

No. 1-14-2855

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANN McAULEY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 10 L 14797
)	
ELIZABETH MARY FEELY, LUKE)	
DAVID KAZMAR, FEELY &)	
KAZMAR, P.C., and THE LAW)	
OFFICE OF ELIZABETH M. FEELY,)	
P.C.,)	Honorable
)	James P. Flannery, Jr.,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Connors and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held:* Where appellant provided no transcript of the hearing on her section 2-1401 petition to vacate the dismissal of her case, this court lacks any basis to find the denial of the petition was an abuse of the circuit court's discretion. Moreover, the petition failed to allege a meritorious underlying claim or due diligence.

¶ 2 Plaintiff Ann McAuley appeals the circuit court's order denying her petition to vacate the 2013 order of dismissal for want of prosecution (DWP) of her legal malpractice claim against

defendants Elizabeth Mary Feely and Luke David Kazmar, the law firm of Feely and Kazmar, P.C., and the Law Offices of Elizabeth M. Feely, P.C. (referred to collectively as "defendants"). On appeal, McAuley contends the neglect of the legal malpractice case by her present counsel resulted in its dismissal and that the circuit court should have granted her petition to vacate the DWP order under section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2010)). For the reasons set out below, we affirm.

¶ 3 The 2013 order dismissing the legal malpractice case for want of prosecution was the third such order entered in this case. In December 2010, McAuley's present counsel, Gauthier & Gooch (hereinafter referred to as "counsel"), filed a complaint alleging, *inter alia*, that defendants failed to keep McAuley informed of the status of her dissolution case, caused repeated delays of the trial date, and failed to conduct necessary discovery into the marital assets.¹ The complaint alleged that in March 2010, a trial took place at which neither McAuley nor defendants appeared. The complaint alleged defendants failed to inform McAuley or counsel they would not appear on the trial date and ignored her e-mails asking "if they were still her lawyers and what was taking place in her case." The complaint alleged that had McAuley been able to testify at trial, she would have been awarded a greater share of the marital estate.

¶ 4 In September 2011, the malpractice complaint was dismissed for want of prosecution for the first time. Counsel moved to vacate the dismissal, alleging the court date of the order dismissing the complaint "was not in counsel's computer." In October 2011, the circuit court

¹ The facts of the dissolution action, which McAuley initiated in 2007, are set out in *In re Marriage of McAuley-Galassini and Galassini*, No. 1-10-3559 (2011) (unpublished order under Supreme Court Rule 23).

vacated the DWP order, reinstated the case, and found defendants in default. No further action occurred in the case until April 2012, when the circuit court entered a *sua sponte* order setting the case for status. In July 2012, the case was continued to September 24, 2012 for a status hearing on prove-up.

¶ 5 The case was dismissed for want of prosecution for a second time on August 20, 2012. The circuit court's order of that date noted the case was "above the black line." On November 5, 2012, counsel moved to vacate the dismissal, asserting "prosecution was ongoing at the time" and a prove-up was being scheduled to establish damages. Counsel stated it had no notice of the status hearing or the DWP order. On November 19, 2012, the circuit court vacated the DWP order and reinstated the case.

¶ 6 In 2013, after defendants did not appear at several court dates, counsel filed a motion for prove-up by affidavit, noting defendants had been found in default in 2011. Defendants moved to vacate the default order and quash service, asserting proper service was not made in 2011. The circuit court granted defendants' motion to quash service and vacated the default order. Defendants were given 28 days to respond to the complaint. When no response was filed in that period, counsel again moved for a default judgment. On November 4, 2013, the circuit court allowed defendants a final extension of 28 days to plead.

¶ 7 On December 17, 2013, the circuit court dismissed the case for want of prosecution. The court's form order noted the case was "above the black line."

¶ 8 On April 4, 2014, counsel filed a petition to vacate the DWP order pursuant to section 2-1401 of the Code. The petition recounted the case's procedural history and asserted defendants had taken no action in the case since its reinstatement in 2012.

¶ 9 The petition further stated:

"On December 17, 2013, this matter apparently appeared on the Black Line Trial Call. Counsel for Plaintiff is unable to verify this as the electronic Black Line Trial Call Search is not functional at the time of the drafting of this instant motion, however based upon a postcard notice received by Plaintiff's counsel that this matter was dismissed for want of prosecution by the [judge named], this appears to be the case.

* * *

[T]he postcard received by Plaintiff's counsel's support staff was mishandled and it was just discovered on April 3, 2014. Plaintiff's counsel immediately began drafting this instant motion, which will be filed on the first business day after discovering the postcard."

The petition asserted no discovery had been conducted in the case and further stated "it appears likely that Defendants will ultimately be found in default and this matter proved up as such" and the case "never should have been released to the Black Line Trial Call for trial assignment."

¶ 10 Attached to the petition was an affidavit of Thomas W. Gooch III, the primary trial attorney for McAuley in the legal malpractice action. Gooch attested that his office was not aware of the December 17, 2013 trial call, alleging the postcard notice of the DWP was not brought to his attention or that of his law partner when it was received. Gooch's affidavit was not

executed. Also attached to the petition were copies of the circuit court's orders entered between May and November 2013.

¶ 11 After a hearing on June 17, 2014, the circuit court denied McAuley's section 2-1401 petition, entering an order stating "the basis for vacating the order as set forth in the Motion to Vacate is insufficient." Counsel filed a motion to reconsider. A court order setting that motion for a hearing indicated defendants would file no response to the motion. On September 9, 2014, the court denied the motion to reconsider. A timely notice of appeal was filed from that ruling.

¶ 12 On appeal, McAuley contends the circuit court erred in denying her section 2-1401 petition and denying the motion to reconsider that ruling. As a threshold matter, we note that when a party appeals the denial of a motion to reconsider, this court may address any issues concerning the underlying order. See *Heller Financial, Inc. v. Johns-Byrne Co.*, 264 Ill. App. 3d 681, 688 (1994) (notice of appeal from a denial of a motion to reconsider is sufficient to vest the appellate court with jurisdiction to review the underlying order of ultimate judgment).

Therefore, even though McAuley now has filed an appeal from the circuit court's ruling on the motion to reconsider, that order incorporated all previous orders comprising the circuit court's judgment in this case, most notably the order denying the section 2-1401 petition.

¶ 13 Section 2-1401 of the Code provides a comprehensive statutory procedure for vacating or modifying final judgments more than 30 days after their entry. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). A party seeking to vacate a default judgment must show that "through no fault or negligence of his own, an error of fact or existence of a valid defense was not made to appear to the trial court in the initial proceedings." *Ameritech*

Publishing of Illinois, Inc. v. Hadyeh, 362 Ill. App. 3d 56, 59 (2005). Relief under section 2-1401 invokes the "equitable powers of the circuit court" and "whether a section 2-1401 petition should be granted lies within the sound discretion of the circuit court, depending upon the facts and equities presented." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986). Accordingly, the circuit court's ruling on a petition seeking relief from judgment under section 2-1401 will be disturbed on appeal only upon a finding of an abuse of that discretion. *Paul*, 223 Ill. 2d at 95.

¶ 14 Although McAuley responds "there was no report of proceedings in the common law record," that does not excuse her omission. As the appellant, it is McAuley's burden to present a sufficiently complete record of the proceedings in the circuit court. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). McAuley has not furnished this court with any record of the June 17, 2014 hearing, at which the circuit court heard the arguments of counsel on the section 2-1401 petition and denied the petition. We also have no record of the September 9, 2014 hearing on the motion to reconsider that ruling. In lieu of a transcript, such a record can be made by way of a bystander's report or an agreed statement of facts. See Illinois Supreme Court Rule 323(c), (d) (eff. Dec. 13, 2005). We also note that McAuley has appended numerous documents to her appellate brief that appear duplicative of the common law record. However, if those documents are not otherwise part of the record on appeal, they cannot be considered by this court. See *In re Marriage of Kuyk*, 2015 IL App (2d) 140733, ¶ 21 (attachments to briefs not otherwise of record are not properly before this court).

¶ 15 In the absence of a record supporting McAuley's claim of the circuit court's error, this court has no documentation of the arguments made by the parties or of the circuit court's

reasoning in denying her request for relief. Thus, this court has no meaningful basis to evaluate whether the circuit court's ruling constituted an abuse of discretion. Any doubts arising from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392.

Numerous cases have discussed the particular applicability of *Foutch* where an abuse of discretion standard is involved. See, e.g., *Gakuba v. Kurtz*, 2015 IL App (2d) 140252, ¶ 22 (presumption that the court acted properly in absence of a complete record applies "especially" when standard of review is abuse of discretion); *Willis Capital LLC v. Belvedere Trading LLC*, 2015 IL App (1st) 132183, ¶ 23; *Young v. Alden Gardens of Waterford, LLC*, 2015 IL App (1st) 131887, ¶ 67; *Victor Township Drainage District 1 v. Lundeen Family Farm Partnership*, 2014 IL App (2d) 140009, ¶¶ 34-36; *In re Marriage of Blinderman*, 283 Ill. App. 3d 26, 34 (1996).

Without an adequate record of the claimed error, this court must presume the circuit court's order had a sufficient factual basis and conformed with the law. *Foutch*, 99 Ill. 2d at 391-92.

¶ 16 Moreover, based solely on our review of McAuley's section 2-1401 petition, the petition does not allege facts to support the existence of a meritorious claim. A petition brought pursuant to section 2-1401 must set forth specific factual allegations supporting three elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition seeking relief. *Paul*, 223 Ill. 2d at 94. We focus on the first and third elements. As to the first element, the requirement that a section 2-1401 petition allege a meritorious claim is designed to ensure that the party bringing the petition, having had one chance in court that it failed to observe, does not gain a second chance without some support for its position. *Ameritech*

Publishing, 362 Ill. App. 3d at 59. A petition under section 2-1401 must be supported by affidavit or other showing of matters not contained in the record. 735 ILCS 5/2-1401(b) (West 2010).

¶ 17 Thus, to resurrect the "original action" in this case, *i.e.*, the legal malpractice claim, the section 2-1401 petition was required to provide specific factual allegations as to the merits of that claim. To allege legal malpractice, McAuley's present counsel was required to prove a "case within a case," *i.e.*, that defendants were negligent in their representation of McAuley in the dissolution case and that but for their negligent acts or omissions, McAuley would have prevailed in her dissolution trial and received an equitable financial judgment. See *Rodi v. Horstman*, 2015 IL App (1st) 142787, ¶ 31. Here, the petition alleged that defendants delayed the legal malpractice suit by obtaining continuances and failing to file responsive pleadings, and as a result, the case could not proceed to a prove-up or "any substantive resolution on the merits." The petition alleged it appeared "likely" that defendants would "ultimately be found in default" and "this matter proved up as such." Those bare allegations do not present the existence of a meritorious legal malpractice claim.

¶ 18 Furthermore, McAuley and her counsel did not exercise due diligence in filing the section 2-1401 petition. Due diligence requires that the section 2-1401 petitioner have a reasonable excuse for failing to act within the appropriate time. *Johnson v. Wal-Mart Stores, Inc.*, 324 Ill. App. 3d 543, 547 (2001), citing *Smith*, 114 Ill. 2d at 222. Due diligence is judged by the reasonableness of the petitioner's conduct under all of the circumstances, including the conduct of the litigants and their attorneys. *Paul*, 223 Ill. 2d at 99-101; see also *Robinson v. Ryan*, 372 Ill.

App. 3d 167, 176-77 (2007). Relief under section 2-1401 is available only to those who diligently pursue their claims and remedies in court, not those who disregard court procedures. *Johnson*, 324 Ill. App. 3d at 548.

¶ 19 The section 2-1401 petition was accompanied by an unexecuted affidavit of Gooch that his office was not aware of the December 17, 2013 trial call at which the DWP order was entered. McAuley asserts on appeal that the petition was prepared immediately after counsel learned, on April 3, 2014, that a paralegal "mishandled" the postcard from the court informing counsel's office about the DWP ruling more than three months earlier. McAuley asserts that the member of counsel's office staff "had only been employed as a paralegal for approximately two months when the postcard was presumably received" and contends counsel "was unable to verify the Black Line Trial Call date" at the time the motion to vacate was drafted.

¶ 20 It is the duty of every litigant to follow the progress of litigation to which they are a party. *Flisk v. Central Area Park District*, 203 Ill. App. 3d 253, 256 (1990). A party is generally bound by the mistakes or negligence of its counsel. *R.M. Lucas Co. v. Peoples Gas Light & Coke Co.*, 2011 IL App (1st) 102955, ¶ 18. A section 2-1401 petition will not relieve a party of the consequences of its attorney's neglect of a matter, even when that results in the entry of a default judgment. *Id.* (citing *Paul*, 223 Ill. 2d at 105); see also *Ameritech Publishing*, 362 Ill. App. 3d at 60; *Dassion v. Homan*, 161 Ill. App. 3d 141, 145 (1987) ("[t]he intent of section 2-1401 *** is not to relieve parties from the consequences of their own mistakes or their attorneys' negligence"). Therefore, McAuley has not alleged either a meritorious claim against defendants or due diligence in bringing the section 2-1401 petition.

¶ 21 In summary, without a transcript of the hearing at which the circuit court denied McAuley's section 2-1401 petition, we cannot find that denial reflected an abuse of the circuit court's discretion. In addition, relief from judgment under section 2-1401 is not available without allegations of a meritorious underlying claim and due diligence.

¶ 22 Accordingly, the circuit court's order denying McAuley's petition to vacate the dismissal of her legal malpractice case for want of prosecution is affirmed.

¶ 23 Affirmed.