2017 IL App (5th) 160385-U

NO. 5-16-0385

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re ESTATE OF ELIZABETH D. DAVINROY, Deceased,	)	Appeal from the Circuit Court of St. Clair County.
(Albert J. Davinroy, Jr.,	)	
Petitioner-Appellant,	)	
v.	)	No. 15-P-84
Estate of Elizabeth D. Davinroy, Deceased,	)	Honorable Stephen P. McGlynn,
Respondent-Appellee).	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the order of the circuit court dismissing the petition for relief from judgment and denying petitioner leave to file a petition to reform the 2009 settlement agreement.

¶ 2 Petitioner, Albert J. Davinroy, Jr., filed a series of petitions to contest the will of his mother, Elizabeth D. Davinroy, deceased. Petitioner's sisters, Carol A. Filomena, Adrianne Davinroy, and Julie A. Davinroy, are executors of the estate of Elizabeth D. Davinroy (Elizabeth's estate). In response to petitioner's attempts to contest the will, Elizabeth's estate asserted petitioner waived his rights to said estate in 2009 when he

participated in mediation and agreed to settlement terms involving his deceased father's estate. Petitioner filed a petition for relief from the 2009 judgment pursuant to section 2-1401 of the Code of Civil Procedure. 735 ILCS 5/2-1401 (West 2014). The trial court granted Elizabeth's estate's motion to dismiss that petition. Petitioner then attempted to file a petition to reform the 2009 settlement agreement, but the trial court denied petitioner leave to file that petition. The two issues raised on appeal are: (1) whether the trial court erred in granting Elizabeth's estate's motion to dismiss the petition for relief from judgment; and/or (2) whether the trial court erred in denying petitioner leave to file a petition to reform the settlement agreement.

¶ 3 After oral argument, petitioner's attorney sent a letter/supplemental brief pertaining to a jurisdictional question which was raised during argument. We construed the four-page letter as a motion for leave to file a supplemental brief, which we granted. Thereafter, we allowed Elizabeth's estate 14 days to file a supplemental brief. Elizabeth's estate filed a postargument response brief. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 Petitioner's father, Albert Davinroy, Sr., died on November 21, 1998. Petitioner filed a claim against his father's estate in which he alleged damages against said estate and requested money from the distribution of the assets of his father's estate. In 2008, while his lawsuit against his father's estate was still pending, petitioner filed a complaint for *quantum meruit* and unjust enrichment against his mother Elizabeth, individually. Petitioner and his mother agreed to mediate both his father's estate lawsuit and the individual lawsuit.

¶ 6 Pursuant to mediation on September 9, 2009, an agreement was reached. Terms of the agreement were summarized in a handwritten document, which states as follow:

> "As full & final settlement of all claims brought in these matters or previously occurring not brought in these matters Elizabeth Davinroy shall pay to [petitioner] the amount of $22,000.00. Counsel for [petitioner] & Elizabeth Davinroy shall cooperate to fully prepare the settlement documents outlining the payment agreed to herein & all other terms of the settlement."

The handwritten agreement was signed by petitioner's attorney and Elizabeth's attorney. As per the requirements of Associated Dispute Resolution (ADR), Elizabeth's attorney, Matthew Jacober, prepared the formal settlement agreement and forwarded it to petitioner's attorney, Charles Stegmeyer.

¶ 7 The typewritten agreement specifically states *inter alia*:

> "3. Davinroy, Jr., in exchange for a full and final payment of $22,000.00 from the Estate of Albert Davinroy and/or Elizabeth Davinroy, from whomever the funds may come, is hereby agreeing to forever settle and dismiss any and all claims, causes of action, Will contests, objections to the final disposition, closing and any other matter, as to Estate of Albert Davinroy and Elizabeth Davinroy, either known or unknown, which have accrued up until the date of the instant settlement agreement.
>
> 4. Davinroy, Jr., in addition to giving up all known and unknown claims which have accrued, further agrees that he will not assert any claims, causes of action, Will contests, objections to the final disposition and closing of the Estate of

Elizabeth Davinroy, and further acknowledges, admits and affirms that he has been duly informed that he has been disinherited under the terms of the estate documents as prepared by Elizabeth Davinroy, and that in exchange for this one time payment, he acknowledges and affirms that he will neither take from the estate, as a matter of the operation of the estate, nor shall he bring any cause of action against the estate, in an attempt to take from same once it has been opened.

5. Davinroy, Jr., further states that he will hold harmless both the Estate of Albert Davinroy, Elizabeth Davinroy and her agents, servants, successors, heirs, executors, administrators and all other persons, firms, corporations, subsidiaries, associations or partnerships of and from, for any claims, causes of action, or right to sue which may arise against Elizabeth Davinroy, unless said claim is supported by an independent writing evidencing an intent by Davinroy, Jr., and Elizabeth Davinroy to modify the terms of this agreement or enter into a separate and distinct contractual agreement between the parties."

After receiving the settlement agreement attorney Stegmeyer advised attorney Jacober that petitioner would not sign the typed settlement agreement despite Stegmeyer's advice to petitioner that the settlement agreement was "in good faith and agreed to by all parties."

¶ 8 Elizabeth then filed a motion to enforce the settlement in both the father's estate lawsuit and the individual lawsuit. On the same day the motion to enforce was filed, petitioner filed a motion to set aside the settlement agreement. Petitioner alleged he was not in the room when Mr. Stegmeyer agreed to the terms of the settlement on his behalf.

¶ 9 On November 5, 2009, a hearing was held on the motion to enforce. Petitioner appeared *pro se*, having terminated Mr. Stegmeyer sometime earlier. Nevertheless, Mr. Stegmeyer was in attendance at the hearing. Stegmeyer stated on the record that the settlement was reached in good faith and petitioner gave him authority to sign the agreement. Petitioner disagreed that Stegmeyer possessed the authority to sign the agreement, but admitted he agreed to the settlement amount at mediation by shaking his head in the affirmative.

¶ 10 Ultimately, the circuit court entered an order granting the motion to enforce the settlement agreement and ordered his father's estate and Elizabeth to make payment within 14 days of receiving payment instructions. Petitioner received payment as evidenced by a letter drafted by him to Mr. Stegmeyer in which petitioner acknowledged payment of the $22,000, but questioned the agreed-upon attorney fees arrangement. Petitioner did not seek any further relief from the circuit court's order granting the motion to enforce the settlement agreement.

¶ 11 On January 11, 2015, Elizabeth died. Elizabeth left a will and a trust. On February 12, 2015, Elizabeth's daughters, Carol, Adrianne, and Julie, who were appointed executors of Elizabeth's estate, filed a petition for probate of will and for letters testamentary. The petition listed seven heirs and legatees of Elizabeth, all of whom were Elizabeth's sons or daughters: (1) Karen Salvador, (2) Diana Gassoff, (3) Adrianne (4) petitioner, (5) Mark Davinroy, (6) Julie, and (7) Carol. A fourth codicil to the will specifically excluded Diana, Mark, and petitioner, and their respective descendents, from receiving any assets from either the will or the trust.

¶ 12 On August 14, 2015, petitioner filed a petition to contest the will and a petition to contest the trust. Several hearings were held during which Elizabeth's estate raised the defense that petitioner was barred from contesting Elizabeth's estate or participating in it in any manner by virtue of the 2009 agreement in the litigation surrounding his father's estate in which he agreed to waive all rights to Elizabeth's estate. Petitioner was granted leave to amend four times. On March 29, 2016, he 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 2014)) in which he asserted that his 2009 waiver was invalid and he should be allowed to proceed in Elizabeth's estate.

¶ 13 Elizabeth's estate filed a joint motion to dismiss the petition for relief from judgment. After hearing oral argument, the trial court granted Elizabeth's estate's motion to dismiss. Petitioner now appeals.

¶ 14 After oral argument was heard in this case, we received a letter/supplemental brief from petitioner. Thereafter, we entered an order construing petitioner's letter as a motion for leave to file a supplemental brief. We granted that motion and then granted Elizabeth's estate 14 days to file a responsive brief, which it did.

¶ 15 ANALYSIS

¶ 16 I. MOTION TO DISMISS

¶ 17 The first issue is whether the trial court erred in granting Elizabeth's estate's motion to dismiss the petition for relief of judgment. Petitioner contends the allegations in his petition and his exhibits are sufficient to state a cause of action to set aside the 2009 order, and the uncontradicted evidence demonstrates he did not waive any claims to

Elizabeth's estate. Petitioner insists he is not bound by the 2009 order and the trial court erred in granting the motion to dismiss. We disagree.

¶ 18 In reviewing the dismissal of a complaint under either section 2-615 or section 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2014)), we apply a *de novo* standard of review. *Dopkeen v. Whitaker*, 399 Ill. App. 3d 682, 684 (2010); *R-Five, Inc. v. Shadeco, Inc.*, 305 Ill. App. 3d 635, 639 (1999). A motion to dismiss under section 2-615 of the Code tests the legal sufficiency of the complaint, whereas a motion to dismiss under section 2-619 admits the legal sufficiency of the complaint, but asserts an affirmative defense outside the complaint that serves to defeat the cause of action. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Under either section, we accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from the facts against the nonmoving party. *Dopkeen*, 399 Ill. App. 3d at 684.

¶ 19 The preclusive effect of a prior adjudication on a subsequent claim or cause of action falls under the law of *res judicata. Res judicata* is separated into two distinct doctrines: (1) true *res judicata*, known as "claim preclusion," and (2) collateral estoppel, known as "issue preclusion." *Housing Authority for La Salle County v. Young Men's Christian Ass'n of Ottawa*, 101 Ill. 2d 246, 251 (1984). Both serve the same purpose, which is to promote judicial economy and prevent repetitive litigation. *People v. Moore*, 184 Ill. App. 3d 102, 104 (1989), *rev'd on other grounds*, 138 Ill. 2d 162 (1990). Collateral estoppel applies when a party participates in two separate and consecutive cases arising out of different causes of action and some controlling factor or question material to the determination of both cases has been adjudicated against the party in a

former suit by a court of competent jurisdiction. *Stathis v. First Arlington National Bank*, 226 Ill. App. 3d 47, 53 (1992).

¶ 20 Petitioner's request for relief from judgment is a request to vacate the 2009 order which enforced a settlement agreement reached by the parties through mediation. A settlement agreement requires a meeting of the minds. *City of Chicago v. Ramirez*, 366 Ill. App. 3d 935, 946 (2006). An evidentiary hearing regarding the formation and terms of a settlement agreement is appropriate when there are disputed factual issues in that regard and additional evidence is necessary to satisfactorily resolve the issues. *Ramirez*, 366 Ill. App. 3d at 946.

¶ 21 In the instant case, a settlement agreement was reached in 2009 via mediation. A handwritten agreement was signed by both petitioner's attorney and Elizabeth's attorney. Per ADR requirements, Elizabeth's attorney prepared a formal settlement agreement. The typewritten agreement was forwarded to petitioner's attorney. After receiving the agreement, petitioner's attorney informed Elizabeth's attorney that petitioner refused to sign it despite his advice that it was "in good faith and agreed to by all parties." In response, Elizabeth filed a motion to enforce.

¶ 22 At the hearing on the motion to enforce, the circuit court was fully informed that petitioner refused to sign the formal agreement as evidenced by the following colloquy:

> "THE COURT: –except for did you sign the settlement agreement?
>
> [Petitioner]: I did not. And–
>
> THE COURT: Did you–

[Attorney for Petitioner]: Your Honor–

THE COURT: How did that go?

[Attorney for Petitioner]: The agreement is there, and I had full authority–

[Petitioner]: No.

[Attorney for Petitioner]: –from [Petitioner] as his attorney to sign that agreement. Furthermore, there's another agreement in there where [Petitioner] did sign he'll abide by the mediation, so that's part of the agreement.

[Petitioner]: I was told that they would draft up an agreement resolution and I would be able to view it and sign it the next day. I was walked out of the mediation by [Mr. Stegmeyer], walked out before they even started any writing of the agreement and–

THE COURT: Well, did you come to a number?

* * *

[Petitioner]: I–at the time I shook my head.

THE COURT: Okay, I'm going to enforce the settlement. That's the way it's going to be. If you agreed to the number I'm going to enforce the settlement."

Thus, the circuit court was fully apprised that petitioner refused to sign the settlement agreement, but nevertheless found it enforceable.

¶ 23 Thereafter, petitioner filed a *pro se* motion to set aside the settlement agreement in which he specifically alleged that his attorney "unbeknownst to petitioner and estate's attorney Matthew Jacober drafted dispute resolution settlement agreement and both

signed." He went on to state that he "made multiple attempts to reject settlement offer" and asked the circuit court to set aside the settlement agreement. The circuit court denied petitioner's motion to set aside.

¶ 24 In the instant case, petitioner sought relief pursuant to section 2-1401 of the Code. A petition for relief from judgment made pursuant to section 2-1401 must be filed within two years after entry of the judgment being challenged. 735 ILCS 5/2-1401(c) (West 2014). Petitions filed beyond the two-year period will not be considered unless the person seeking relief is under legal disability or duress or the ground for relief was fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2014). A party relying on section 2-1401 is not entitled to relief "unless he shows that through no fault or negligence of his own, the error of fact or the existence of a valid defense was not made to appear to the trial court." *Brockmeyer v. Duncan*, 18 Ill. 2d 502, 505 (1960).

¶ 25 Petitioner's insistence that the 2009 order was based on fraud is simply wrong. The record before us shows that the circuit court was fully aware of the same allegations raised herein back in 2009. Specifically, the court was aware that petitioner refused to sign the typewritten agreement. Despite this fact, the circuit court chose to enforce the agreement. Petitioner accepted the $22,000 payment as evidenced by a letter drafted by him to his attorney, Mr. Stegmeyer, in which he acknowledged receipt of the money, but objected to attorney fees. Petitioner did not appeal the circuit court's ruling granting the motion to enforce. He now attempts to belatedly appeal the 2009 order.

¶ 26 Here, the trial court granted petitioner 45 days to submit any deposition testimony or the affidavit of the mediator in order to show fraud. While petitioner submitted an

affidavit from the mediator, it merely states in pertinent part, "My practice is that, upon completion of a mediation wherein a settlement has been reached, one of the attorneys handwrites the terms of the settlement, and that the parties and their attorneys sign said agreement." Contrary to petitioner's assertions, the affidavit of the mediator does not show fraud occurred in the instant case. It merely indicates that both the parties and their attorneys normally sign an agreement. The fact that petitioner did not sign the agreement does not indicate any fraud occurred.

¶ 27 Petitioner was involved with Elizabeth in contentious litigation for over a decade concerning his father's estate. He accepted payment of $22,000 and the typewritten agreement unequivocally states that this is full payment. It also states he was informed that Elizabeth had disinherited him. While we agree the terms of the agreement were fleshed out more fully in the typewritten agreement, the time to object to those terms was in 2009. The circuit court was aware of petitioner's objections in 2009, but chose to enforce the agreement despite petitioner's objections. Pursuant to section 2-1401 of the Code, petitioner should have filed his petition for relief from judgment within two years of the issuance of the 2009 order. Having failed to do so and having failed to show any fraud here, the trial court correctly dismissed the petition for relief from judgment.

¶ 28 II. LEAVE TO AMEND

¶ 29 The other issue raised in this appeal is whether the trial court erred in denying petitioner leave to file a petition to reform the settlement agreement. Petitioner contends he did not present his petition to reform the settlement agreement as an amendment to his previous petition for relief from judgment, but instead presented it as a petition for

declaratory judgment. The trial court on its own motion assumed a petition for leave to amend, which it denied. Petitioner argues that even though he never filed such a petition, the trial court erred in denying it.

¶ 30 We first note that plaintiffs do not have an absolute and unlimited right to amend. *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 6 (2004). Second, the decision to grant leave to amend a complaint rests within the sound discretion of the trial court. *Id.*, at 7. A relevant factor to be considered in determining whether the trial court abused its discretion is whether or not the proposed amendment would cure the defective pleading; however, the primary consideration is whether amendment would further the ends of justice. *Id.*

¶ 31 Contrary to petitioner's assertions, the petition to reform was nothing more than petitioner's fifth attempt to amend. It fails to present any additional facts not already before the trial court. The trial court correctly saw petitioner's new filing for exactly what it was–a fifth attempt to amend and collaterally attack the 2009 order. Petitioner has failed to show us how the ends of justice would be served by allowing him leave to amend a fifth time. Accordingly, the trial court did not abuse its discretion in denying petitioner leave to amend a fifth time. It is time to put this litigation to rest.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we hereby affirm the order of the circuit court of St. Clair County dismissing the petition for relief from judgment and denying petitioner leave to file a petition to reform the 2009 settlement agreement.

¶ 34 Affirmed.