2015 IL App (2d) 140219-U
No. 2-14-0219
Order filed February 3, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

IN RE THE MARRIAGE OF RANDY ANBAR, n/k/a RANDY RODIN, Petitioner-Appellant, v. DAN ANBAR, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Lake County. No. 07-D-0821 Honorable David P. Brodsky, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ ~~1~~ *Held*: The trial court had jurisdiction over ex-husband's "Amended Petition for Declaratory Relief, or, in the Alternative, for Reformation of 'Marital Settlement Agreement.'" because a timely extension to amend a timely filed post-trial motion had been filed and no ruling had been made on that post-trial motion when the petition at issue was filed. Also, the amended petition was not barred on *res judicata* grounds because both the amended post-trial motion and the amended petition were heard in the same proceeding, therefore no "subsequent action" occurred. Finally, the trial court erred in granting the ex-husband's amended petition without holding an evidentiary hearing because the terms of the marital settlement agreement were ambiguous. The judgment of the trial court was vacated and remanded for an evidentiary hearing.

¶ 2 On appeal, appellant Randy Anbar (Randy) argues that the trial court erred in granting appellee Dan Anbar's "Amended Petition for Declaratory Relief, or, in the Alternative, for Reformation of 'Marital Settlement Agreement'" because the trial court did not have jurisdiction to entertain the petition. In the alternative, she argues that the petition: (1) was barred by *res judicata*; (2) was an improper motion for reconsideration; or (3) the trial court's interpretation of the Marital Settlement Agreement (MSA) was contrary to the rules of contract construction. After a review of the record, we hold that the trial court had jurisdiction to review the amended petition and that it was not barred on *res judicata* grounds. However, the trial court erred in ruling on the amended petition without an evidentiary hearing when the terms of the MSA were ambiguous. Therefore, we vacate the trial court's order granting Dan's amended petition and we remand for further proceedings.

¶ 3 The record reflects that the parties were married on March 31, 1985. During their marriage they had three children, all of whom are now emancipated. On September 23, 2008, the trial court entered a judgment for dissolution of marriage which incorporated a MSA that had been previously executed between the parties. The MSA recited that the parties owned two single family residences, one at 998 Saxony Drive and another at 912 Rollingwood Road; both residences were in Highland Park. The homes had been placed on the market for sale prior to the execution of the MSA. Randy signed a power of attorney which enabled Dan to have sole discretion regarding the sale prices of the homes. Dan was to make payments on the existing mortgages and any net proceeds from the sale of the properties were to be divided equally. Randy was allowed to live in the Saxony Drive home as long as it remained on the market.

¶ 4 Article III of the martial settlement agreement provided as follows:

"1. DAN shall pay maintenance to RANDY is the following amounts. $4500.00 per month until the sale and closing of both of the real properties located at 998 Saxony Dr. Highland Park, Illinois and 912 Rollingwood in Highland Park, Illinois as long as she is able to remain living in the Saxony residence. However, if the Saxony residence is sold prior to the Rollingwood Residence, then DAN shall pay to RANDY the sum of $6000.00 per month as maintenance until the sale of the Rollingwood property;
$8000.00 per month in the first year following the sale of both of said properties;
$7500.00 per month in the second year following the same of both of said properties; and
$6500.00 per month for the third through the tenth years following the sale of both of said properties;

Further, DAN shall pay the health insurance premiums for RANDY until the expiration of four months from the date of the last closing date of the sale of both these residences.

In the event RANDY remarries during the ten year period of maintenance, DAN shall pay the full amount of maintenance listed above for the first four years of the maintenance period, the maintenance payments shall then be reduced to 50% of the above listed amounts and the maintenance shall terminate at the end of the eighth year.

Except as provided in the above paragraph concerning RANDY's remarriage, DAN's obligation to provide maintenance shall cease at the end of the tenth year following the sale of said properties. Furthermore, DAN's obligation to provide maintenance shall

cease upon the death of RANDY. In the event of RANDY's conjugal cohabitation, DAN's obligation to provide maintenance shall remain in full force and effect.

The maintenance provided for in this agreement shall not be subject to review or modification.

2. DAN shall be upon effective date of this agreement forever barred from seeking maintenance from RANDY."

¶ 5 At the prove up hearing on the date of judgment Dan testified that the MSA was a mediated document and that he understood the terms of the maintenance provision, including those related to Randy's remarriage or cohabitation, and that his attorney had advised him against the agreement in those regards because they precluded the court from terminating maintenance as it ordinarily would be authorized to do.

¶ 6 On July 15, 2011, Dan filed a "Petition for Maintenance to Commence"[1] (Maintenance Petition) through the same attorney who had represented him at the time the MSA was executed. In the petition, Dan alleged that at the time the MSA was entered into, both parties intended that the residences would sell in a "very reasonable time" but that the real estate market had crashed, and neither property had sold. Dan also claimed that the parties had intended for Randy to reside at the Saxony residence so that she would not have expenses, but almost immediately after the judgment was entered Randy remarried and moved out of that residence.

¶ 7 Dan further alleged that pursuant to Article III of the MSA, since neither residence had sold, the remaining maintenance provisions of that article had not yet been triggered, which

[1] We note that the title of this petition is inaccurate since maintenance had already commenced.

created an undue hardship to Dan. Since the properties had not sold, Dan contended, he was paying maintenance for a period of time well in excess of what was contemplated and intended by the parties at the time they entered into the MSA. He acknowledged that the MSA was not subject to review or modification, however, Dan requested that since it was unforeseeable that the real estate market would crash, and since Randy did not reside in the Saxony home, the trial court should rule that the maintenance provisions in the MSA had been triggered retroactive to the date Randy moved out of the Saxony residence and remarried.

¶ 8 On August 31, 2011, Randy filed a motion to dismiss Dan's petition pursuant to section 2-619(a)(4) of the Code of Civil Procedure. 735 ILCS 5/2-619(a)(4) (West 2010). In the motion, she alleged that the language of the MSA was clear and unambiguous, that the parties had the right to agree that the maintenance could not be modified or terminated except upon conditions set forth in the MSA. Randy also alleged that Dan's petition was barred by a prior judgment.

¶ 9 On December 19, 2011, Dan filed a response to Randy's motion to dismiss. Generally, Dan denied that his petition was barred by a prior judgment, and he claimed that the unforeseeable events he had cited in his petition rendered the maintenance provision in the MSA unconscionable.

¶ 10 On February 9, 2012, a hearing was held on Randy's motion to dismiss. A transcript of that hearing is not part of the record. On April 3, 2012, the trial court entered an order granting Randy's motion. Specifically, the order stated:

¶ 11 "This cause coming to be heard upon Randy's Motion to Dismiss Dan's petition for Maintenance Payments to Commence and Dan's response thereto, the court having heard

argument of counsel and having reviewed the case law provided; it is ordered: Randy's motion to dismiss Dan's Petition for Maintenance Payments to Commence is granted."

¶ 12 On May 3, 2012, Dan filed a motion to reconsider the trial court's order granting Randy's motion to dismiss pursuant to section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2012)). In the motion, Dan reiterated that in his petition he had requested that maintenance "commence" on July 15, 2011, that the MSA had contemplated a 10 year maintenance duration that would begin when the homes were sold shortly after the judgment, but since the homes had not sold the maintenance was lasting too long and had become unconscionable.

¶ 13 On August 28, 2012, Randy filed a response to Dan's motion to reconsider. In her response, she contended that all of Dan's arguments in his motion to reconsider had been previously made and rejected, and that Dan was simply trying to get the trial court to rewrite a non-modifiable agreement.

¶ 14 A hearing on the motion to reconsider was continued several times from September 2012 to January 2013. On January 9, 2013, Dan's new attorney filed an appearance on his behalf, and Dan's former attorney subsequently withdrew. On January 29, 2013, the trial court entered an agreed order allowing the withdrawal, and granting Dan 28 days to amend his motion to reconsider.

¶ 15 On February 26, 2013, Dan's new counsel filed an "Amended Motion for Reconsideration, Clarification and Other Relief." In that motion, counsel argued that Dan's petition and Randy's motion to dismiss were both flawed. He also alleged that since the trial court's order of April 3, 2012, granted Randy's motion on the basis of *res judicata*, it was also inaccurate "but only as to reasoning, but not as to result." Counsel agreed that Dan's petition

should have been dismissed, "but not under the *res judicata* doctrine and consequently under Paragraph 2-619(a)(4) of the Code of Civil Procedure." Instead, he argued that because the maintenance bargained for by the parties was "maintenance in gross" or that the MSA explicitly barred modification, these issues constituted "affirmative matters," and, therefore, dismissal was only correct under section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2012)). Counsel also argued that Dan's petition had been brought under various sections of the Illinois Marriage and Dissolution of Marriage Act (Act) that did not apply. He also claimed that that *res judicata* did not apply here since post-decree litigation lacked the identity of subject matter or cause of action necessary to invoke that principle. Finally, counsel argued that since the record was unclear as to whether the trial court granted Randy's motion to dismiss pursuant to the *res judicata* doctrine or another legal basis, he urged the trial court to reconsider its April 3, 2012, order and to do one of two things upon reconsideration: (1) vacate the April 3, 2012, order and grant Dan leave to voluntarily withdraw his petition with prejudice as to filing a new petition under section 510 of the Act (750 ILCS 5/501 (West 2012)); or (2) vacate the April 3, 2012, order and enter an order affirming the dismissal of his petition under section 2-619(a)(9) of the Code. 735 ILCS 5/2-619(a)(9) (West 2012).

¶ 16 Randy filed a response to Dan's amended motion for reconsideration, and argued that *res judicata* had never been mentioned in her motion to dismiss Dan's petition *or* by the trial court in its order granting her motion to dismiss. Randy contended that her motion to dismiss simply argued that the relief Dan sought in his petition was barred because the MSA was unambiguous and non-modifiable. She also alleged that Dan's argument about which subsection of section 2-619 of the Code should have resulted in the dismissal of his petition was irrelevant, and that the April 3, 2012, order should stand.

¶ 17 On the same day that Dan filed his amended motion for reconsideration he also filed a two-count "Petition for Declaratory Relief or, in the alternative, for Reformation of 'Marital Settlement Agreement'" (declaratory relief/reformation petition). On April 16, 2013, he filed an "Amended Petition for Declaratory Relief or, in the Alternative, for Reformation of 'Marital Settlement Agreement'" (amended declaratory relief/reformation petition). In count I of the amended petition, Dan moved for a declaration of rights stating that: (1) the term of maintenance required by Article III of the MSA began on September 23, 2008 (the date the judgment of dissolution was entered); (2) all maintenance payments made by Dan to date, as well as those going forward, count toward the completion of that maintenance term; (3) under the terms of Article III, Randy's remarriage resulted in a reduction of maintenance to 50% of that maintenance rate paid during the first four years after the entry of the judgment; and (4) under the terms of Article III Randy's remarriage also resulted in a reduction of the term of maintenance from 10 to 8 years. Dan argued that declaratory relief was appropriate under section 2-701 of the Code because the MSA was a contract right under which Dan had a vested interest, that Randy's position as to when maintenance commenced under the MSA was adverse to Dan's, that there was an ongoing controversy, and declaratory relief as to what the MSA intended would resolve the controversy.

¶ 18 In count II of the pleading, Dan requested in the alternative that under the law of contracts, the trial court enter an order reforming Article III of the MSA to state that the terms of maintenance in that article began on September 23, 2008, and that all payments made by Dan to date, as well as those going forward, count toward the completion of that maintenance term. Dan also asked that the reformation incorporate a recognition of Randy's remarriage and that her remarriage resulted in a reduction of maintenance of 50% of the rate being paid during the first

four years after the entry of the judgment of dissolution, as well as a reduction of the term of maintenance from 10 to 8 years.

¶ 19 On May 31, 2013, Randy filed a response to Dan's amended declaratory relief/reformation petition. In her response, Randy asserted that Dan's maintenance petition spoke for itself and the MSA could not be re-characterized by a new pleading. She argued that Dan's maintenance petition had been dismissed because the maintenance provisions had been clear and unambiguous as well as non-modifiable. Randy also pointed out that neither in her motion to dismiss, nor in the trial court's order granting her motion, had *res judicata* been mentioned. Randy denied that declaratory relief was available to Dan since the dispute had ended with the dismissal of Dan's maintenance petition, and the trial court would be issuing a ruling on Dan's amended motion for reconsideration at a future date. She argued that Dan had chosen his path for relief, and that he could not now "hop to a new legal theory." Specifically, his argument about the real estate market crashing had been heard and rejected, and it was irrelevant as being outside the four corners of a clear and unambiguous MSA. She also claimed that the plainly drafted MSA was not subject to reformation.

¶ 20 On June 10, 2013, Dan filed an "Omnibus Reply in Support of 'Amended Motion for Reconsideration, Clarification and Other Relief' and 'Amended Petition for Declaratory Relief, or, in the Alternative, for Reformation of Marital Settlement Agreement.'" In that reply, Dan responded to Randy's argument that her motion to dismiss and the trial court's order granting that motion did not reference *res judicata* by arguing that it was established law that the term "barred by a prior judgment " as used in paragraph (4) of subsection 2-619(a) of the Code (735 ILCS 5/2-619(a)(4) (West 2012)) meant only one of two things: that the matter was barred by *res judicata* or by collateral estoppel. Dan claimed that even if *res judicata* was not mentioned

in this motion to dismiss or the dismissal order, only section 619(a)(4) could have been the basis of the dismissal. Dan also reiterated that *res judicata* was not applicable because there was no identity of subject matter or cause of action between the judgment of dissolution and the post-decree litigation.

¶ 21 On June 12, 2013, the trial court held hearings on the amended motion for reconsideration and the amended declaratory relief/reformation petition. At the beginning of the hearing, the trial court suggested the possibility of a pre-trial conference. However, Randy's counsel stated that his client was not present because the matter had been set for legal argument only. Both counsels agreed that while only the amended reconsideration motion had been set for argument, the court could hear arguments on both motions and neither party had expected to be submitting evidence that day.

¶ 22 At the portion of the hearing on Dan's amended motion to reconsider, Dan's counsel reiterated his position that the motion brought by previous counsel to "commence maintenance" had improperly invoked section 501 and 503 of the Act, since those paragraphs dealt with temporary relief and division of property. He also acknowledged that section 510 of the Act, also invoked in that petition, was not proper statutory authority because the parties' maintenance agreement had been non-modifiable.

¶ 23 Dan's counsel again stated his position that the maintenance petition should have been dismissed by the trial court pursuant to section 2-619(a)(9) of the Code since it should have been dismissed as "other affirmative matter" instead of on *res judicata* grounds. According to Dan's counsel, the significance of having the dismissal of the prior maintenance petition pursuant to subsection (a)(9) instead of subsection (a)(4) was that it would allow the declaratory action to proceed without being "clouded" by *res judicata* or collateral estoppel issues.

¶ 24 Randy's attorney responded that Dan should not get a "do over" that requested the court to simply disregard two years of litigation over a petition that Dan had submitted and signed under oath so that they could now argue a declaratory action that took an entirely different position. Randy's counsel then referred to paragraph 5 of Dan's maintenance petition which stated, "[p]ursuant to Article 3 of the marital settlement agreement, since neither residence was sold, the remaining maintenance provisions of Article 3 have not yet been triggered" and Dan was thus under "undue hardship." Randy's counsel stated that that statement was an admission that the non-modifiable maintenance article has not yet been triggered by the agreed conditions. Counsel also noted that Dan had filed a motion to reconsider raising the same arguments and only changed them when he hired new counsel.

¶ 25 Dan's counsel responded that the maintenance pleading could not be a judicial admission because the marital settlement agreement was a contract and only the trial court could construe it. He also argued that the parties were not barred by a prior judgment, but bound by a prior contract which the court had to construe.

¶ 26 After hearing the parties' arguments, the trial court said that it believed its earlier ruling granting Randy's motion to dismiss Dan's maintenance petition was correct because the petition was barred by a prior judgment, specifically, the judgment of dissolution of marriage which incorporated the marital settlement agreement. Dan's counsel then asked the court to clarify that it was denying the amended motion to reconsider because it properly granted Randy's motion to dismiss because the maintenance was non-modifiable; however, it was permitting the parties to argue their rights under the MSA. The trial court responded:

> "Right. We are going to get now into the declaratory action and the motion for reformation. But that's correct. I am allowing you to – I don't think that bars you from being able to argue that. We have an actual controversy."

¶ 27 With regard to the amended declaratory relief/reformation petition, Dan's counsel acknowledged that he had continued to pay $4,500 per month in maintenance after Randy remarried, and that the agreement expressly said the obligation to provide maintenance did not terminate until ten years after the properties sold. Randy remarried a few months after the judgment of dissolution was entered and Dan only recently cut the $4,500 payment in half. Counsel argued that the unambiguous part of the MSA indicated that the maintenance term would be eight years if Randy remarried, which counsel suggested started at the time the judgment was entered. As support for that contention, counsel relied on the paragraph in Article III which stated, "[e]xcept as provided in the above paragraph concerning RANDY's remarriage," the maintenance obligation would cease at the end of the tenth year following the sale of the properties.

¶ 28 Dan's counsel also acknowledged that at the prove up of the MSA Dan affirmed the provisions of the MSA which read that the ten year maintenance term began after the properties sold, and the term would be cut to eight years if Randy remarried during that period. The court then asked if the ten year period was triggered at the entry of the judgment of dissolution or by the sale of the properties. In response, Dan's counsel said that there had been a mutual mistake of fact in the drafting of the agreement because it made an unintended, indefinite period of maintenance possible. The court stated that there was a difference between "contemplated" and "intended" and that the belief in the strength of the real estate market would be or what the ability to sell the properties might be could not be construed as a mutual mistake of fact.

¶ 29 Randy's counsel responded that one party not liking how the agreement turned out in the future was not a mutual mistake of fact and that the ten year maintenance period was clearly triggered only by the sale of both properties. Counsel argued that the entire maintenance article needed to be read together, requiring $4,500 per month before the sale of the properties, and a ten year schedule beginning after sale of the properties was the only definition in the agreement as to when the schedule began. Counsel claimed that Randy remarried in reliance on the terms in the MSA, rather than cohabitating, which under the MSA would not have affected her maintenance at all. Counsel argued that the way in which the agreement was written clearly provided that Randy would be paid for ten years commencing with the sale of the properties unless she remarried during the ten year period, which she did not.

¶ 30 In reply, Dan's counsel argued that Randy's interpretation would allow her to be paid forever despite her remarriage if the properties were not sold and that it was not fair to say that Dan could sell short the properties at any time. Counsel repeated that the drafting of the MSA had been mistaken and requested that Randy be limited to eight years of total maintenance, and that it be set at $2,250 per month.

¶ 31 The court then commented that it had to enforce the agreement as written and that it could not be found unconscionable simply because Dan did not like how things turned out.

¶ 32 At the conclusion of the hearings, the trial court entered a written order that denied Dan's amended motion to reconsider and set the ruling on the amended declaratory relief/reformation petition for June 19, 2013.

¶ 33 On that day, after allowing both parties' counsels to make a few additional comments, the trial court stated that where the meaning of an agreement is disputed and one construction leads to harsh consequences, the court will search for a more "reasonable" construction so one party

will not do injustice to the other. However, it also acknowledged that a contract will not be construed simply to make a more equitable result occur, and that the court's responsibility was to enforce a contract's valid terms.

¶ 34 With regard to the MSA, the court noted that it contained two different maintenance periods, the $4,500 monthly payment that Dan was required to make to Randy until the sale of both of the properties, and the maintenance amounts that would begin after both properties had been sold. It then referred to another portion of the MSA which stated, "[e]xcept as provided in the above paragraph concerning Randy's remarriage, Dan's obligation to provide maintenance shall cease at the end of the tenth year following the sale of said properties." The court also noted that the only time the phrase "following the sale of said properties" was not used was in the paragraph which referred to Randy's possible remarriage.

¶ 35 The court then held that the parties could not have intended that Randy's remarriage prior to the sale of the Highland Park properties would result in a longer period of maintenance than if she married after the sales when such an interpretation would have been absurd because it would mean that the parties drafted a contractual scheme that encouraged a former spouse to remarry sooner so that she could receive a greater amount of maintenance for a longer period of time. Therefore, the court struck the words "ten years" from the maintenance paragraph that began, "[i]n the event RANDY remarries during the ten year period of maintenance ***." The court found that striking those words was the only way to comport the agreement with the "reasonable understanding" of the parties and with a "reasonable interpretation" under the rules of contract construction.

¶ 36 The court then held that Dan's base maintenance obligation would expire after a total of eight years from the date of judgment and that since the properties had never sold, the monthly

amount Dan owed after four years was one-half of the initial base maintenance payment of $4,500, or $2,250 per month. In making its ruling, the court discussed both reformation and declaratory actions, however, it never said under which count of Dan's pleading it was ruling. The court then entered an order granting Dan's amended declaratory relief/reformation petition.

¶ 37 Randy timely filed her notice of appeal from the trial court's order granting Dan's amended declaratory relief/reformation petition. Dan did not appeal from the denial of his amended motion to reconsider the trial court's order granting Randy's motion to dismiss his maintenance petition.

¶ 38 II. ANALYSIS

¶ 39 On appeal, Randy argues that the trial court erred in granting Dan's amended declaratory relief/reformation petition. Specifically, she argues: (1) the trial court's interpretation of the MSA was contrary to the rules of contract construction; (2) the trial court had no jurisdiction to consider the amended declaratory relief/reformation petition; (3) that pleading was barred by *res judicata* or as an improper motion for reconsideration.

¶ 40 We initially note that a ruling in Randy's favor on one of the procedural issues she raises would be dispositive of the issues she raises on appeal. Therefore, we will address these procedural issues first. In claiming that Dan's amended declaratory relief/reformation petition was procedurally barred, Randy argues that the trial court lacked jurisdiction to entertain that petition because it was a successive post-trial motion. She also argues that the petition was a new cause of action that was barred on *res judicata* grounds. In the alternative, Randy argues that even if Dan's amended petition for declaratory action/reformation was considered an extension of the amended request for reconsideration, it would not be a proper extension.

¶ 41 A. Trial Court Jurisdiction

¶ 42 Randy claims that Dan's amended declaratory relief/reformation petition was a successive post-trial motion over which the trial court did not have jurisdiction. Specifically, she argues that while Dan's original declaratory relief/reformation petition was filed on the same date as his amended motion for reconsideration, it did not attack the trial court's ruling on the motion to dismiss his initial post-judgment pleading. She argues that a trial court does not have jurisdiction after 30 days over a dismissed cause of action, other than through revestment by the actions of the parties or through the filing of a proper petition pursuant to section 2-1401 of the Code. See 735 ILCS 5/2-1401 (West 2012); *Harchut v. OCE/Bruning, Inc.*, 289 Ill. App. 3d 790, 793 (1997). Further, she claims that the revestment doctrine does not apply here because in her response to Dan's amended declaratory relief/reformation pleading she asserted that Dan did not have the right to file for new relief based upon a different interpretation of the MSA from the one he had been earlier advocating and one in which his claim had been dismissed. She also argues that Dan's declaratory action/reformation pleading was not a proper 2-1401 petition. See 735 ILCS 5/2-1401 (West 2012).

¶ 43 In response, Dan argues that Randy never argued before that the trial court lacked jurisdiction to hear his declaratory relief/reformation petition because it was a successive post-trial motion. He also contends that the trial court had jurisdiction over his amended declaratory relief/reformation petition because the declaratory judgment action was a collateral claim apart from his amended reconsideration motion, and his claim for reformation was a collateral, equitable action. In the alternative, Dan argues that if his pleading is somehow considered a successive post-trial motion, the trial court nevertheless had jurisdiction over his petition under the revestment doctrine. Dan claims the revestment doctrine applies because Randy never objected "at trial" or raised her claim that his amended declaratory relief/reformation petition

was a successive post-trial motion on the record, and she actively participated in the June 2013 proceedings, which is wholly inconsistent with her new claim on appeal.

¶ 44 Whether a trial court has jurisdiction is a question of law which we review *de novo*. *In re Marriage of Hall*, 404 Ill. App. 3d 160, 164 (2010). The issue of subject matter jurisdiction cannot be waived. *Currie v. Lao*, 148 Ill. 2d 151, 157 (1992). Therefore, the issue of jurisdiction may be raised at any time. *Berg v. Allied Security, Inc.*, 193 Ill. 2d 186, 188 (2000). Moreover, this court has an obligation to take notice of matters which go to the jurisdiction of the trial court in the case before us. See *In re Estate of Gebis*, 186 Ill. 2d 188, 192 (1999).

¶ 45 A trial court loses jurisdiction after 30 days from the time the final judgment is entered when: (1) a post-trial motion directed against the judgment is not filed; (2) 30 days passes from the time the trial court disposes of a timely filed post-trial motion; or (3) a notice of appeal is timely filed. *Won v. Grant Park 2, L.L.C.*, 2013 IL App (1st) 122523, ¶ 20.

¶ 46 Here, the trial court had jurisdiction over Dan's amended declaratory relief/reformation petition. The record reflects that Dan timely filed a motion to reconsider the trial court's order granting Randy's motion to dismiss his petition to commence maintenance. He also requested and was granted an extension to file an amended motion to reconsider. When he filed his original declaratory relief/reformation petition on the same day that he filed his amended motion to reconsider, the trial court still retained jurisdiction over this matter. Further, since the trial court had not ruled on the amended motion to reconsider, and 30 days had not passed since such a ruling, it also retained jurisdiction over this matter when Dan filed his amended declaratory relief/reformation petition. Also, the trial court would not have been divested of jurisdiction even if the amended declaratory relief/reformation petition was a successive post-trial motion. See *In re Marriage of Agustsson*, 223 Ill. App. 3d 510, 517 (1992) (denial of ex-husband's

motion to amend judgment of dissolution did not divest the trial court of jurisdiction to hear any additional post-judgment motions, or prevent ex-husband from filing a subsequent motion to vacate the judgment of dissolution, where the successive post-judgment motions did not extend the time for which husband could file a notice of appeal).

¶ 47 Since we have determined that the trial court had jurisdiction over this matter at the time Dan filed his amended declaratory relief/reformation petition we need not discuss the applicability of the revestment doctrine in this case. Therefore, we turn to the next procedural issue that Randy raises – that is, whether *res judicata* applied to bar Dan's amended declaratory relief/reformation petition, or that the amended declaratory relief/reformation petition was an improper extension of Dan's amended motion for reconsideration.

¶ 48 B. *Res Judicata/*Improper Extension to Amended Motion to Reconsider

¶ 49 Randy contends that Dan's new claims in his amended declaratory relief/reformation petition were barred on *res judicata* grounds because the latter filing contained the same set of operative facts between the same two parties as did his maintenance petition, which the trial court dismissed. She also argues that inasmuch as Dan's declaratory relief/reformation petition was filed on the same date as his amended motion to reconsider, "at best the new causes of action could be skewed to constitute an extension of the amended request for reconsideration." However, she claims, that new pleading is not a proper request for reconsideration since it did not bring the court's attention to newly discovered evidence, changes in the law, or errors in the court's previous application of existing law and it did not provide a reasonable explanation for why is was not raised sooner. See *In re Marriage of Epting*, 2012 IL App (1st) 111727, ¶ 41.

¶ 50 Dan makes several arguments in response. First, he argues that Randy has waived her *res judicata* argument because there is no transcript or bystander's report for the April 3, 2012,

hearing on her motion to dismiss Dan's maintenance petition. He claims that "[R]andy has asked this court to divine what occurred at that hearing and then, predicated upon that supposition, to reverse the trial court's explicit ruling that its decision on Randy's motion to dismiss did *not* bar Dan from proceeding on his declaratory-judgment (or other reformation) action. Respectfully, this would be nothing short of 'revers[ing] on speculation and conjecture.'" He also argues that Randy has waived this claim because she did not make this argument at the July 12, 2012, hearing, and she did not file a motion to reconsider the trial court's ruling granting Dan's amended declaratory relief/reformation petition. See *Neal v. Nimmagadda*, 279 Ill. App. 3d 834, 846 (1996) (to preserve an issue for appeal, a party must raise the issue in a post-trial motion or object at trial).

¶ 51 Dan further claims that Randy took the exact opposite conclusion with regard to *res judicata* before the trial court, and therefore she is estoppped from taking a position on appeal that is inconsistent with a position she took in the trial court, citing *In re Stephen K.*, 373 Ill. App. 3d 7, 25 (2007) (a party is estopped from taking a position on appeal that is inconsistent with a position the party took in the trial court). Finally, Dan responds that even if the incomplete record and estoppel arguments are not a bar to Randy's claims here, her *res judicata* argument must fail because the three elements of *res judicata* have not been met here.

¶ 52 *Res Judicata* is an equitable doctrine that is designed to prevent a multiplicity of lawsuits between the same parties where the facts and issues are the same. *Murneigh v. Gainer*, 177 Ill. 2d 287, 299 (1997). Under that doctrine, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). *Res judicata* bars not only what was actually decided in the first action, but also whatever could have

been decided. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). Three requirements must be satisfied for *res judicata* to apply: (1) the existence of an identity of cause of action; (2) the parties or their privies are identical in both actions; and (3) the rendition of a final judgment on the merits by a court of competent jurisdiction. *Id*.

¶ 53 To determine whether a second suit constitutes the same cause of action as a previous suit for *res judicata* purposes, we look to the "transactional test," which asks whether the subsequent action arises from the same set of operative facts as the original action. *River Park v. City of Highland Park*, 184 Ill. 2d 290, 309 (1998). As our supreme court has explained, "[t]he purpose of *res judicata* is to promote judicial economy by requiring parties to litigate, in one case, all rights arising out of the same set of operative fats and also [to] prevent the unjust burden that would result if a party could be forced to relitigate what is essentially the same case.'" *Id*. at 319 (quoting *Henstein v. Buschbach*, 248 Ill. App. 3d 1010, 1015-16 (1993). Whether *res judicata* bars a subsequent claim is a question of law which we review *de novo*. *Amalgamated Transit Union, Local 241 v. Chicago Transit Authority*, 2014 IL App (1st) 122526, ¶ 13.

¶ 54 Before addressing the issue of whether Dan's amended declaratory relief/reformation petition was barred by *res judicata* we will first address his claims that Randy has waived this issue or that she is estopped from making a *res judicata* argument.

¶ 55 We have reviewed the record and find that Randy has not waived her *res judicata* argument on the ground that no transcript or bystander's report of the April 3, 2012, hearing on her motion to dismiss Dan's maintenance petition is contained in the record. Here, the record contains Dan's maintenance petition, Randy's motion to dismiss, and Dan's response to Randy's motion. The record also contains the written order from the trial court granting Randy's motion to dismiss that petition. Although the record does not contain a transcript of the hearing on that

motion, that fact alone is insufficient to find waiver here. When determining whether *res judicata* applies, one looks to the existence of an identity *of cause of action* between the two actions. See *Hudson*, 228 Ill. 2d at 467. Therefore, we need only to compare Dan's maintenance petition with his amended declaratory relief/reformation petition to determine whether the latter pleading was barred by *res judicata*. Accordingly, since Randy has provided this court with an adequate record regarding the claimed error she has not waived this claim. *Holston v. Sisters of Third Order of St. Francis*, 165 Ill. 2d 150, 163 (1995).

¶ 56 We also reject Dan's claim that Randy has waived a *res judicata* argument here because she did not raise it below. The record is clear that at the hearing on July 12, 2013, Randy's counsel objected to the court reaching the merits of Dan's amended declaratory relief/reformation petition. Counsel specifically argued that Dan should not get a "do over" that requested the court to simply disregard two years of litigation that Dan had submitted and signed under oath so that they could now argue a declaratory action that took an entirely different position. Accordingly, Randy has not waived this claim.

¶ 57 Next, Dan submits that Randy is estopped from arguing *res judicata* on appeal because she took the opposite position regarding *res judicata* before the trial court. As support for this claim, Dan refers to Randy's response to his amended motion for reconsideration where she affirmatively stated that the phrase "*res judicata*" did not appear in her motion to dismiss and that her argument was simply that Dan's petition to commence maintenance attempted to modify a maintenance provision that was unambiguously non-modifiable pursuant to the judgment of dissolution. He notes that Randy repeated the same argument in her response to Dan's amended petition for declaratory action/reformation petition, and Randy's counsel reargued this same

position at the June 12, 2013, hearing. Therefore, Dan contends, this court should preclude Randy from making an inconsistent *res judicata* claim on appeal.

¶ 58 We are not persuaded. Here, Dan is confusing Randy's position that she did not argue that *the judgment of dissolution* barred Dan's maintenance petition on *res judicata* grounds in her motion to dismiss that petition with her argument on appeal that Dan's latter pleading, specifically his amended declaratory relief/reformation petition, is barred on *res judicata* grounds because there was already a final judgment on Dan's maintenance petition. Also, we reiterate that it is clear from the record that Randy did voice her objection to the propriety of the trial court hearing Dan's amended declaratory relief/reformation petition at the June 12, 2013, hearing. Accordingly, Randy has not made inconsistent arguments on this issue and she is not estopped from arguing that *res judicata* applies here.

¶ 59 We now turn to the issue of whether Dan's amended declaratory relief/reformation petition was barred on *res judicata* grounds. Randy argues that all three of requirements of *res judicata* have been met here because the parties were the same, the actions were based on the same set of operative facts, and there was a judgment on the merits on Randy's motion to dismiss Dan's petition to commence maintenance. Randy alleges that all Dan did in the declaratory relief/reformation petition was to re-allege that the terms of the MSA should be other than as written in an action between the same parties, relying on the same set of operative facts.

¶ 60 In response, Dan claims that although there was an identity of the parties, there was no identity of the subject matter or cause of action between his maintenance petition and his amended declaratory relief/reformation petition. Specifically, Dan alleges that his maintenance petition *mistakenly* asked the trial court to modify Article III of the MSA to provide that its maintenance term be triggered and commence retroactive to the date of Randy's vacating the

Saxony Drive residence and remarrying. Conversely, he argues, in his amended petition for declaratory relief/reformation petition, he did not seek to modify or change Article III of the MSA. He explained that the request for declaratory relief is that Article III of the MSA is binding and enforceable, but that the parties are in conflict as to its meaning and effect. Accordingly, he asked for a declaration of the parties' rights under Article III. Likewise, he argues, the premise for his alternate request for reformation of Article III is also that it is enforceable and binding, but it did not adequately set forth the terms agreed upon by the parties. Since both claims in the latter petition accept the terms and conditions of Article III, he argues, there is no "same claim" between the parties for the purpose of *res judicata*.

Dan also argues that both petitions do not arise from a "single group of operative facts." He contends that in the first petition, the predicate facts for a change of Article III were, among other things, that because of the real estate market crash he had been unable to sell either residence and. In contrast, he asserts that the predicate fact for the declaratory relief/reformation petition was the conflict of the parties as to the effect of the terms of and conditions of Article III of the MSA.

¶ 61 After a careful review of the record we conclude that Dan's amended declaratory relief/reformation petition was not barred on *res judicata* grounds because one of the fundamental requirements necessary for a finding of *res judicata* was not present here. Specifically, under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any *subsequent* actions between the same parties or their privies on the same cause of action. *Rein*, 172 Ill. App. 3d at 334. Here, there was no subsequent action. The trial court had jurisdiction over Dan's amended declaratory relief/reformation petition because he timely filed a motion to reconsider the trial court's order

granting Randy's motion to dismiss his petition to commence maintenance, and then he timely requested and was granted an extension to file an amended motion to reconsider. Since he filed his declaratory relief/reformation petition within the time frame the trial court allotted him to file the amended motion to reconsider, the trial court retained jurisdiction over any filings during this time period. Likewise, the trial court retained jurisdiction over the matter when Dan filed his amended declaratory relief/reformation petition. Because the trial court retained jurisdiction over this matter, then, there was no separate, *subsequent* action. Accordingly, the principles of *res judicata* simply do not apply here.

¶ 62 Next, Randy argues that inasmuch as Dan's declaratory/reformation petition was filed on the same date as his amended motion for reconsideration, at best the new causes of action could be "skewed" to constitute an extension of the amended request for reconsideration. However, Randy argues, it could not be a proper request for reconsideration since it did not "bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." As support for this proposition, Randy cites to *In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶ 41 (a new issue can only be raised in a motion for reconsideration when a party has a reasonable explanation for why it was not raised sooner). Randy claims that since Dan's explanation for not previously alleging a right to reformation was that his prior attorney's post-decree petition was erroneous, "that purported excuse should not stand as a way to avoid the ordinary and long established rules of procedure."

¶ 63 We are not persuaded. Our review of the record indicates that Dan's declaratory/reformation petition (as well as his timely filed amended petition) was not an extension of his amended request for reconsideration. It is clear from a reading of the declaratory/reformation petition, either the original or the amended version, that in it, Dan was

attempting to amend his Maintenance Petition to state a cause of action upon which relief could be granted after the trial court granted Randy's motion to dismiss that petition. By allowing Dan to file the amended declaratory relief/reformation petition, the trial court was implicitly allowing him to amend the maintenance petition. See *1515 N. Wells, L.P. v. 1513 N. Wells, L.L.C.*, 392 Ill. App. 3d 863, 870 (2009) (Illinois law supports a liberal policy of allowing amendments to the pleadings to enable parties to fully present their alleged causes of action). Therefore, we reject Randy's argument that these petitions were in any way an extension, proper or improper, of Dan's amended motion to reconsider. We now turn to the substantive issues Randy raises on appeal.

¶ 64 C. Trial Court's Interpretation of the MSA

¶ 65 Randy argues that the trial court erred in granting Dan's amended declaratory/reformation petition because its interpretation of the MSA was contrary to the rules of contract construction. Specifically, she contends that if the MSA is read as a whole, the maintenance article in that agreement unambiguously sets forth: (1) a 10 year period of maintenance that is to commence only after the sale of both properties; and (2) that 10 year period will be reduced to 8 years if she remarried *during* the 10 year period (which she did not). In the alternative, she claims that if the agreement is ambiguous, the trial court erred in failing to hold an evidentiary hearing on the petition and therefore this cause should be remanded for such a hearing.

¶ 66 In response, Dan argues that Randy affirmatively waived her right to a full evidentiary hearing on his amended declaratory/reformation petition when her counsel specifically stated that he did not object to foregoing an evidentiary hearing on the petition and instead agreed to simply argue the legal merits as to why the petition should not be granted. In reply, Randy

asserts that the record clearly reflects that the court decided the case on the issue of law alone after Randy's counsel stated, and Dan's counsel concurred, that Randy was not present because no evidence was anticipated on that day since the case had been set only for legal arguments. Therefore, Randy claims that there is no forfeiture or waiver under such circumstances, and should the maintenance article of the MSA be deemed ambiguous, the trial court's order granting Dan's amended declaratory relief/reformation petition should be reversed and this cause should be remanded for an evidentiary hearing.

¶ 67 When interpreting a marital settlement agreement, courts seek to give effect to the parties' intent. *Allton v. Hintzsche*, 373 Ill. App. 3d 708, 711 (2007). Ordinarily, the language the parties use is the best indication of their intent. *In re Marriage of Frain*, 258 Ill. App. 3d 475, 478 (1994). When contract terms are unambiguous, they must be given their plain and ordinary meaning. *Id*. A contract term is not ambiguous merely because the parties disagree as to its interpretation; rather, a term is ambiguous when it may reasonably be interpreted in more than one way. *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 22. Where the language is ambiguous, the trial court may receive parol evidence to decide what the parties intended. *In re Marriage of Michaelson*, 359 Ill. App. 3d 706, 714 (2005). We review *de novo* an interpretation of a marital settlement agreement and a determination of whether the agreement's terms are ambiguous. *In re Marriage of Dundas*, 355 Ill. App. 3d 423, 425-26 (2005).

¶ 68 We have carefully reviewed the MSA and find that it contains several ambiguities. For example, the first paragraph of article three requires Dan to pay to Randy $4,500 per month in maintenance until the sale and closing of both of the properties. Other than upon the sale of the Saxony address alone, which would increase Dan's maintenance payments to $6,000 monthly,

there is no expiration term on this requirement. After the sale of both properties, Dan is then required to pay Randy maintenance for 10 years, with maintenance starting at $8,000 per month and declining to $6,500 per month over that ten year period. The second paragraph of article three is not pertinent to this appeal. The third paragraph of article three refers to the possibility of Randy remarrying. That paragraph requires that if Randy remarries during the "ten year period of maintenance" Dan must pay Randy the full amount of maintenance for four years of the maintenance period, and then the payments shall be reduced to 50% of the "listed amounts," with maintenance terminating at the end of the eighth year. Although the third paragraph refers to the "ten year period of maintenance," it imposes no requirement that the properties be sold before it is triggered; in fact, it is silent as to the sale of the marital properties at all. Then, the fourth paragraph of article three reads, "[e]xcept as provided in the above paragraph concerning Randy's remarriage, Dan's obligation to provide maintenance shall cease at the end of the tenth year following the sale of said properties."

¶ 69 It is clear that article three of the MSA contained ambiguous terms which were susceptible to more than one reasonable interpretation. For example, since the sale of the properties was not mentioned in the paragraph regarding Randy's possible remarriage, did the "ten year period of maintenance" commence when Randy was remarried, even if the properties had not sold? This is a possibility, especially since paragraph four of article three appears to make Randy's remarriage an exception to the requirement that Dan pay maintenance for ten years *after the sale of both properties*. Or, did paragraph four merely mean that the ten year period of maintenance following the sale of the properties would be decreased to eight years if Randy remarried? Another interpretation of the MSA is that Randy was entitled to receive $4,500 per month regardless of her marital status until the properties sold, and after they had sold

she was to receive maintenance for eight years. Finally, was Randy to receive the entire 10 years' worth of maintenance after the properties sold because she remarried *before* the ten year maintenance term commenced and not *during* that term, as written in paragraph three? Even if we were to agree with the trial court that this last interpretation would be absurd because it would mean that the parties drafted a contractual scheme that encouraged a former spouse to remarry sooner so that she could receive a greater amount of maintenance for a longer period of time, several other interpretations of the MSA are not unreasonable. For this reason, the trial court should have required an evidentiary hearing in order for the parties to present parol evidence with regard to their intent when drafting the MSA. Although it is true that Randy's counsel waived her right to such a hearing, the ambiguities on the face of the MSA required that an evidentiary hearing be held in order for the trial court to properly discern the parties' intent. See *Cambridge Engineering v. Mercury Partners*, 378 Ill. App. 3d 437, 453 (2007) (waiver is a limitation on the parties and not on the court). Therefore, we vacate the trial court's order granting Dan's amended declaratory relief/reformation petition and we remand this cause for an evidentiary hearing.

¶ 70 III. CONCLUSION

¶ 71 In sum, the trial court had jurisdiction over Dan's amended declaratory action/reformation petition because at the time he filed the amended petition a timely post-judgment motion directed against the judgment had been filed, a timely amendment to that motion had also been filed, and no ruling had been made on those post-trial motions. Further, Dan's amended declaratory relief/reformation petition was not barred by *res judicata* because the amended petition and the amended motion to reconsider were heard as part of one proceeding; therefore, the required "subsequent action" element of *res judicata* was missing. Finally, since

the MSA contained ambiguous terms, the trial court erred in failing to hold an evidentiary hearing on Dan's amended declaratory action/reformation petition before making its ruling.

¶ 72 The judgment of the circuit court of Lake County is vacated and this cause is remanded for further proceedings consistent with this order.

¶ 73 Vacated and remanded.