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2014 IL App (3d) 150551-U

Order filed April 19, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

In re MARRIAGE OF)	Appeal from the Circuit Court
RICK ANDERSON,)	of the 10th Judicial Circuit,
)	Tazewell County, Illinois.
Petitioner-Appellee,)	
)	Appeal No. 3-15-0551
v.)	Circuit No. 04-D-541
)	
NANCY ANDERSON,)	The Honorable
)	Paul Gilfillan,
Respondent-Appellant.)	Judge, Presiding.
)	

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court properly dismissed ex-wife's petition seeking to vacate an agreed order setting maintenance where petition was filed over three years after agreed order was entered and failed to allege sufficient facts to support relief.
- ¶ 2 More than six years after the parties divorced and over three years after the trial court entered an agreed order requiring petitioner Rick Anderson to pay respondent Nancy Anderson \$6,000 per month in "indefinite maintenance," Nancy filed a petition, pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), seeking to

vacate the agreed order and increase maintenance. After the trial court dismissed that petition without prejudice, Nancy filed an amended and supplemental petition alleging that Rick had misrepresented his income, that his misrepresentation constituted fraud, and that she was under duress when she agreed to the order. Rick filed a motion to dismiss, which the trial court granted, dismissing the amended petition with prejudice. We affirm.

¶ 3

FACTS

¶ 4

Rick and Nancy were married in 1976 and had four children during their marriage. In 2004, Rick filed a petition for dissolution of marriage. At that time, Nancy was a homemaker, and Rick was employed as a physician at Methodist Medical Center. In a 2005 financial affidavit, Rick listed his gross monthly income as \$23,371.25. Nancy had no income but had a bachelor's degree and was working toward her master's degree.

¶ 5

The trial court entered a judgment of dissolution in 2007 that incorporated a marital settlement agreement. Pursuant to the agreement, Rick was required to pay Nancy child support in the amount of \$3,803.12 per month, plus 28% of his net income from Prairie Emergency Group and 28% of his net income from any bonus he received from Methodist Medical Center. Child support was to terminate on May 31, 2010.

¶ 6

Rick was also ordered to pay Nancy maintenance of \$2,988.17 per month, plus 22% of his net income from Prairie Emergency Group and 22% of his net income from any bonus from Methodist Medical Center. According to the agreement: "Bonus shall include any earned income that he could have taken as a cash bonus but chose to put into a deferred compensation account. It does not include retirement or qualified funds unless Rick has the choice to take such funds as a cash bonus." The maintenance was set to terminate on May 31, 2010, but could be

extended if Nancy filed “proper pleadings requesting maintenance to be continued past May 2010.”

¶ 7 On April 26, 2010, Nancy filed a petition to extend and modify maintenance, seeking to increase her monthly maintenance “permanently to \$11,926.91, plus 50% of Petitioner’s deferred income.” Attached to the petition was a copy of Rick’s 2009 tax return and W-2s, showing that Rick earned \$392,398 that year. According to Nancy’s financial affidavit, she was earning \$826 per month as a counselor and adjunct instructor. Rick listed his gross monthly income as \$28,329.09 on an unsigned financial affidavit filed in May 2010. He also provided copies of paycheck stubs, showing that he earned \$28,473.09 in February 2010. On May 18, 2010, an agreed order was entered granting Nancy “indefinite maintenance” of \$6,000 per month beginning on June 1, 2010.

¶ 8 In January 2014, Nancy filed a petition, pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)), to vacate the May 18, 2010 agreed order and modify maintenance. The petition alleged that Rick misrepresented his income to the court and that his actual gross income, including deferred compensation, was \$653,011 in 2010. Rick filed a motion to dismiss Nancy’s petition. The trial court granted Rick’s motion and dismissed Nancy’s petition without prejudice.

¶ 9 In November 2014, Nancy filed an amended and supplemental 2-1401 petition, alleging that Rick misrepresented “that his gross monthly income from all sources *** in 2010 was \$28,329.09.” Nancy alleged in pertinent part:

“16. That on or about October 2013 Respondent watched a television show, which led her to contact the Attorney General, from whom she obtained documentation which became available online through guidestar.com two years after the year the income was

earned, which clearly shows that that [sic] Petitioner was concealing income he deferred from Methodist Medical Center in 2010 and that his actual gross income in 2010 was \$54,417.58 per month.”

17. That based upon the Petitioner’s actual gross income of \$54,417.58 per month, the maintenance award of \$6,000 per month is unconscionable and it was procured through the fraudulent misrepresentations of the Petitioner who at all times prior to and on May 18, 2010 has represented to the Court that his deferred income is income for purposes of setting his support obligations, but has never disclosed his deferred income. Furthermore, in light of the fact that if no maintenance had been awarded on May 18, 2010, maintenance would have terminated permanently, respondent was under duress.

24. That if Respondent had known the truth about Petitioner’s income, that it was actually \$54,417.58 per month and not \$28,329.09 per month, she would NEVER have agreed to accept \$6,000 ***, and she would have insisted that she receive at least \$11,525 per month *** on May 18, 2010, as and for permanent maintenance.”

Nancy asked the court to vacate the May 18, 2010 agreed order and modify it so that Rick would be required to pay “\$11,525.00 per month retroactive to May 18, 2010.”

¶ 10 Rick filed a combined motion to dismiss Nancy’s amended and supplemental petition, pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)). The trial court granted Rick’s motion and dismissed Nancy’s amended petition with prejudice, finding that dismissal was appropriate under section 2-619 of the Code (735 ILCS 5/619 (West 2012)) because (1) Nancy did not comply with the two-year limitation period of section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)); (2) “no allegations of duress or fraud (to the extent they

are factually alleged) can be established on the basis of this file’s record”; (3) Nancy “has failed to exercise due diligence”; and (4) Rick’s motion to dismiss cites portions of the record that negate or refute Nancy’s “conclusions (of law and fact).” The court also found that dismissal was appropriate under section 2-615 of the Code (735 ILCS 5/615 (West 2012)) because Nancy’s petition was “replete with unacceptable conclusion of law/fact and argument” and that, based on the record, Nancy “will not be able to state a viable 2-1401 cause of action.”

¶ 11 ANALYSIS

¶ 12 Nancy argues that the trial court improperly dismissed her amended and supplemental petition to vacate and modify.

¶ 13 A section 2-1401 petition is a statutory procedure by which judgments may be vacated after 30 days but not later than two years after the entry thereof. 735 ILCS 5/2-1401 (West 2012). The purpose of a section 2-1401 petition is to bring before the trial court facts not appearing in the record that if known to the court at the time judgment was entered would have prevented its entry. *Burchett v. Goncher*, 235 Ill. App. 3d 1091, 1098 (1991).

¶ 14 To be entitled to relief under section 2-1401 of the Code, the petitioner must set forth specific factual allegations (1) showing the existence of a meritorious claim, (2) demonstrating due diligence in presenting the claim to the circuit court in the original action, and (3) showing that the petitioner acted with due diligence in filing the section 2-1401 petition. *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 15. The petitioner bears the burden of establishing her right to relief. *Id.*

¶ 15 A section 2-1401 petition is not intended to give the litigant another opportunity to do what she should have done in an earlier proceeding. *In re Marriage of Himmel*, 285 Ill. App. 3d 145, 148 (1996); *Burchett*, 235 Ill. App. 3d at 1098. A judgment will be set aside because of a

misrepresentation only if the misrepresentation could not reasonably have been discovered at the time of, or prior to, the entry of the judgment. *Himmel*, 285 Ill. App. 3d at 148. A litigant will not be relieved of the consequences of her lack of diligence in failing to discover relevant information. *Id.*

¶ 16 A motion to dismiss a section 2-1401 petition is reviewed under the same standards as any motion to dismiss a pleading. *In re Marriage of Lyman*, 2015 IL App (1st) 132832, ¶ 57. Only well-pleaded facts are admitted. *In re Marriage of Travlos*, 218 Ill. App. 3d 1030, 1036 (1991). Conclusions of law or factual conclusions that are unsupported by allegations of specific facts are not admitted. *Vincent v. Williams*, 279 Ill. App. 3d 1, 5 (1996). We review *de novo* a trial court's ruling on a motion to dismiss. See *Lyman*, 2015 IL App (1st) 132832, ¶ 57.

¶ 17 Here, Nancy fails to allege specific facts to support many of the required elements of her section 2-1401 petition. First, Nancy fails to allege facts establishing a meritorious claim or defense. Nancy alleges in her petition that Rick concealed that he was receiving deferred compensation. However, the record establishes that Nancy knew that Rick received deferred compensation in 2010 and several years prior thereto. The marital settlement agreement entered into by the parties in 2007 makes reference to deferred compensation and indicates that certain deferred compensation is to be treated as a "bonus" for child support and maintenance purposes. Additionally, Nancy specifically mentioned deferred compensation in her 2010 petition to extend and modify maintenance, requesting that she receive maintenance in the amount of \$11,926.91, "plus 50% of Petitioner's deferred income." Nancy knew Rick was receiving deferred compensation when she entered into the agreed order, thereby negating her claim of concealment and misrepresentation by Rick.

¶ 18 Nancy's petition also fails to allege specific facts establishing that she exercised due diligence in discovering Rick's alleged concealment. "Due diligence is judged by the reasonableness of a petitioner's conduct under the circumstances." *Goldsmith*, 2011 IL App (1st) 093448, ¶ 49. A party fails to exercise due diligence when she elects to accept the representations and warranties of the other party instead of engaging in formal discovery. *Id.*; *Lyman*, 2015 IL App (1st) 132832, ¶ 83.

¶ 19 Here, Nancy knew that Rick was receiving deferred compensation but chose to forego formal discovery to determine the amount of deferred compensation he was receiving. Thus, she did not act with due diligence. See *Goldsmith*, 2011 IL App (1st) 093448, ¶ 50. Without showing due diligence, Nancy failed to establish a necessary element of her section 2-1401 petition. *Id.*

¶ 20 Nancy's petition was also properly dismissed because it was not brought within the time constraints of section 2-1401. Nancy filed her initial petition in January 2014, over three years after the agreed order was entered on May 18, 2010. This was well beyond the two-year time limitation set forth in section 2-1401. See 735 ILCS 5/2-1401(c) (West 2012). Thus, the petition was not timely and was properly dismissed on that basis. See 735 ILCS 5/2-619(a) (5) (West 2012).

¶ 21 Nevertheless, Nancy contends that her petition was timely because it contained allegations of duress and fraud. The two-year limitation mandated by section 2-1401 need not be adhered to upon a clear showing that the person seeking relief is under duress or the ground for relief is fraudulently concealed. *King v. King*, 130 Ill. App. 3d 642, 655 (1985).

¶ 22 A

¶ 23 Duress is defined as the imposition, oppression, undue influence or the taking of undue advantage of the stress of another whereby one is deprived of the exercise of his free will. *In re Marriage of Hamm-Smith*, 261 Ill. App. 3d 209, 215 (1994). The person asserting duress has the burden of proving, by clear and convincing evidence, that she was bereft of the quality of mind essential to make the contract. *Id.* To establish duress, there must be facts showing that extreme pressure was imposed on one party by the other party, the court or counsel. See *In re Marriage of Steichen*, 163 Ill. App. 3d 1074, 1079 (1987). Duress is not established merely because a party is in a vulnerable position. See *In re Marriage of McCaskey*, 167 Ill. App. 3d 860, 864-65 (1988).

¶ 24 Here, Nancy's petition contains one sentence regarding duress. Her sole allegation of duress states: "[I]n light of the fact that if no maintenance had been awarded on May 18, 2010, maintenance would have terminated permanently, respondent was under duress." This lone allegation is insufficient because it contains no facts alleging that Nancy was bereft of the quality of mind essential to enter into an agreement. See *Hamm-Smith*, 261 Ill. App. 3d at 217. Additionally, Nancy failed to assert facts showing that Rick, the trial court or counsel imposed extreme pressure on Nancy. See *Steichen*, 163 Ill. App. 3d at 1079. Instead, Nancy merely alleged that she felt rushed into entering the agreement because her maintenance was going to terminate soon. While this allegation supports that Nancy may have been in a vulnerable position, it fails to establish that she was under duress. See *McCaskey*, 167 Ill. App. 3d at 864-65. Moreover, any vulnerability that Nancy felt was caused by her own delay in seeking to extend maintenance. Pursuant to the terms of the marital settlement agreement, it was Nancy's responsibility to file pleadings to extend maintenance beyond May 31, 2010. By filing her petition to extend and modify maintenance just 35 days before her maintenance was scheduled to

end, Nancy put herself in a difficult position. Nancy's petition failed to allege sufficient facts supporting her claim of duress.

¶ 25

B

¶ 26

To prove fraud, the complainant must show that (1) the other party falsely stated a material fact or concealed a material fact that he had a duty to disclose; (2) the fact was intentionally misstated or concealed to induce the complainant to act; and (3) that the complainant detrimentally relied upon the misstatement or the nonexistence of the fact. *Travlos*, 218 Ill. App. 3d at 1037. If a person does not avail herself of the means of knowledge available to her, she cannot complain that she was misled by a misrepresentation. *Id.* at 1038-39.

¶ 27

In her petition, Nancy alleges that Rick committed fraud when he misrepresented "that his gross monthly income from all sources *** in 2010 was \$28,329.09." However, Nancy fails to allege sufficient facts to establish any of the elements required to prove fraud. First, Nancy failed to establish that Rick falsely stated or concealed a material fact. As explained above, Nancy was aware, based on the terms of the marital settlement agreement and her petition to extend and modify maintenance, that Rick was receiving deferred compensation. While Nancy claims that she did not know the amount of deferred compensation Rick was receiving, she fails to establish that Rick falsely stated a material fact when he did not include his deferred compensation in his gross income. The marital settlement agreement provides that a certain type of deferred compensation is to be considered a "bonus." However, nothing in the agreement or any other document in the record required Rick to include any or all of his deferred compensation in his "gross income." Thus, Nancy failed to allege facts sufficient to support the first element of fraud.

¶ 28 Nancy also failed to establish facts sufficient to support the second element of fraud: that Rick intended to conceal or misstate his gross income. The record shows that Rick consistently reported his gross income without including his deferred compensation. In his 2005 financial affidavit, Rick reported his gross monthly as \$23,371.25. This did not include his deferred compensation. When he was required to complete a financial affidavit again in 2010, he reported his gross monthly income as \$28,329.09, which did not include his deferred compensation. The amount reported by Rick was supported by pay stubs, a tax return and W-2s. Because Rick's reporting of his gross income in 2010 was consistent with his past practices and supported by documentation, Nancy failed to sufficiently allege facts establishing that Rick intentionally concealed or misrepresented his income.

¶ 29 Finally, Nancy failed to allege sufficient facts establishing that she detrimentally relied on Rick's alleged misrepresentation of his income. That a party could have discovered information through her own investigation diminishes a claim of detrimental reliance. *In re Marriage of Broday*, 256 Ill. App. 3d 699, 704 (1993). Here, Nancy knew about Rick's deferred compensation but failed to perform adequate discovery to determine its value. Nancy's failure to use resources available to her to discover the amount of Rick's deferred compensation diminishes claim of detrimental reliance. See *id.*

¶ 30 In this case, the record shows that Nancy knew that Rick was receiving deferred compensation when she entered into the marital settlement agreement in 2007 and when she filed her petition to extend and modify maintenance in 2010. She could have made an effort to determine the amount of Rick's deferred compensation, but she failed to do so. The trial court properly refused to give Nancy another opportunity to do what she could have done before agreeing to the May 18, 2010 order. The court did not err in dismissing Nancy's petition.

¶ 31 The judgment of the circuit court of Tazewell County is affirmed.

¶ 32 Affirmed.