2017 IL App (1st) 160630-U
No. 1-16-0630
September 26, 2017

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

EMILY NORA NETTLE,	)	Appeal from the Circuit Court
	)	Of Cook County.
Petitioner-Appellant,	)	
	)	No. 14 L 3352
v.	)	
	)	
HEATHER M. McMAHON,	)	The Honorable
	)	John H. Ehrlich,
Respondent-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justice Pucinski concurred in the judgment.
Justice Mason specially concurred in the judgment.

ORDER

¶ 1 *Held*: A circuit court does not abuse its discretion when it grants a section 2-1401 petition if (i) the petition is supported with a verification by certification and the petition is signed under oath, and (ii) the petitioner alleges that the judgment was void, which negates the need to establish a meritorious defense or due diligence.

¶ 2 On July 14, 2013, Emily Nettle was visiting Heather McMahon's home when she alleges that a pit bull owned by McMahon attacked her. Nettle filed a complaint against McMahon and alleged that McMahon negligently failed to restrain the pit bull. On April 18, 2014,

Deputy Sheriff Bruce House filed an affidavit in which he averred that he served the defendant by substitute of service on April 14, 2014 when he left a copy of the summons and complaint at the McMahon's usual place of abode with a family member who was 13 years or older, Val McMahon, and informed him of the contents of the summons. On September 5, 2014, Nettle filed a motion for default and the circuit court granted the motion because McMahon failed to appear, answer, or otherwise plead. On October 10, 2014, the circuit court entered a judgment in favor of Nettle and against McMahon in the amount of $150,000, plus costs. On August 14, 2015, McMahon filed a section 2-1401 petition and moved to vacate the judgment on the grounds that substitute service was defective because no male living at the residence had any knowledge of any service of summons. On February 18, 2016, the circuit court granted McMahon's 2-1401 petition. Nettle appeals and maintains that the circuit court abused its discretion when it granted McMahon's 2-1401 petition.

¶ 3 We find that the circuit court did not abuse its discretion when it granted McMahon's 2-1401 petition because she supported her petition with a verification by certification which she signed under oath. Furthermore, because she challenged the judgment on the basis of voidness, we find that she did not need to allege, nor do we need to determine if she established a meritorious defense or exercised due diligence as generally required to support a section 2-1401 petition.

¶ 4 Background

¶ 5 On July 14, 2013, Emily Nettle was visiting Heather McMahon's home, which was located at 5713 West 88th Place in Oak Lawn, Illinois. During the visit, a pit bull owned by McMahon attacked Nettle. On March 24, 2014, Nettle filed a complaint against McMahon

and alleged in count I that McMahon's pit bull attacked her without provocation and she sustained severe injuries. Nettle also cited the Animal Control Act (Act) which provides that the owner of a dog who attacks, without provocation, a person who is peaceably conducting himself or herself is liable in civil damages for the full amount of any injury caused by the dog. 510 ILCS 5/16 (West 2006). Finally, Nettle alleged in count II that McMahon negligently failed to restrain the pit bull, and prayed that the court would enter a judgment against McMahon in an amount in excess of $50,000, plus the costs of bringing the action.

¶ 6 On April 18, 2014, Deputy Sheriff Bruce House filed an affidavit in which he certified that he served the defendant by substitute service on April 14, 2014. Specifically, Deputy House averred that substitute of service was obtained "by leaving a copy of the summons and complaint at the defendant's usual place of abode with a family member or person residing there, 13 years or older, and informing that person of the contents of the summons." Deputy House also averred that a copy of the summons was mailed to McMahon's usual place of abode on April 14, 2014. Finally, Deputy House averred that on April 14, 2014, the writ was served on Val McMahon, a white male, but the age printed on the affidavit for Val McMahon is difficult to decipher: it could be 48 or 98.

¶ 7 On September 5, 2014, Nettle filed a motion for default and Judge John H. Ehrlich granted the motion because McMahon failed to appear, answer, or otherwise plead. Judge Ehrlich also set the matter for a prove-up on October 10, 2014. On October 10, 2014, Judge Thomas E. Flanagan presided over the prove-up and entered a judgment in favor of Nettle and against McMahon in the amount of $150,000, plus costs.

¶ 8 On January 29, 2015, Nettle filed a citation to discover assets and requested that McMahon be ordered to produce her federal tax returns, title to all real estate and vehicles, bank statements from the past year, payroll stubs from the past year, and a list of all accounts payable. On July 8, 2015, McMahon filed an appearance.

¶ 9 On August 14, 2015, McMahon filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)) and moved to vacate the default judgment. McMahon maintained in her petition that "Substitute service was defective because the Affidavit of Service reads that the Summons and Complaint were served on a 98 year old male." At the time of the alleged service, she maintained that a 98 year old male was not living at the residence. She also maintained that there is no male living at the residence who recalls or has knowledge of any service of said summons.

¶ 10 In McMahon's reply to Nettle's response, which is not in the record, McMahon maintained that Nettle's claim-- that she failed to support her section 2-1401 petition with an affidavit -- had no merit because she supported the non-record allegations in her petition with a verification by certification and signed it under oath, as required by section 1-109 of the Code. McMahon further argued that she was diligent in filing her section 2-1401 petition because (i) she believed that her insurance provider, State Farm, was corresponding with Nettle's attorney; and (ii) after she received notice of the citation proceedings and after realizing that State Farm was not handling the matter, she promptly retained counsel and filed her section 2-1401 petition.

¶ 11 McMahon's section 2-1401 petition was pending before Judge Flanagan from October 21, 2015 until January 19, 2016. On January 19, 2016, McMahon filed a motion to transfer her section 2-1401 petition from Judge Flanagan to Judge John H. Ehlrich because Judge Ehlrich was the judge who granted the motion for a default judgment. On January 26, 2016, Judge Flannery denied Nettle's objection to McMahon's motion to transfer, granted McMahon's motion to transfer, and transferred the case to Judge Ehrlich.

¶ 12 On February 16, 2016, Judge Ehrlich found that the citation to discover assets issued against McMahon was voluntarily dismissed without prejudice. On February 18, 2016, Judge Ehrlich granted McMahon's petition for relief from judgment. Finally, Judge Ehrlich found that the case was immediately appealable pursuant to Supreme Court Rule 304(b)(3).

¶ 13 On February 29, 2016, Nettle filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 In this appeal, Nettle maintains that the circuit court abused its discretion when it granted McMahon's section 2-1401 petition. In *Warren County Soil and Water Conservation Dist. v. Walters*, our supreme court explained the standard of review for cases involving section 2-1401 petitions and held that cases involving purely legal questions are reviewed *de novo*, and cases involving a fact-dependent challenges to a final judgment employ an abuse of discretion standard of review. *Walters Warren County Soil and Water Conservation Dist. v. Walters*, 2015 IL 117783, ¶ 47, 52.

¶ 16 Here, McMahon alleged in her section 2-1401 petition that service was defective because the affidavit of service stated that service was effectuated on a 98-year-old man but, when service was allegedly effectuated, there was no 98 year old man living at her residence. We

find that McMahon's section 2-1401 petition presented a factual challenge to the final judgment because it challenged the age of the man served at her residence and required the court to determine the age of the person served and whether the plaintiff exercised diligence in filing the petition. Therefore, the factual questions to be answered lie within the sound discretion of the circuit court. *Walters*, 2015 IL 117783, ¶ 37; *Paul v. Gerald & Associates, Ltd.*, 223 Ill. 2d 85, 95 (2006). Accordingly, we will reverse the circuit court's order only if it constitutes an abuse of its discretion. *Walters*, 2015 IL 117783, ¶ 37; *Paul*, 223 Ill. 2d at 95.

¶ 17 Section 2-1401 Petition

¶ 18 Nettle argues that McMahon did not meet her burden of alleging and proving facts that justify relief under section 2-1401. We note that a proceeding under section 2-1401 is initiated by the filing of a petition "supported by affidavit or other appropriate showing as to matters not of record." *Paul*, 223 Ill. 2d at 94 (citing 735 ILCS 5/2-1401(b) (West 2002)). Generally, the petition must set forth specific factual allegations supporting each of the following elements: (i) the existence of a meritorious claim or defense, (ii) due diligence in presenting a claim or defense to the circuit court in the original action, and (iii) due diligence in filing the section 2-1401 petition. *Walters*, 2015 IL 117783, ¶ 37; *Paul*, 223 Ill. 2d at 94. Finally, the petition must be filed no later than two years after the entry of the order or judgment. *Paul*, 223 Ill.2d at 94 (citing 735 ILCS 5/2-1401(c) (West 2002)).

¶ 19 Our supreme court has held that a section 2-1401 petition must be supported by affidavit or other appropriate showing as to matters not of record. *Walters*, 2015 IL 117783, ¶ 31 (citing 735 ILCS 5/2-1401(b) (West 2012)). Section 1-109 of the Code provides that any pleading, affidavit, or other document certified in accordance with this section may be used

in the same manner and with the same force and effect as though subscribed and sworn to under oath. 735 ILCS 5/1-109 (West 1984). Here, McMahon supported the non-record allegations in her section 2-1401 petition with a verification by certification and she signed the petition under oath as required by section 1-109 of the Code. 735 ILCS 5/1-109 (West 2014). Therefore, because McMahon supported the allegations in her section 2-1401 petition that were not of record with a verification by certification and signed it under oath, we find that she satisfied the requirement in section 2-1401 that the petition be supported by "other appropriate showing" as to matters not of record.

¶ 20 Next, we must address Nettle's claim that McMahon's 2-1401 petition (i) lacked a meritorious defense, and (ii) failed to exercise due diligence. We note that a meritorious defense under section 2-1401 involves errors of fact, not error of law. *People v. Lawton*, 212 Ill. 2d 285, 305-06 (2004). McMahon argues that because a member of her family was never served, she was never served by substitute service, so the circuit court never acquired personal jurisdiction over her and, as a result, the default judgment entered was void. She also argues that an attack on a judgment on the basis of voidness renders the requirements of a meritorious defense or due diligence unnecessary. We agree. In *Sarkissian*, our supreme court held that "the allegation that a judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). Therefore, by alleging that the judgment was void, McMahon did not need to allege and, as a consequence, we do not need to determine if she established a meritorious defense or exercised due diligence.

¶ 21 We hold that McMahon complied with the requirements for a section 2-1401 petition because she supported the allegations in her petition that were not of record with a verification by certification and signed it under oath in accordance with section 1-109 of the Code. We also hold that by alleging that the default judgment was void, McMahon did not have to allege that she had a meritorious defense or that she exercised due diligence. *Sarkissian*, 201 Ill. 2d at 104.

¶ 22 Abuse of Discretion

¶ 23 Finally, we address Nettle's claim that the circuit court abused its discretion when it granted McMahon's section 2-1401 petition. The circuit court's decision is presumed to be correct and conform with the law unless the record indicates otherwise. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 72; *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007). A clear abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the court. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009). We found no evidence in the record and Nettle failed to cite any cases or provide evidentiary materials (admissions, affidavits, or depositions, etc.) which established that the circuit court abused its discretion. Accordingly, we hold that the circuit court did not err when it granted McMahon's section 2-1401 petition.

¶ 24 Conclusion

¶ 25 After reviewing the record, we find that McMahon's petition met the requirements prescribed by the Code for a section 2-1401 petition. We also find that the circuit court did not abuse its discretion when it granted McMahon's section 2-1401 petition. Therefore, we affirm the order entered by the circuit court and remand this matter to the circuit court.

¶ 26 Affirmed and remanded.

¶ 27 JUSTICE MASON, specially concurring.

¶ 28 I concur in the majority's decision to affirm the trial court's order vacating the judgment against McMahon. I write specially as I do not agree that McMahon's petition should have been granted on the ground that the default judgment against her was void for lack of service. The return of service indicates that McMahon was served via substitute service on April 14, 2014, when a copy of the summons and complaint was left with a member of her household, Val McMahon, who, as other evidence in the records shows, is McMahon's husband. Although the age of the person served is difficult to read (it could be 48 or 98), that is not enough to invalidate the return. All the 2-1401 petition alleges is that "there was not a 98 year old male living at the residence" on the date of service and that "no male living at the residence … recalls or has knowledge of any service of said summons." A failure to recall service is not the same as an affirmative denial that service was effected. Similarly, McMahon's denial that she ever received the mailed copy of the summons and complaint is insufficient to overcome the deputy's certificate of mailing. On this record, I could not find that McMahon was entitled to set aside the default judgment on the ground that it was void.

¶ 29 But Nettle, as the appellant, has not provided the court with a transcript of the hearing on McMahon's section 2-1401 petition conducted before Judge Ehrlich, who ultimately granted the petition. The appellant has the burden to present a complete record on appeal to support its claims of error. *Balough v. Northeast Illinois Regional Commuter R.R. Corp.*, 409 Ill. App. 3d 750, 770 (2011) citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 393 (1984). And the decision on the petition was a matter committed to the trial court's discretion. Absent an

adequate record, there is no basis upon which to determine whether the trial court abused its discretion in its ruling. *In re Marriage of Blinderman*, 283 Ill. App. 3d 26, 34 (1996). If we are not provided with a complete record, we must presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 72; *Foutch*, 99 Ill. 2d at 391-92; see also *Corral v. Mervis Indsutries*, 217 Ill. 2d 144, 157 (2005) ('without an adequate record preserving the claimed error, the reviewing court must presume that the circuit court had a sufficient factual basis for its holding and that its order conforms to the law.'). Because the record reveals equitable considerations that could have prompted a reasonable trial judge to grant relief, *e.g.*, the order of default did not check the pre-printed language requiring the plaintiff to provide notice of the entry of the order to all parties, including those in default, and the apparent excessiveness of a $150,000 judgment based on $3,000 in medical specials, I agree that the order granting McMahon's section 2-1401 petition should be affirmed.