

2015 IL App (2d) 150410-U
No. 2-15-0410
Order filed December 8, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> MARRIAGE OF JAMES R. ALYINOVICH,)	Appeal from the Circuit Court of Du Page County.
)	
Petitioner,)	
)	
and)	No. 11-D-388
)	
DEBRA A. ALYINOVICH,)	
)	
Respondent-Appellee,)	Honorable
)	Robert A. Miller,
(Michael D. Canulli, Petitioner-Appellant).)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Schostok and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's award of fees to the respondent's former attorney was not an abuse of discretion.

¶ 2 This dispute over attorney fees arises in the context of postdissolution proceedings in which attorney Michael Canulli represented respondent, Debra Alyinovich. Upon withdrawing as Debra's counsel, Canulli filed a petition for final fees and costs pursuant to section 508(c) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(c) (West 2012)). Canulli sought an award of \$24,920.60 in addition to the \$14,530.20 that Debra had already paid

him. Following an evidentiary hearing, the court awarded Canulli \$6,653.70. Canulli appeals. For the reasons that follow, we affirm.

¶ 3

I. BACKGROUND

¶ 4 Debra and James Alyinovich were married in 1983 and have three children, all of whom are now emancipated. In February 2011, James petitioned for dissolution of their marriage. Debra was personally served but did not file an appearance. On James's motion, the court found Debra to be in default. On August 15, 2011, following a prove-up hearing at which James testified, the court entered a default judgment of dissolution. At the time the judgment was entered, one of the parties' children was still a minor. The court awarded the parties joint legal custody, designating James as the primary residential custodian. The court reserved the issue of child support "until further Petition and Order of Court" and divided the marital property that was identified by James. The judgment indicated that although Debra was currently unemployed, "[n]either party suffers from any disabilities and given their respective shares of the marital estate, their education and skills, both are capable of working and supporting themselves, and not in need of maintenance."

¶ 5 In March 2013, Debra retained Canulli as her attorney. On April 19, 2013, Canulli filed on Debra's behalf a motion to vacate the default judgment pursuant to section 2-1301(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1301(e) (West 2012)), arguing that the trial court had never entered a final judgment. In the same filing, Debra alternatively petitioned the court to vacate the judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)), which provides a mechanism for challenging a final judgment between 30 days and 2 years after it is entered. We will hereinafter refer to the section 2-1301(e) motion and the section 2-1401 petition collectively as the "motion to vacate."

¶ 6 In “count I” of the motion to vacate, brought pursuant to section 2-1301(e) of the Code, Debra argued that the court had improperly entered a bifurcated judgment of dissolution in violation of section 401(b) of the Act (750 ILCS 5/401(b) (West 2012)). Debra insisted that if James had not complied with the statutory requirements, “the court was without authority to enter this particular judgment” and the default judgment was “null and void.”

¶ 7 In “count II,” which was also brought pursuant to section 2-1301(e) of the Code, Debra argued that good cause existed to vacate the default judgment because James made false representations to the court and failed to disclose material information. Debra proposed that the terms of the judgment—particularly the division of property and the lack of maintenance—were unfair and unconscionable. She asserted that James earned in excess of \$500,000 per year while she was uninsurable and unable to maintain employment due to her severe clinical depression. She also argued that the court had not previously been informed of James’s “cruel conduct and mistreatment” of her that precipitated her depression. Additionally, Debra insisted, contrary to James’s testimony at the prove-up hearing, she was not a licensed CPA and she had not been employed in the accounting field since 1995. Nor had James informed the court that, prior to the prove-up hearing, their minor son had been residing with Debra since 2009. Furthermore, Debra contended, James “purposefully minimized his income,” did not inform the court of “his substantial historical earnings,” and ignored the fact that she had given up her own successful career to raise a family. Debra maintained that certain marital assets were not disclosed to the court and were accordingly not valued or divided in the default judgment.

¶ 8 In “count III” of the motion to vacate, Debra alleged that even if the default judgment were a final judgment, it should be vacated pursuant to section 2-1401 of the Code in the interests of justice and fairness. In addition to the arguments detailed in the first two “counts” of

the motion to vacate, she alleged that James had been “physically, emotionally and psychologically abusive,” which had required her to contact the police on one occasion.

¶ 9 Finally, in “count IV” of the motion to vacate, Debra asserted that James had failed to provide a comprehensive financial statement and corroborating documents as required by local court rules. According to Debra, if James had complied with those rules, the court would not have been misled about the “nature and extent of the marital estate” and James’s income. Debra did not specify whether this “count” was brought pursuant to section 2-1301(e) or 2-1401 of the Code.

¶ 10 James filed a response to the motion to vacate, and Canulli filed a reply in support of the motion on Debra’s behalf. On June 26, 2013, while the motion to vacate remained pending, Canulli filed on Debra’s behalf a motion for partial summary judgment. Although it is not entirely clear, it appears that this was intended to be a motion for “partial” summary judgment in the sense that Debra attempted to demonstrate her right to relief only under the portion of the motion to vacate brought pursuant to section 2-1301(e) of the Code. Debra argued many of the points that she had raised in the motion to vacate. She also attempted to refute the arguments that James had made in his response to the motion to vacate. For example, Debra argued that the default judgment did not constitute a final judgment, but rather was a bifurcated judgment that did not comply with the requirements of the Act. Additionally, Debra again argued that James made misrepresentations at the prove-up hearing with respect to: the parties’ son’s custodial arrangements, the marital assets and liabilities, Debra’s status as a licensed CPA, and James’s income and historical earnings. Debra also argued that the allocation of the marital estate was inequitable.

¶ 11 On August 5, 2013, the court denied Debra's motion for partial summary judgment. The record on appeal does not contain a transcript of the parties' oral arguments on the motion, but it does contain the court's oral ruling. With respect to the default judgment, the court did not believe that there "was a bifurcated hearing, no matter what anyone calls it." According to the court, the custody judgment was proper and "final in nature even with the reservation," and it "met with the requirements of the law with regard to notice." The court clarified that it was "not making a finding as to whether or not the terms of the judgment are inequitable or unconscionable." Nor was the court "precluding Mr. Canulli from going forward with those arguments."

¶ 12 On September 25, 2013, Canulli filed a motion to reconsider the denial of the motion for partial summary judgment. While the original motion to vacate and the motion to reconsider remained pending, Debra retained new counsel.¹

¶ 13 On November 13, 2013, Canulli filed a petition for final fees and costs pursuant to section 508(c) of the Act. He alleged that Debra had paid him \$14,530.20 but that a balance of \$24,920.60 remained. Among the exhibits attached to the fee petition were Canulli's itemized billing records and a written engagement agreement signed by Debra. The engagement agreement required Debra to inform Canulli of any objections within seven days of receiving each statement. In response to the fee petition, Debra asserted that Canulli performed

¹ In subsequently addressing Canulli's fee petition, the court noted that, inadvertently, no order granting Canulli leave to withdraw as counsel had been entered. Accordingly, on March 17, 2014, the court entered a *nunc pro tunc* order granting Canulli leave to withdraw as of November 13, 2013.

unauthorized and unnecessary services. She also contended that the amount billed was unreasonable and that she was financially unable to pay the fees.

¶ 14 The trial court held a lengthy evidentiary hearing on the fee petition. The court found that Canulli's billing rate of \$304 per hour was "substantially lower than what other attorneys in the area do charge for similar work." The court also rejected Debra's argument that the requirement in the engagement agreement to voice objections within seven days was unconscionable. Therefore, according to the court, at least until September 2013, by virtue of not objecting to the bills within seven days of receipt, Debra "in some respects waives the objection and is responsible for the bill."

¶ 15 Nevertheless, the court determined that Debra could not have been expected to immediately question certain of Canulli's bills upon receipt. For example, Debra would not have known that Canulli's research on the issue of maintenance was not related to the motion to vacate.² Moreover, the court found Debra and Canulli had an agreement that "the legal work performed would be streamlined" and that it "would be the most cost-efficient manner of proceeding." To that end, the court explained that Debra's current attorney "brings out a good point when she states that the Motion for Summary Judgment wasn't necessary" and that "it wasn't the least cost method of proceeding." The court was apparently referring to Debra's contentions in closing arguments that (1) several of the points raised in the motion for partial summary judgment were "totally fact based," (2) Canulli's bifurcation argument was "a way-out-

² From our review of the billing records attached to the fee petition, it appears that Canulli spent approximately one hour researching this issue on June 3, 2013, and less than two hours doing so on August 28. Both of these billing entries were after Canulli had filed the motion to vacate.

there issue,” and (3) “[i]t would have been less expensive to just go ahead and go to hearing on the Motion to Vacate.” According to the court, Debra would not have been aware that the motion for partial summary judgment was unnecessary. Furthermore, recalling testimony that Debra had originally been quoted an estimate of \$10,000 for work short of trial, the court found that there were no subsequent conversations that this estimate would be “doubled, tripled or even quadrupled.”

¶ 16 Accordingly, the court disallowed Canulli’s fees for researching the issue of maintenance. The court also did not award fees in connection with the motion for partial summary judgment or the related motion to reconsider. Additionally, the court disallowed certain fees for clerical work and the issuance of a summons. Finally, the court awarded no fees for work performed after October 4, 2013 (the date that Canulli sent Debra a motion to withdraw as counsel) apart from one hour for coming to court to withdraw. The court stated that it was unable to provide the amount of fees actually awarded, because the court was “not sure [it] was able to find each one of these entries.” The court directed the attorneys to identify the disallowed billing entries and prepare an order. On May 30, 2014, the court entered a written order providing that Debra owed Canulli \$6,653.70 in addition to what she had already paid him.

¶ 17 We dismissed Canulli’s previous appeal for lack of jurisdiction. *In re Marriage of Alyinovich*, 2015 IL App (2d) 140669-U. The trial court subsequently made findings pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb 26, 2010), thus curing the jurisdictional defect that had precluded us from reviewing the merits of the case. Canulli timely filed a new notice of appeal.

¶ 18

II. ANALYSIS

¶ 19 Canulli argues that the trial court’s award of attorney fees was erroneous for several reasons. As an initial matter, we note that he does not specifically challenge the portions of the court’s order disallowing fees related to clerical work, the issuance of a summons, or work performed after October 4, 2013. Instead, he focuses primarily on the disallowance of fees connected with the motion for partial summary judgment and the related motion to reconsider. He also contends that the court should have awarded fees for his research on the issue of maintenance.

¶ 20 Section 508(c) of the Act allows an attorney to file a petition for final fees and costs after withdrawing as counsel. The statute provides, in relevant portion:

“The court shall first consider the written engagement agreement and, if the court finds that the former client and the filing counsel, pursuant to their written engagement agreement, entered into a contract which meets applicable requirements of court rules and addresses all material terms, then the contract shall be enforceable in accordance with its terms, subject to the further requirements of this subdivision (c)(3). Before ordering enforcement, however, the court shall consider the performance pursuant to the contract. Any amount awarded by the court must be found to be fair compensation for the services, pursuant to the contract, that the court finds were reasonable and necessary.” 750 ILCS 5/508(c)(3) (West 2012).

Despite Canulli’s advocacy for *de novo* review, we must review the trial court’s order for an abuse of discretion. Section 508(c)(3) of the Act plainly states that the determination of reasonable attorney fees “is within the sound discretion of the trial court.” 750 ILCS 5/508(c)(3) (West 2012). “The question for the reviewing court is not whether it agrees with the trial court’s decision; rather, the reviewing court must analyze whether the trial court, in the exercise of its

discretion, acted arbitrarily without conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial injustice resulted.” *In re Marriage of Baniak*, 2011 IL App (1st) 092017, ¶ 9. For the reasons that follow, we hold that the trial court did not abuse its discretion.

¶ 21 Canulli argues that he sufficiently demonstrated that his legal fees devoted to the motion for partial summary judgment, the motion to reconsider, and his research regarding maintenance were reasonable and necessary. However, the trial court found that “there was an agreement between Mrs. Alyinovich and Mr. Canulli *** that *** the legal work performed would be streamlined” and that it “would be the most cost-efficient manner of proceeding.” The court also found that “there was [*sic*] never any subsequent conversations with [Debra] stating that a \$10,000.00 estimate that was originally put forth would be doubled, tripled or even quadrupled at a point where a trial had not been held.” Canulli does not challenge these factual findings on appeal. Instead, he suggests that the motion for partial summary judgment “presented the most efficient and inexpensive procedural means available to vacate the default judgment.”

¶ 22 The trial court reasonably disallowed all fees associated with the motion for partial summary judgment. Canulli pursued that motion almost immediately after filing a fully briefed motion to vacate for which he had already billed Debra approximately \$15,000. As an initial matter, Canulli has not cited any case where a litigant filed a motion for summary judgment with respect to a section 2-1301(e) motion. Section 2-1301(e) of the Code provides that “[t]he court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable.” 735 ILCS 5/2-1301(e) (West 2012). Ordinarily, the matter would simply proceed to a hearing on the section 2-1301(e) motion itself. See, e.g., *Jacobo v.*

Vandervere, 401 Ill. App. 3d 712, 715 (2010) (the trial court did not abuse its discretion in denying a motion to vacate a default judgment). This stands in contrast to a section 2-1401 proceeding, which “constitutes an independent and separate action from the original action” (*Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31) that is “subject to the usual rules of civil practice” (*People v. Vincent*, 226 Ill. 2d 1, 8-9 (2007)).³ Consequently, it is not entirely clear that the motion for partial summary judgment that Canulli filed was even procedurally proper, insofar as it pertained to Debra’s section 2-1301 motion. Nevertheless, James did not raise this point in his response to the motion for partial summary judgment. Nor did the trial court rely on this basis in denying Canulli’s requests for fees connected with the motion.

¶ 23 Assuming that the motion for partial summary judgment was not a procedural nullity, the question arises as to why it was reasonable or necessary to spend time and money pursuing such a motion rather than proceeding to a hearing on the fully briefed motion to vacate—or at least those portions of the motion to vacate that arguably implicated purely legal issues rather than disputed facts. Canulli says that he filed the motion for summary judgment “to avoid expensive discovery and a long and costly trial on the underlying facts.” However, Canulli candidly admitted at the hearing on the fee petition that there were factual issues involved in the motion for partial summary judgment that he filed. For example, he acknowledged that Debra’s “medical illness” was one of the issues in the motion and that “[t]hat would be a fact issue” rather than a legal issue. Canulli similarly testified that it was a factual issue whether or not all assets were disclosed, and he said that the issue of bifurcation was both a legal issue and a

³ This includes summary judgment procedures—*i.e.*, granting or denying the 2-1401 petition on the pleadings alone. *Vincent*, 226 Ill. 2d at 9.

factual issue. Indeed, the motion for partial summary judgment addressed numerous other matters that were inherently factual in nature and subject to ongoing dispute, such as whether James had made misrepresentations to the court at the prove-up hearing and whether the allocation of the marital estate was inequitable. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012).

¶ 24 To the extent that Canulli believes that there was a purely legal basis to vacate the default judgment (as opposed to a basis entrenched in disputed factual matters), he had already presented those arguments in the motion to vacate. Indeed, this seems to be what the trial court had in mind when it found that Debra's counsel "brings out a good point when she states that the Motion for Summary Judgment wasn't necessary" or "the least cost method of proceeding." As noted above, Debra's counsel argued at the hearing on the fee petition that the summary judgment motion included "totally fact based" arguments and that "[i]t would have been less expensive to just go ahead and go to hearing on the Motion to Vacate." We must not forget the trial court's unchallenged factual finding that there was an agreement between Debra and Canulli that "the legal work performed would be streamlined" and that it "would be the most cost-efficient manner of proceeding." Under these circumstances, the trial court did not abuse its discretion in disallowing fees associated with the motion for partial summary judgment and the related motion to reconsider.

¶ 25 Canulli nevertheless argues that the motion for partial summary judgment was "meritful" because the default judgment against Debra was not final and could be vacated under section 2-1301(e) of the Code. Beyond what we have already said about the motion for partial summary judgment, we express no opinion on the merits of Debra's motion to vacate, as that issue is not

properly before us. However, we note in passing that in this portion of his brief, Canulli relies only on *In re Marriage of Jackson*, 259 Ill. App. 3d 538 (1994), and moreover he inaccurately represents the holding of that case. Canulli states that the appellate court in *Jackson* “vacated a default judgment entered against the Wife under the same fact circumstances as the case *sub judice*.” In actuality, the court in *Jackson* affirmed an order striking the respondent’s section 2-1301(e) motion pursuant to local court rules due to her failure to bring the motion to hearing until a year-and-a-half after filing. *Jackson*, 259 Ill. App. 3d at 539. Canulli’s argument is therefore rooted in *Jackson*’s *dicta* rather than its holding.

¶ 26 Canulli also emphasizes that long after he withdrew, Debra’s new counsel was successful in vacating the default judgment against Debra based on the motion to vacate that Canulli had filed. The record reflects that on April 13, 2015, a different judge granted Debra’s motion to vacate in part and denied the motion in part. The record on appeal does not include a transcript of the April 13, 2015, proceedings. However, the written order indicates that the court denied “count I” of the motion to vacate “consistent with Judge Miller’s ruling on the Motion for Summary Judgment.” The court granted “count II” because “the division of property was inequitable and unconscionable.” The court made no specific ruling as to “count III,” which had been brought pursuant to section 2-1401 of the Code, but noted that this “was taken into consideration by the court in granting Count II.” The court denied “count IV,” which had alleged that James failed to comply with local court rules. It is not clear exactly why Canulli believes that this subsequent ruling shows that it was reasonable or necessary for him to have filed a motion for partial summary judgment. According to the ruling on “count I,” the successor judge apparently agreed with Judge Miller’s order denying Debra’s motion for partial summary judgment. To the extent that it is even relevant, the successor judge’s ruling would seem to

underscore that the prudent course of action was to proceed to hearing on the motion to vacate rather than incurring time and expense filing a motion for summary judgment.

¶ 27 With respect to the disallowance of fees for researching Debra’s potential maintenance claim, Canulli argues that this was “reasonably connected to the ‘central issue’ in this case, namely the vacatur of the judgment.” He also insists that even an experienced attorney must conduct some amount of legal research. Be that as it may, in light of the trial court’s finding that Debra and Canulli agreed to proceed in a cost-efficient manner, we cannot say that the court abused its discretion by disallowing fees associated with this research. Canulli arguably put the cart before the horse in researching Debra’s potential maintenance claim before succeeding in vacating the default judgment against her. As noted above, the motion to vacate was already on file when Canulli performed the research in question.

¶ 28 Canulli also argues that “before a court may disallow services admittedly provided by the attorney It [*sic*] must necessarily line itemed [*sic*] those services in order to parse out services deemed unreasonable or unnecessary and after identifying such services, provide some detail of why they were disallowed.” Canulli similarly insists that “[t]he *Judge* needs to line item the bill and no one else; to order the attorneys to argue over the bill or what services are associated with the Motion for Summary Judgment is asking the attorneys to do that which falls within the exclusive province of the trial court.” (Emphasis in original.) These arguments are unavailing. The trial court clearly identified several categories of Canulli’s work that it determined were unnecessary, and it simply asked the lawyers to prepare an order that conformed to its rulings. None of the cases that Canulli cites support that doing so was improper. For example, *Fitzgerald v. Lake Shore Animal Hospital, Inc.*, 183 Ill. App. 3d 655, 662 (1989), is readily distinguishable, because the trial judge in that case “did not make clear what billings he was striking” and simply

“clove the baby in two.” Unlike in *Fitzgerald*, the court here conducted “a full, complete and detailed hearing” and made “a ruling on each billing entry.” *Fitzgerald*, 183 Ill. App. 3d at 662.

¶ 29 Canulli also argues that the court erred in not including in its ruling a specific reason supporting each reduction. He suggests that the court “never made any findings why the legal fees associated with the Summary Judgment Motion were unreasonable and unnecessary” and that the court “simply ruled that it would not award such legal fees.” Case law indicates that “[w]hen a trial court reduces the amount requested in a fee petition, the court’s ruling should include the reasons justifying a particular reduction.” *Richardson v. Haddon*, 375 Ill. App. 3d 312, 315 (2007). However, as explained above, the trial court clearly articulated its reasons for disallowing the fees at issue.

¶ 30 Moreover, Canulli suggests that even though his efforts were unsuccessful, he should be awarded fees because he sought to vacate the default judgment in good faith. He cites several cases illustrating that a trial court in a divorce proceeding need not deny fees simply because a litigant is ultimately unsuccessful. For example, in *In re Marriage of Broday*, 256 Ill. App. 3d 699, 702 (1993), the wife knowingly declined to hire her own attorney before signing a separation agreement distributing marital assets. She thereafter retained an attorney and filed a petition for relief from the judgment pursuant to section 2-1401 of the Code on the basis that the husband failed to disclose or value certain assets. *Broday*, 256 Ill. App. 3d at 702. After the trial court vacated the judgment, the wife’s attorney filed a petition requesting fees. *Broday*, 256 Ill. App. 3d at 702. The trial court granted the fee petition (although not in the amount requested) and ordered the husband to pay 75%. *Broday*, 256 Ill. App. 3d at 702. The appellate court reversed the order granting the 2-1401 petition, determining that the wife had failed to prove fraud or unconscionability. *Broday*, 256 Ill. App. 3d at 705. Nevertheless, the court affirmed the

order requiring the husband to contribute to the wife's attorney fees. The court noted that "[a] party seeking to vacate a divorce settlement agreement may receive attorney fees if she proceeds in good faith, even if she is unsuccessful," emphasizing that the wife lacked the financial ability to pay her legal fees and that there was a "great financial disparity between the parties." *Broday*, 256 Ill. App. 3d at 706. Nothing in the trial court's ruling in the present case is inconsistent with *Broday*. The court did not disallow fees simply because Canulli was unsuccessful in his efforts on Debra's behalf. Instead, the court disallowed fees for certain work that it determined was unnecessary.

¶ 31 Furthermore, Canulli asserts that Debra forfeited any objections to the legal fees at issue by failing to object within seven days of receiving the bills, as required by the terms of the engagement agreement. Canulli cites no authority in this section of his brief, so the argument is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (an appellant's brief must contain argument with citation of authorities). " 'The appellate court is not a depository into which a party may dump the burden of research.' " *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 13 (quoting *People v. O'Malley*, 356 Ill. App. 3d 1038, 1046 (2005)). Nevertheless, forfeiture is a limitation on the parties, not this court. *O'Neal-Vidales v. Clark*, 2015 IL App (2d) 141248, ¶ 18. Forfeiture aside, the trial court enforced the seven-day requirement in the engagement agreement, with the exception of certain categories of work that Debra would not have known were unnecessary simply from reviewing the bills. Canulli does not offer any reason why Debra, a non-attorney, should have immediately known to question his litigation decision to pursue summary judgment rather than proceeding directly to hearing on the fully briefed motion to vacate.

¶ 32 Finally, Canulli argues that a trial court should award all fees that were earned and invoiced to a client in accordance with the engagement agreement as a matter of contract unless the court properly finds that specific legal fees were unreasonable or unnecessary. Having already held that the trial court did not abuse its discretion in finding that certain of Canulli's work was unnecessary, we need not address this point further.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we affirm the judgment of the trial court.

¶ 35 Affirmed.