would have correctly declined to consider that parol evidence. See *State Farm Mutual Insurance Co. v. Rodriguez*, 2013 IL App (1st) 121388, ¶ 35, ("[I]f the contract language is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence."). Thus, without more—which is not present here—Irwin failed to present a defense or claim that would have precluded the court's grant of summary judgment in Shymansky's favor.

¶ 34 Accordingly, we reject Irwin's argument that the trial court erred by striking her petition for relief from judgment.

¶ 35 B. Irwin's Response to Shymansky's Petition for Fees

¶ 36 Irwin appeals, arguing that the trial court abused its discretion by awarding Shymansky attorney fees. Specifically, Irwin contends that the court's award was unreasonable in light of Shymansky's "wrongdoing." We disagree.

¶ 37 An appropriate award of attorney fees must consist of reasonable charges for reasonable services. *In re Marriage of Patel and Sines-Patel*, 2013 IL App (1st) 112571, ¶ 103.

"In determining whether the fees charged are reasonable, the trial court considers not only the number of hours the attorney spent on the case but the following factors as well: (1) skill and standing of the attorneys; (2) the difficulty of the issues; (3) the amount and importance of the subject matter in the field of family law; (4) the degree of responsibility involved in the management of the case; (5) the usual and customary charge in the community; and (6) the benefits to the client." *Id.*

An appellate court reviews a court's award of attorney fees and costs for an abuse of discretion. *Goldfine v. Barack, Ferranzano, Kirschbaum & Perlman*, 2013 IL App (1st) 111779, ¶ 53.

¶ 38 We note that in her "response to petition for fees filed [August 9, 2013,] and petition for relief from judgment" under section 2-1401 of the Civil Procedure Code, Irwin does not specifically address the trial court's attorney fee award of \$26,012 in Shymansky's favor. Instead, Irwin makes the aforementioned overarching argument that any award over \$7,000—the court's original award that it later amended—was unreasonable because of Shymansky's wrongdoing. Absent from Irwin's response was any claim attacking the court's specific award—such as, the court considered inappropriate factors or Shymansky's attorney charged exorbitant fees or greatly exaggerated the time to complete identified tasks.

¶ 39 In this case, the trial court considered Shymansky's award for attorney fees, which we note was segregated by category (postjudgment, appellate, and legal research) and detailed the

