2018 IL App (1st) 172077-U

FIRST DIVISION
July 23, 2018

Nos. 1-17-2077 & 1-17-2347 (cons.)



IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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| ROY FLORES, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County |
| | ) | |
| v. | ) | No. 15 L 238 |
| | ) | |
| PATRICK DUGGAN, | ) | The Honorable |
| | ) | Daniel T. Gillespie, |
| Defendant-Appellee. | ) | Judge Presiding. |

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Griffin concurred in the judgment.

**ORDER**

¶ 1 *Held*: As a procedural matter, we dismiss plaintiff's first notice of appeal for lack of jurisdiction, as it was filed prior to the entry of a final and appealable order. The circuit court's denial of plaintiff's section 2-1401 petition is reversed, and the relief requested in the section 2-1401 petition is granted.

¶ 2 Plaintiff Roy Flores filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)), seeking to modify an order dismissing his personal injury claim with prejudice. The circuit court denied plaintiff's petition, and plaintiff appeals. For the reasons that follow, we reverse the circuit court's order denying plaintiff's

petition. Pursuant to Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we grant plaintiff's section 2-1401 petition, and we grant the relief requested therein.

¶ 3 BACKGROUND

¶ 4 On January 12, 2015, plaintiff and his wife Wanda Flores filed a two-count complaint against defendant Patrick Duggan to recover damages for injuries they allegedly sustained in an automobile accident. The first count of the complaint sought damages for plaintiff's injuries, and the second count sought damages for Wanda's injuries. Defendant answered the complaint, and the parties engaged in discovery. On August 5, 2016, the parties appeared at a case management conference. There is no transcript of the proceedings, and the parties have not submitted any substitute report of proceedings for the case management conference. The circuit court entered a handwritten order, drafted by defendant's counsel, stating, "Plaintiff Roy Flores is hereby voluntarily dismissed as a party plaintiff, with prejudice and without cost to any party." The record does not contain any written motion that sought to dismiss Roy as a party plaintiff. On January 27, 2017, the circuit court held a jury trial on Wanda's claim, and the jury returned a verdict in her favor. No portion of Wanda's claim is at issue in—nor is Wanda a party to—this appeal.

¶ 5 On February 21, 2017, plaintiff's counsel Daniel J. McDevitt purportedly sent a letter to defendant's insurer that plaintiff would be refiling his claim.[1] On February 22, 2017, defendant's counsel Richard Aronson responded that the August 5, 2016, order dismissed plaintiff's claim with prejudice. Aronson asserted that the dismissal with prejudice was agreed to in prior correspondence. Attached to Aronson's letter was a copy of the August 5, 2016, order, along with a July 11, 2016, letter from Aronson to McDevitt that stated, "This is just to confirm our

[1]This letter is not contained in the record on appeal. Plaintiff cites to his trial counsel's affidavit to support his contention that this letter was sent.

conversation regarding the voluntary dismissal of Roy Flores. You will dismiss Roy Flores, with prejudice, at the next case management, set for August 5, 2016." The record is devoid, however, of any indication that this letter was sent.

¶ 6 On March 24, 2017, plaintiff filed a petition pursuant to section 2-1401 of the Code, seeking to modify the circuit court's August 5, 2016, case management order. Plaintiff's petition asserted that on August 5, 2016, Ronald W. Cobb, III, an associate at McDevitt's firm, informed the circuit court that plaintiff's case would be voluntarily dismissed without prejudice, but that opposing counsel drafted the order to reflect that the dismissal was with prejudice. The petition asserted that Cobb reviewed the draft order "and inadvertently believed the hand-written language of the order to read that [plaintiff's] case was dismissed without prejudice, consistent with what [p]laintiff's counsel reported" to the circuit court. Plaintiff denied that his attorneys told Aronson that plaintiff's claim would be dismissed with prejudice, and asserted "There is no conceivable reason for [p]laintiff's counsel to have agreed to or proposed voluntarily dismissing [plaintiff's] claim with prejudice on August 5, 2016."

¶ 7 Plaintiff's petition further asserted that the copy of the August 5, 2016, order that Cobb received was illegible and "would not have been sufficient to put [p]laintiff's counsel on notice" that the dismissal was with prejudice. Plaintiff asserted that the circuit court had authority to modify the August 5, 2016, order because the order did not accurately reflect the intention of the parties. Plaintiff further asserted that his attorneys received correspondence from Aronson on February 22, 2017, notifying plaintiff that the August 5, 2016, order barred refiling of his claim. McDevitt denied ever having received defendant's counsel's July 11, 2016, letter purporting to memorialize an agreement to dismiss plaintiff's claim with prejudice.

¶ 8 Attached to plaintiff's petition was a June 8, 2016, letter from McDevitt to plaintiff recommending that his claim be voluntarily dismissed, which would allow the claim to be refiled within one year. Also attached to the petition were affidavits from Cobb and McDevitt. Cobb averred that he informed the circuit court on August 5, 2016, that plaintiff's claim would be dismissed without prejudice. Cobb further averred that he inadvertently read the proposed order drafted by defendant's counsel to read "voluntarily dismissed without prejudice," and that the order was not consistent with Cobb's representations to the circuit court. McDevitt averred that he was not present at the August 5, 2016, case management conference, but that he instructed Cobb that plaintiff's claim should be dismissed without prejudice, and that it was his "belief that the order entered on August 5, 2017 [*sic*] voluntarily dismissed [plaintiff's] lawsuit without prejudice, with the right to re-file the claim on or before August 5, 2017." McDevitt further averred that his office never received the July 11, 2016, letter from Aronson, and McDevitt denied making any statement to Aronson that plaintiff's claim would be dismissed with prejudice.

¶ 9 Defendant's written response to the petition asserted that McDevitt and Aronson regularly communicated about the case by phone and email. Prior to July 11, 2016, McDevitt informed Aronson that it was in the best interest of Wanda's case that plaintiff's claim be dismissed, which led to Aronson's July 11, 2016, letter—which defendant claimed was sent via email—confirming that plaintiff's claim would be dismissed with prejudice. Defendant asserted that the July 11, 2016, email "was not returned undelivered," and that neither McDevitt nor Cobb responded to the July 11, 2016, email. At the August 5, 2016, hearing, Aronson advised the circuit court that plaintiff would dismiss his claim with prejudice and that Cobb reviewed the draft order prior to its entry, which Cobb admitted in his affidavit. Defendant argued that

McDevitt and Aronson regularly emailed one another between June 2016 and February 2017, which defendant asserted undermined any claim that Aronson's July 11, 2016, email was not received. Defendant further argued that plaintiff failed to meet his burden of due diligence in bringing his section 2-1401 petition because plaintiff did not file his petition until seven months after the dismissal order and two months after Wanda's trial. Attached to defendant's response was an email chain between McDevitt and Aronson, along with Aronson's affidavit in which he averred that he requested that McDevitt dismiss plaintiff's claim with prejudice and that McDevitt "said he understood." Aronson averred that he told the circuit court on August 5, 2016, that plaintiff's claim was being dismissed with prejudice and that Cobb assented and reviewed the order prior to its entry.

¶ 10 Plaintiff's reply asserted that equity required modifying the August 5, 2016, order. Plaintiff blamed Aronson for giving Cobb a copy of the dismissal order "that was illegible due to a combination of poor penmanship and carbon copying," and asserted, "[h]ad a decipherable copy been presented to [p]laintiff's counsel at the August 5, 2016[,] case management hearing, he would have been in a position to have more expediently brought a motion to modify ***." Plaintiff contended that the "erroneous contents of the August 5, 2016[,] order went unrecognized by [p]laintiff's counsel until he received correspondence dated February 22, 2017[,] from defense counsel." Plaintiff further asserted that his petition to vacate was timely because it was filed within 30 days of receiving that correspondence.

¶ 11 Plaintiff does not direct our attention to any portion of the record that might tend to show that he requested an evidentiary hearing on his petition, and the circuit court did not hold one. On July 19, 2017, without hearing oral argument, the circuit court entered a handwritten order, stating

> "On [p]laintiff Roy Flores' petition pursuant to [section 2-1401 of the Code] to modify the court order of August 5, 2016, the [c]ourt having jurisdiction, briefs filed by [p]laintiff and [d]efendant, it is hereby ordered the [section 2-1401] petition *** is denied. The [c]ourt shall file a written opinion on August 24, 2017, and the written decision of the [c]ourt on August 24, 2017[,] shall be considered the final order."

Plaintiff filed a notice of appeal on August 18, 2017, from the circuit court's July 19, 2017, order, despite the circuit court's express statement that it would file a final written order. Plaintiff's August 18, 2017, notice of appeal was docketed in this court as no. 1-17-2077.

¶ 12 On August 25, 2017, the circuit court entered a written order. The circuit court set forth the legal standards for motions to reconsider and for section 2-1401 petitions. The circuit court found that plaintiff "supplied newly discovered evidence of his belief and intent to this [c]ourt." The circuit court acknowledged that "It is entirely possible that [p]laintiff's [c]ounsel believed that they had successfully voluntarily dismissed [plaintiff] without prejudice despite the evidence presented by [d]efendant. But that finding is not corroborated by the August 5, 2016[,] [c]ase [m]anagement [o]rder." The circuit court noted that Cobb averred that he inadvertently read the order as stating that the dismissal was without prejudice. The circuit court concluded that Cobb's inadvertent reading of the order did not "meet the standard necessary of an exercise of due diligence by [p]resenting this claim in his original action," and denied plaintiff's section 2-1401 petition.

¶ 13 On September 21, 2017, plaintiff filed a notice of appeal from the circuit court's orders entered on August 25, 2017, July 19, 2017, and "all interlocutory or other orders that preceded and are affected by the foregoing order [*sic*], including the order of August 6 [*sic*], 2015 [*sic*],

dismissing the claims of [plaintiff] ***." Plaintiff's appeal was docketed in this court as no. 1-17-2374. We allowed plaintiff's motion to consolidate the appeals.

¶ 14 ANALYSIS

¶ 15 Plaintiff raises three arguments on appeal. First, plaintiff argues that the circuit court either erred as a matter of law or abused its discretion in finding that plaintiff failed to establish due diligence under section 2-1401 of the Code. Second, plaintiff argues that the circuit court erred by not conducting an evidentiary hearing on plaintiff's section 2-1401 petition. Third, plaintiffs argue that this court may correct the August 5, 2016, order *nunc pro tunc* pursuant to our inherent authority.

¶ 16 As an initial matter, we remind plaintiff's counsel that Illinois Supreme Court Rule 341(h) requires a party to cite to the record on appeal in support of its statement of facts and argument, not to the materials appended to the appellant's brief. Ill. S. Ct. R. 341(h)(6), (7) (eff. Nov. 1, 2017). In both his statement of facts and argument, plaintiff regularly cites to his Rule 342 appendix without providing citations to the pages of the record where those materials are located. This infraction is relatively minor and does not warrant forfeiture of any argument on appeal. Instead, we simply remind counsel that compliance with Rule 341(h) is mandatory. *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8.

¶ 17 Second, as a procedural matter, we must dismiss appeal no. 1-17-2077 for lack of jurisdiction because the August 18, 2017, notice of appeal was premature. Although the circuit court entered an order denying plaintiff's section 1401 petition on July 19, 2017, the contents of that order reflect that it was not intended to be the circuit court's final order. The July 19, 2017, order was not a final and appealable order, and therefore the August 18, 2017, notice of appeal did not confer this court with jurisdiction. Dismissing appeal no. 1-17-2077 results in no

prejudice to the plaintiff because he timely appealed the circuit court's August 25, 2017, order, and we have jurisdiction over appeal no. 1-17-2347 pursuant to Supreme Court Rule 303(a) (Ill S. Ct. R. 303(a) (eff. July 1, 2017), or alternatively pursuant to Rule 304(b)(3) (Ill. S. Ct. R. 304(b)(3) (eff. Mar. 8, 2016)).

¶ 18 Turning to the merits, plaintiff contends that the circuit court erred by finding that his petition did not establish due diligence. Plaintiff argues that the circuit court misapplied section 2-1401 because the circuit court "evaluated whether [p]laintiff showed due diligence relative to the entry of the August 5, 2016[,] order, not whether [p]laintiff demonstrated that he exercised due diligence in presenting his claim overall in the original action." Plaintiff accuses the circuit court of "approach[ing] its analysis almost as if from a defense perspective, evaluating whether [p]laintiff sufficiently explained or justified the circumstances surrounding entry of the dismissal order, *i.e.*, defended that event." Plaintiff insists that this case involves an "excusable mistake" by plaintiff's counsel, "and not a lack of due diligence or neglect." Plaintiff further argues that he diligently pursued his personal injury claim up until the time he intended to voluntarily dismiss his claim without prejudice. Alternatively, plaintiff contends that there were factual disputes that required an evidentiary hearing.

¶ 19 Section 2-1401 of the Code allows a party to file a petition in the circuit court seeking relief from a final order or judgment more than 30 days after the entry of that order or judgment, provided that the petition is filed within two years of the complained of order or judgment. 735 ILCS 5/2-1401(a), (c) (West 2016). A section 2-1401 petition must be filed in the original case and constitutes a new proceeding rather than a continuation of the underlying proceedings that culminated in a final judgment. *Id.* § 2-1401(b). A section 2-1401 petition may assert either a purely legal challenge to a final judgment or raise a fact-dependent challenge to the judgment.

*Warren County Soil & Conservation District v. Walters*, 2015 IL 117783, ¶ 31. In order to obtain relief pursuant to section 2-1401 of the Code, the petition 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 for relief. *Id.* ¶ 51; *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). "[D]ue diligence is judged by the reasonableness of the petitioner's conduct under all of the circumstances." *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 99-100 (2006). Additionally, a section 1401 proceeding "is not intended to give the litigant a new opportunity to do that which should have been done in an earlier proceeding or to relieve the litigant of the consequences of [his] mistake or negligence." *In re Marriage of Himmel*, 285 Ill. App 3d 145, 148 (1996).

¶ 20 Here, plaintiff's petition raised a fact-dependent challenge to the August 5, 2016, dismissal order, based on plaintiff's alleged discovery that the August 5, 2016, order did not reflect plaintiff's intention to dismiss his claim without prejudice. "To set aside a judgment based on newly discovered evidence, the petitioner must show the new evidence was not known to [him] at the time of the proceeding and could not have been discovered by the petitioner with the exercise of reasonable diligence." *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 15. In *Warren County*, our supreme court stated that "a section 1401 petition that raises a fact-dependent challenge to a final judgment or order must be resolved by considering the particular facts, circumstances, and equities of the underlying case." *Warren County*, 2015 IL 117783, ¶ 50 (citing *Airoom*, 114 Ill. 2d at 221). When a petition "presents a fact-dependant challenge to a final judgment or order the standards from *Airoom* govern that proceeding." *Id.* ¶ 51. Under the *Airoom* standards, a petitioner must set forth factual allegations on each of the three elements

identified above. *Id.* "The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence, and the circuit court's ultimate decision on the petition is reviewed for an abuse of discretion." *Id.* (citing *Airoom*, 114 Ill. 2d at 221). A circuit court abuses its discretion only if it acts arbitrarily without the employment of conscientious judgment, exceeds the bounds of reason and ignores recognized principles of law, or if no reasonable person would take the position adopted by the circuit court. *Schmitz v. Binette*, 368 Ill. App. 3d 447, 452 (2006).

¶ 21 We find that plaintiff's section 2-1401 petition satisfied the *Airoom* criteria applicable to fact-dependent 2-1401 petitions, and that plaintiff was entitled to relief under section 2-1401 of the Code. The circuit court abused its discretion when it found that plaintiff failed to demonstrate due diligence in presenting his claim in the underlying action, and further abused its discretion by failing to consider all of the facts, circumstances, and equities of the case.

¶ 22 First, the circuit court found, and defendant does not dispute, that plaintiff's section 2-1401 petition asserted the existence of a meritorious claim in the underlying case. Plaintiff asserted that he never intended to dismiss his personal injury claim with prejudice. Plaintiff's argument was corroborated by a letter sent to him by his counsel prior to the entry of the dismissal order that indicated that plaintiff's claim would be dismissed and could be refiled within one year. Plaintiff's section 2-1401 petition satisfied the first *Airoom* requirement.

¶ 23 Second, plaintiff demonstrated due diligence in pursuing his personal injury claim in the original action from the time it was filed until the August 5, 2016, dismissal order. The circuit court's order denying plaintiff's section 2-1401 petition stated "An inadvertent reading of the proposed order does not meet the standard necessary of an exercise of due diligence by [p]laintiff in presenting this claim in his original action." The circuit court apparently faulted plaintiff for

not asserting any argument concerning the August 5, 2016, dismissal order until March 2017, and concluded that Cobb's mistake precluded plaintiff from obtaining any relief. The circuit court failed to consider, however, that Cobb acknowledged his mistake in misreading the draft order prior to its entry, and he asserted that the copy of the order he received was illegible. Cobb averred that he believed the order accurately reflected plaintiff's intention to voluntarily dismiss his claim without prejudice, and that his copy of his order was insufficient to put him on notice that error had occurred. McDevitt averred that he was unaware that the August 5, 2016, order was a dismissal with prejudice until February 2017, when he informed defendant of his intention to refile plaintiff's claim and learned the true contents of the dismissal order. It is clear from the record before this court that plaintiff diligently pursued his personal injury claim in the underlying action, decided to seek a voluntary dismissal with the right to reinstate within one year of the dismissal, and, given the erroneous reading to the handwritten order prepared by opposing counsel, that he had no reason to believe that his claim was dismissed with prejudice until February 2017. Under these circumstances, it was error for the circuit court to conclude that plaintiff failed to act with reasonable diligence in presenting his arguments for modifying the August 5, 2016, dismissal order in the original action.

¶ 24 Finally, there is no dispute that plaintiff demonstrated due diligence in bringing his section 2-1401 petition, as it was filed approximately one month after plaintiff learned that the dismissal order was with prejudice. In sum, plaintiff's section 2-1401 petition satisfied each of the three elements required by *Airoom*.

¶ 25 Furthermore, based on our review of the record, we conclude that no reasonable person would adopt the circuit court's view that plaintiff was not entitled to relief under section 2-1401 of the Code. Viewing all of the facts, circumstances, and equities of the case together, it is

apparent that counsel for plaintiff intended to voluntarily dismiss plaintiff's claim without prejudice pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2016)). Although defendant claims that its counsel insisted that the dismissal be with prejudice, there is nothing in the record to support a conclusion that plaintiff agreed to this unusual request, considering plaintiff had an absolute right to dismiss his claim and refile within one year under section 2-1009. Cobb then appeared in court and sought to voluntarily dismiss plaintiff's claim. Although defendant claims that it was defense counsel who told the circuit court that the dismissal was to be with prejudice, this assertion is not supported by the record, as there is no report of the August 5, 2016, proceedings. Furthermore, there is no indication whatsoever that the circuit court endeavored to resolve the parties' conflicting assertions as to the nature of the dismissal, or that the parties advanced any argument resulting in the circuit court deciding whether the dismissal was intended to be with or without prejudice.

¶ 26 Typically, a movant will prepare an order following a hearing on their motion, but here—for some unexplained reason—defense counsel drafted the order voluntarily dismissing plaintiff's claim, and Cobb then misread the handwritten order prepared by opposing counsel. As the circuit court's order denying plaintiff's 2-1401 petition observed, "if it was a discrepancy, the discrepancy went unnoticed." Plaintiff's counsel would have no reason to reexamine an order that he mistakenly believed was consistent with his stated intention to seek a voluntary dismissal that allowed—as a matter of right—the refiling of plaintiff's claim within one year of the voluntary dismissal. Six months later, when plaintiff advised defense counsel that he was going to refile, he was informed by defense counsel the order of dismissal was with prejudice, and plaintiff then diligently moved to correct the error to ensure that he could pursue his personal injury claim by refilling his original claim within one year of the dismissal order, as allowed

under section 2-1009 of the Code. And while McDevitt and Cobb could have avoided this situation by filing a written motion pursuant to section 2-1009, or, at a minimum, by either attending the August 5, 2016, hearing with a draft order in hand or by preparing the voluntary dismissal order themselves, under the facts presented, equity demands that plaintiff be permitted to pursue his personal injury claim on its merits rather than be forever barred from doing so due to this error by his counsel.

¶ 27 Defendant claims that, had it known that plaintiff could refile his claim, it would have cross-examined plaintiff differently at Wanda's trial, although defendant fails to explain how it would have altered its trial strategy. Defendant's argument is unpersuasive at best and, at worst, the claimed prejudice is minimal. In any event, the claimed prejudice to defendant is not sufficient to outweigh the equities that lie in favor of plaintiff. Therefore, we reverse the circuit court's order denying plaintiff's section 2-1401 petition. Because we are in the same position as the circuit court in the review of the submissions in support of and in opposition to the section 2-1401 petition, pursuant to our authority under Rule 366(a)(5), we grant plaintiff's section 2-1401 petition. The circuit court's August 5, 2016, order is modified to reflect that the dismissal of plaintiff's personal injury claim is without prejudice.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we dismiss appeal no. 1-17-2077 for lack of jurisdiction. In appeal no. 1-17-2347, the August 25, 2017, judgment of the circuit court is reversed and judgment is entered in favor of plaintiff modifying the August 5, 2016, order to reflect that the dismissal of plaintiff's claim is without prejudice.

¶ 30 No. 1-17-2077 dismissed.

¶ 31 No. 1-17-2347 reversed; petition granted; order modified.