2016 IL App (2d) 151119-U
No. 2-15-1119
Order filed April 8, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF KIMBERLY BEATTIE	)	Appeal from the Circuit Court of Kane County.
Petitioner-Appellee,	)	
and	)	No. 06-D-1325
MICHAEL P. BEATTIE,	)	Honorable David P. Kliment,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Where central facts were in dispute, the trial court erred in making findings of fact and granting petitioner's section 2-619 motion to strike and dismiss respondent's section 2-1401 petition without holding an evidentiary hearing. Vacated and remanded for further proceedings.

¶ 2 Respondent, Michael P. Beattie, appeals from the dismissal of his petition for relief from judgment under section 2-1401 (735 ILCS 5/2-1401 (West 2014)) pursuant to a motion to dismiss and strike under section 2-619 (735 ILCS 5/2-619) (West 2014)) brought by petitioner, Kimberly A. Beattie, a/k/a Kimberly Stewart. We vacate and remand to the circuit court for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Kimberly and Michael were married in June, 2003. In November, 2006, a judgment for dissolution of their marriage incorporating a marital settlement agreement was entered. Kimberly was awarded the sole care, custody control and education of the two children born to Kimberly and Michael during their marriage. Michael was awarded reasonable and liberal visitation with the children.

¶ 5 On November 9, 2012, Michael filed a petition for modification of the custody judgment, citing changed circumstances. Michael supported his request for the care, custody, control and education of the minor children with numerous allegations of misconduct by Kimberly, including excessive drinking and partying in the presence of the children, bad-mouthing of Michael to the children, and showing favoritism to one child at the expense of the other.

¶ 6 After filing the petition for modification, Michael requested and received the appointment of a guardian *ad litem* and a custody evaluator. On July 24, 2014, a Parenting Agreement was entered. Neither party took depositions or sought other discovery following the filing of the modification petition and prior to the entry of the Parenting Agreement. Pursuant to the agreement, Kimberly remained the sole custodial parent of the children.[1]

¶ 7 Michael filed his section 2-1401 petition for relief from the entry of the Parenting Agreement on May 4, 2015. On June 24, 2015, after obtaining an affidavit from Kimberly's ex-boyfriend, Brian George, Michael filed an amended petition for relief incorporating Brian's

[1] Although Kimberly argues on appeal that both the guardian *ad litem* and custody evaluator recommended that the children remain in her custody, she cites only to her own trial court arguments in support; there is no competent evidence in the record of a report by either appointee.

affidavit. The affidavit contained numerous allegations of alcohol and drug abuse by Kimberly at home and in the car, with the children present; during the time period Brian dated and resided with Kimberly, October, 2010, through February, 2015. The affidavit also contained allegations that Kimberly instructed and coached the children and Brian to lie to the custody evaluator about her behavior and about Michael's shortcomings as a father. According to Brian, Kimberly was proud of her ability to manipulate and lie to the custody evaluator. Brian further alleged that Kimberly would not allow him to remain in the residence when the guardian *ad litem* visited because she did not want Brian to speak with her about living with the children.

¶ 8 Kimberly moved to dismiss the section 2-1401 petition on its merits under section 2-619(a)(4) of the Code of Civil Procedure (735 ILCS 5/2-619(4) (West 2014)), arguing that the petition was barred by *res judicata* because the petition sought "to re-litigate the exact same pleading and allegations [Michael] filed on November 9, 2012, which were resolved by an Agreed Custody Order on June, 24, 2014." Kimberly also challenged the petition on it s factual merits and attached an affidavit to her 2-619 motion to dismiss. In his response to the motion to dismiss, Michael asserted that *res judicata* did not apply because a proper pleading under section 2-1401 also required the existence of a final judgment. Michael further addressed the factual issues raised by Kimberly's motion and affidavit.

¶ 9 A hearing was set for October 20, 2015. Prior to the hearing, Michael successfully moved to reappoint the guardian *ad litem*, subpoenaed documents from the custody evaluator, subpoenaed Brian's appearance and testimony at the hearing, and filed a motion *in limine* asking the court to bar Kimberly from testifying or presenting witnesses at the hearing due to her failure to respond to Michael's discovery requests.

¶ 10 Michael's section 2-1401 petition for relief, his motion *in limine*, and Kimberly's motion to dismiss the petition were scheduled to be heard on October 20, 2015. The court heard argument on the motion to dismiss first. Kimberly did not raise the *res judicata* defense that she had argued in her section 2-619 motion to dismiss. Instead, she primarily argued that Michael had not been diligent in pursuing the allegations of his petition prior to the entry of the Parenting Agreement in 2014 or in presenting the petition to the court following the entry of the Parenting Agreement. Michael briefly reiterated his position that *res judicata* did not apply and argued that, for purposes of a section 2-619 motion, the court must accept the allegations of his petition and the supporting affidavit as true. He also stated that he had exercised due diligence "in asking the court to investigate the underlying motion, and . . . [in] coming into court" after the affidavit was signed.

¶ 11 The court granted the motion to dismiss, finding that "the allegations contained or made in the affidavit basically mirror what's set forth in the Petition for Modification of Custody and for Other Relief, so I find that [Michael] did not exercise due diligence in this matter." The court concluded: "I find that relief under section 2-1401 is not available to reverse an agreed custody judgment where [Michael] stipulated that such a judgment was in the best interest of the minor children [and] where he had the chance to conduct discovery which would have discovered all the things he's complaining about now."

¶ 12 This timely appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Generally, to obtain relief under section 2–1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting that defense or claim to the trial

court in the original action; and (3) due diligence in filing the section 2–1401 petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220–21 (1986). When the facts supporting a section 2–1401 petition are challenged by the respondent, a full and fair evidentiary hearing should be held. *Warren County Soil & Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 51.

¶ 15 The purpose of a motion to dismiss pursuant to section 2–619 is to dispose of a case on the basis of issues of law or easily proved issues of fact. *Fleckles v. Diamond*, 2015 IL App (2d) 141229, ¶ 30. A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts certain defects, defenses, or other affirmative matters that act to defeat the claim. *Id.* In ruling on a section 2–619 motion, all pleadings and supporting documents must be construed in the light most favorable to the nonmoving party, and the motion should be granted only where no material facts are in dispute and the defendant is entitled to dismissal as a matter of law. *Id.*

¶ 16 Where a motion to dismiss is made pursuant to section 2–619 on grounds not appearing on the face of the pleading attacked, the motion must be supported by affidavit. *Hoppe*, 220 Ill.App.3d at 284. "Thus, when a party responds to a 2–1401 petition on the merits, he [or she] must raise arguments challenging the relief sought and must file an affidavit opposing the factual assertions made by the petitioner." *Id.* Such a motion and affidavit is "in the nature of a motion for summary judgment." *Id.* See also *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993).

¶ 17 "A section 2–1401 petition is subject to a motion to dismiss where it either fails to state a cause of action or shows on its face that the petitioner is not entitled to relief. *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 279–80 (1982). However, a motion to dismiss should not be granted unless it clearly appears that no set of facts could ever be proved that would entitle the plaintiff to relief. *Ostendorf*, 89 Ill.2d at 280." *In re Det. of Morris*, 362 Ill.

App. 3d 321, 323 (2005); *In re Marriage of Hoppe*, 220 Ill. App. 3d 271, 285 (1991). A dismissal order entered pursuant to section 2-619 in a section 2–1401 proceeding is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 18 In the matter before us, Kimberly attached an affidavit to her 2-619 motion to dismiss opposing the factual assertions in Michael's petition. Thus, we must consider whether the existence of a genuine issue of material fact should have precluded the dismissal. *Kedzie*, 156 Ill. 2d at 116–17. Our review shows that, contrary to the trial court's finding, the allegations in the petition and Brian's affidavit do not "mirror" the allegations in Michael's 2012 petition for modification of the custody judgment but, rather, raise for the first time fraud and manipulation in the procurement of the Parenting Agreement that awarded sole custody to Kimberly. Especially given that the best interests of the children are at stake, these new allegations, and Kimberly's denials, present genuine issues of material fact, necessitating an evidentiary hearing. See *In re R.L.S.*, 218 Ill. 2d 428, 442 (2006) ("[f]it parents are presumed to act in the best interests of their children"); *Ostendorf*, 89 Ill. 2d at 286 (if any of the "central facts" in a section 2-1401 proceeding are controverted, the court must hold an evidentiary hearing). Because Brian's affidavit presents new and contested allegations of fact involving the best interests of Kimberly's and Michael's children, the trial court erred in granting the section 2-619 motion to dismiss without holding an evidentiary hearing.

¶ 19 The trial court further erred in finding as a matter of dispository fact, without holding a hearing, that relief under section 2-1401 was not available "where [Michael] had the chance to conduct discovery which would have discovered all the things he's complaining about." In determining that Michael failed to exercise due diligence in pursuing his claims, the court did not decide that dismissal was appropriate as a matter of law because there was no genuine issue of

material fact that should preclude dismissal. See *Kedzie*, 156 Ill. 2d at 116–17. To the contrary, the court's suggestion that early discovery would have uncovered the facts now alleged by Michael begs the question of whether a fact issue precludes dismissal under section 2-619.

¶ 20 Kimberly argues that Michael is not entitled to an evidentiary hearing because he did not set forth specific factual allegations showing due diligence in the underlying action or in filing the petition for relief from judgment and because he failed to allege fraud with "specificity, particularity and certainty." The sufficiency of the pleadings, however, is not at issue in a section 2-619 proceeding; rather, a motion to dismiss under section 2-619 admits the legal sufficiency of the complaint. *Fleckles v. Diamond*, 2015 IL App (2d) 141229, ¶ 30.

¶ 21 Kimberly also challenges the sufficiency of Brian's affidavit under Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). "This court has noted that Rule 191 is satisfied if, after review of the affidavit as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial." *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 71. (Citations omitted.) As stated in his affidavit, Brian dated or resided with Kimberly throughout the time period referenced in his affidavit (October 2010 to February 2015). He attests that he personally witnessed the events he describes, and it is reasonable to infer that he could competently testify to the contents of his affidavit at trial or an evidentiary hearing.

¶ 22 Finally, Kimberly argues that Michael waived his right to an evidentiary hearing because he did not request one. An appellate court, however, may vacate a trial court's grant of a section 2-619 motion and recommend that there be an evidentiary hearing on remand when no evidentiary hearing was requested. See *Nosbaum ex rel. Harding v. Martini*, 312 Ill. App. 3d 108, 122-23 (2000).

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we vacate and remand for further proceedings.

¶ 25 Vacated and remanded.