

NOTICE
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2018 IL App (5th) 170290-U

NO. 5-17-0290

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> MARRIAGE OF)	Appeal from the
)	Circuit Court of
KENNETH FULTS,)	St. Clair County.
)	
Plaintiff/Respondent-Appellee,)	
)	
and)	No. 14-D-319
)	
BOBBI JO FULTS,)	Honorable
)	Julia R. Gomric,
Defendant/Petitioner-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Moore and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's denial of the petitioner's petition to vacate the property settlement award filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)) without an evidentiary hearing is reversed where the petitioner is entitled to a full and fair evidentiary hearing on her section 2-1401 allegations. Thus, the case is reversed and remanded for an evidentiary hearing on the petitioner's section 2-1401 petition.

¶ 2 On November 23, 2015, the circuit court of St. Clair County entered a judgment dissolving the marriage of the petitioner, Bobbi Jo Fults (Bobbi Jo), and the respondent, Kenneth Fults (Kenneth). The judgment incorporated a marital settlement agreement that

provided for the distribution of the parties' property. On March 3, 2017, Bobbi Jo filed a verified first amended petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)), seeking to vacate that property settlement. On April 18, 2017, Kenneth filed a motion to dismiss the petition under section 2-615 of the Code (*id.* § 2-615). On July 6, 2017, the trial court denied Bobbi Jo's section 2-1401 petition to vacate the property settlement. The order made no reference to the motion to dismiss. Bobbi Jo appeals from the court's order denying the petition. For the reasons that follow, we reverse and remand for an evidentiary hearing on Bobbi Jo's section 2-1401 petition.

¶ 3 Kenneth and Bobbi Jo were married and divorced four times over an approximately 26-year period. The four marriages occurred during the following time periods: May 27, 1989, until 1992; June 1995 until 1996; June 24, 2004, until February 2007; and November 21, 2010, until November 23, 2015 (this divorce is the subject of the appeal). They had four children, one of which was a minor at the time of the divorce at issue.

¶ 4 In May 2014, Kenneth filed a petition for dissolution of the parties' fourth marriage. On November 23, 2015, a hearing was held on the division of the parties' assets. On the morning of the hearing, the trial court accepted a written consent from Bobbi Jo, which indicated that she no longer wanted to proceed with her retained counsel, after verifying that she wanted to continue *pro se*. At the hearing, Kenneth testified that after six months and approximately three drafts, the parties had entered into a marital settlement agreement (MSA). Bobbi Jo testified that she had seen the MSA, believed that

it had been fully explained to her, and indicated that she was asking the court to approve it.

¶ 5 After hearing the parties' testimony, the trial court entered a final judgment of dissolution of marriage, which incorporated the final version of the parties' MSA and the joint parenting agreement. In the MSA, Kenneth received the following property: real property located at 3601 Mississippi Avenue, Cahokia, where Kenneth operated Archview Auto Sales; a house and land located at 3525 Bridge Lane, Millstadt; real property located at 10 Cat Trail Court, Belleville, that Kenneth and Bobbi Jo were to hold jointly as tenants in common; and a mobile home in Smithton. Kenneth was also awarded his interest in Ken's American Motors, Inc., as nonmarital property. Bobbi Jo was awarded a lump sum payment of \$200,000 from Kenneth in exchange for signing away her interest in certain real estate that was held jointly between the parties. The money was used to purchase a home in Smithton, which had an approximate value of \$250,000. Kenneth was required to pay \$750 per week in child support, and both parties waived any right to maintenance. Each party was awarded their own personal property.

¶ 6 Over a year following the entry of the judgment for dissolution, on March 3, 2017, Bobbi Jo filed a verified first amended petition to vacate the property settlement pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2016)). In the petition, she contended that she had a meritorious claim in that the property settlement was unconscionable because her attorneys failed to discover all of the marital property that should have been included in the property settlement distribution, that they failed to protect her interests because they knew that the settlement was considerably below a fair

share of the marital property, and that they abandoned her on the morning of the prove-up hearing. She further asserted that she did not receive a reasonably fair share of the marital assets. In particular, she alleged that the marital property was worth more than \$3 million at the time of the divorce; that Kenneth concealed his assets and income; and that he deprived her of relevant evidence of the amount and value of the marital property, which included a list of assets transferred to his October 2013 revocable living trust, by failing to fully comply with discovery requests. She indicated that she did not receive any property or money as part of the settlement other than the house located in Smithton.

¶ 7 Bobbi Jo identified the following as marital property at the time of the parties' November 23, 2015, divorce: (1) house and land located at 3520 Bride Lane, Millstadt, which was worth approximately \$900,000; (2) property at 3525 Bridge Lane, Millstadt, which consisted of five acres and a home that was worth approximately \$400,000; (3) a house yacht obtained during their fourth marriage, which was worth approximately \$270,000, and was traded for a more expensive yacht; (4) three parcels of real estate purchased in Cahokia, which was worth approximately \$500,000; (5) a home in Cahokia purchased by Kenneth in his name during their fourth marriage, which was worth approximately \$50,000; (6) a jetboat, worth approximately \$16,500; (7) a pontoon boat purchased during their fourth marriage, worth approximately \$15,000; (8) more than \$500,000 in cash; (9) a lot in Belleville worth approximately \$125,000, which was purchased during their fourth marriage and was used to operate American Motors; (10) real property located at 3402 Camp Jackson Road, Cahokia, which was worth approximately \$180,000; (11) real property located at 10280 Lincoln Trail, Fairview

Heights, which was worth approximately \$400,000 and was transferred to Kenneth as trustee under a October 2013 revocable living trust; (12) real property located at 3827 North Belt West, Belleville, which was worth approximately \$200,000 and was transferred to Kenneth as trustee of the living trust; and (13) all other assets transferred to the October 2013 living trust between October 1, 2013, and November 23, 2015, which have an unknown value.

¶ 8 Bobbi Jo also contended that she entered into the MSA under duress and at a time when she was under extreme emotional stress. She explained that she was subjected to extreme mental and physical abuse by Kenneth throughout their marriages, which caused and/or contributed to her suffering from depression and anxiety at the time of the hearing, and that she had been taking Xanax for many years prior to the hearing. She maintained that Kenneth exercised dominion and control over her through intimidation and verbal abuse, that he isolated her from family and friends, that he constantly demeaned her to make her feel insecure, that he had been physically abusive toward her, and that he threatened to take away her children.

¶ 9 Bobbi Jo explained that she was addicted to Xanax, but, after the divorce, she recovered from her addiction and discovered that not all of the marital property was included in the MSA. She maintained that she learned the following additional facts relating to Kenneth's concealment of marital property: (1) that he paid a number of bills in cash and purchased substantial items using other people's credit cards, who he then reimbursed in cash; (2) that he received substantial cash payments as income from his automobile dealerships; (3) that he placed a number of assets into a revocable trust,

which was formed in October 2013, and has since refused to provide her with a copy of the trust; (4) that he transferred real property from Ken's American Motors, Inc., to himself as trustee under the October revocable trust; (5) that real property worth approximately \$200,000 was transferred to him as trustee under the October trust; (6) that he transferred numerous other assets to the October 2013 trust between October 2013 and November 23, 2015; (7) that he sold the house yacht that he previously claimed belonged to his brother and then purchased a more expensive house yacht; and (8) that in 2016, he purchased a carwash for approximately \$45,000 and spent a large amount of cash upgrading the carwash, which evidenced the fact that he had a large amount of undisclosed cash.

¶ 10 Bobbi Jo maintained that she was diligent in pursuing her claim in that she contacted David Duree for possible representation in March 2016; that after retaining him, he requested documents from Kenneth's attorney, Kenneth's accountant, the Internal Revenue Service, the Illinois Department of Revenue, and her previous counsel; and on or about June 20, 2016, he received documents from her prior counsel, which totaled more than 13,000 pages. Duree also sent a letter to Kenneth's counsel and her previous counsel, asking for their position on a number of assets that Bobbi Jo contended should have been included in the property distribution. As these letters did not resolve the case, she filed her first petition to vacate on November 22, 2016, requesting the court vacate the property settlement award and allow her to relitigate the property settlement issue.

¶ 11 On April 18, 2017, Kenneth filed a motion to dismiss Bobbi Jo's first amended petition to vacate the property settlement pursuant to section 2-615 of the Code (735

ILCS 5/2-615 (West 2016)). In the motion, Kenneth argued that Bobbi Jo did not act with due diligence in pursuing her claim; that the assets listed in the section 2-1401 petition were known at the time of the prove-up hearing; that she failed to make specific allegations as to what assets or income were concealed during the divorce proceedings; that her attorneys engaged in extensive discovery during the course of their representation; that she signed a consent allowing her attorneys to withdraw the morning of the hearing; and that she could have retained new counsel or engaged in additional discovery, but she voluntarily agreed to proceed with the prove-up hearing and enter into the MSA without representation. In support of these arguments, he relied on discovery depositions taken of Kenneth and Bobbi Jo in February 2017.

¶ 12 On May 23, 2017, a hearing was held on Kenneth's section 2-615 motion to dismiss. At the hearing, Bobbi Jo's counsel argued that she had sufficiently alleged facts of a meritorious claim in that the property settlement was inadequate and/or unconscionable and that she exercised due diligence in presenting the claim and the section 2-1401 petition to vacate. Kenneth's counsel reiterated the arguments that Bobbi Jo had not proven the existence of a meritorious claim and due diligence. In response, Bobbi Jo's counsel argued that the motion before the trial court was Kenneth's section 2-615 motion to dismiss and that the only relevant issue was whether the petition stated a claim upon which relief could be granted. No evidence was presented regarding the allegations contained in Bobbi Jo's section 2-1401 petition to vacate.

¶ 13 On July 6, 2017, the trial court entered an order, denying Bobbi Jo's section 2-1401 petition to vacate the property settlement award. The order made no mention of the

section 2-615 motion to dismiss. In the order, the court made the following findings: that Bobbi Jo's former attorneys engaged in extensive discovery, taking depositions and requesting all financial documents which were subsequently provided in a timely manner; that the evidence demonstrated that she voluntarily consented to the withdrawal of her former attorneys from this action, knowingly and voluntarily waived her right to retain new counsel, and voluntarily agreed to move forward with the settlement; and that the evidence failed to demonstrate that she was incompetent to enter into the MSA or to otherwise represent herself at the hearing. The court found that she did not prove that the settlement agreement was unconscionable in that she failed to demonstrate that it was entered into because of duress or coercion, failed to prove her attorneys did not discover all of the marital assets that should have been included in the property settlement, and failed to prove that her attorneys did not protect her interests. Bobbi Jo appeals.

¶ 14 The purpose of a section 2-1401 petition is to bring before the trial court facts not appearing in the record which, if known to the court at the time judgment was entered, would have prevented entry of the judgment. *In re Marriage of Johnson*, 339 Ill. App. 3d 237, 241 (2003). Section 2-1401 was never intended to give petitioner a new opportunity to do that which should have been done in an earlier proceeding or to relieve petitioner of the consequences of her mistakes or negligence. *In re Marriage of Labuz*, 2016 IL App (3d) 140990, ¶ 35. A section 2-1401 petition is subject to a motion to dismiss where it fails to state a cause of action or shows on its face that petitioner is not entitled to relief. *In re Marriage of Buck*, 318 Ill. App. 3d 489, 493 (2000). Thus, a motion to dismiss a section 2-1401 petition is to be considered in the same manner as a civil complaint. *Id.*

¶ 15 A motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)) attacks the legal sufficiency of the complaint. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348 (2003). Section 2-615 motions do not raise affirmative factual defenses but only allege defects appearing on the face of the complaint. *Id.* In ruling on a section 2-615 motion to dismiss, the question is whether the complaint's allegations, when viewed in the light most favorable to petitioner, are sufficient to state a cause of action upon which relief can be granted. *Id.* When making this determination, the trial court should only consider the allegations in the pleadings. *Id.* at 349.

¶ 16 The section 2-1401 petition must set forth specific factual allegations supporting the following three elements: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting this claim or defense to the trial court in the original action; and (3) due diligence in filing the section 2-1401 petition. *In re Marriage of Callahan*, 2013 IL App (1st) 113751, ¶ 17. Relief under section 2-1401 may be available to set aside a settlement agreement that is unconscionable or entered into as a result of duress, coercion, or fraud. *Id.*

¶ 17 A marital settlement agreement is unconscionable if there is an absence of meaningful choice on the part of one of the parties together with contractual terms that unreasonably favor the other party. *In re Marriage of Bielawski*, 328 Ill. App. 3d 243, 251 (2002). The fact that the marital settlement agreement merely favors one party over the other does not make the agreement unconscionable. *Id.* To be unconscionable, the agreement must be improvident, totally one-sided, or oppressive. *Id.* "[The] general definition encompasses both procedural unconscionability—involving impropriety during

the process of forming a contract that deprives a party of meaningful choice—and substantive unconscionability—a situation in which a clause or term in the contract is one-sided or harsh." *Callahan*, 2013 IL App (1st) 113751, ¶ 20. An unconscionability finding may be based on either procedural or substantive unconscionability, or a combination of both. *Labuz*, 2016 IL App (3d) 140990, ¶ 37. The trial court must consider the following two factors when determining whether the settlement agreement is unconscionable: (1) the circumstances and conditions under which the agreement was made; and (2) the economic circumstances of the parties that result from the agreement. *Id.*

¶ 18 In the present case, Bobbi Jo argues that the trial court erred in dismissing her section 2-1401 petition where she has sufficiently stated a cause of action upon which relief can be granted, or, alternatively erred in denying her section 2-1401 petition to vacate without a full and fair evidentiary hearing as required by *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986).

¶ 19 In that case, petitioner filed a section 2-1401 petition to vacate a default judgment. *Id.* at 216. At the hearing on the section 2-1401 petition, the parties made their arguments to the court, but no evidence other than the petition itself and the petition's attachments were presented. *Id.* at 220. The trial court thereafter denied the petition. *Id.* Our supreme court concluded that where facts sufficient to support the grant of relief under section 2-1401 are disputed by respondent, a full and fair evidentiary hearing must be held. *Id.* at 223. However, the court then held that petitioner forfeited its right to the evidentiary hearing. *Id.*

¶ 20 Similarly, in *In re Marriage of Buck*, 318 Ill. App. 3d 489, 492 (2000), petitioner filed a section 2-1401 petition to vacate, seeking reformation of the MSA entered into with respondent based on allegations of fraudulent concealment, and, in response, respondent filed a motion to dismiss pursuant to section 2-619(a) of the Code (735 ILCS 5/2-619(a) (West 1998)). The trial court granted respondent's motion to dismiss without an evidentiary hearing on the section 2-1401 petition even though petitioner had requested that an evidentiary hearing be held before the court's ruling on the motion to dismiss. *Buck*, 318 Ill. App. 3d at 498.

¶ 21 On appeal, the First District concluded that where the section 2-1401 allegations and the attached exhibits sufficiently state a claim for fraudulent concealment if true, the trial court must hold an evidentiary hearing before granting a motion to dismiss under section 2-619. *Id.* at 497. Noting that petitioner's section 2-1401 petition pled specific factual allegations alleging the existence of a meritorious claim and alleged due diligence in presenting that claim in the original action, the court determined that an evidentiary hearing, which had been sought, must be held in the trial court to resolve the contested issues of fact before a ruling on the section 2-619 motion to dismiss can be made. *Id.* at 497-98.

¶ 22 Thereafter, in *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 51, our supreme court reiterated its position that where facts supporting the section 2-1401 petition are challenged by respondent, a full and fair evidentiary hearing should be held. In that case, petitioner filed a section 2-1401 petition to vacate a default

judgment, which was denied following the presentation of the parties' arguments but no submission of " 'formal evidence.' " *Id.* ¶ 21.

¶ 23 Although the present case is procedurally different from *Buck* and *Smith* in that Kenneth filed a section 2-615 motion to dismiss, the trial court did not dismiss Bobbi Jo's petition pursuant to section 2-615. Instead, the court denied her section 2-1401 petition to vacate without addressing the motion to dismiss. Thus, where facts sufficient, if true, to support the grant of relief under section 2-1401 are disputed, the trial court must hold an evidentiary hearing on the petition.

¶ 24 Bobbi Jo's section 2-1401 petition makes specific factual allegations concerning the existence of meritorious claims, *i.e.*, that the parties' property settlement agreement was unconscionable in that Kenneth had concealed marital assets and that she was under duress and extreme emotional stress at the time that she entered into the MSA. She has also made specific allegations concerning due diligence. Kenneth disputed Bobbi Jo's section 2-1401 factual allegations in his section 2-615 motion to dismiss and in his argument at the hearing on the motion to dismiss. The trial court, without ruling on Kenneth's motion to dismiss or holding an evidentiary hearing on the section 2-1401 petition to vacate, concluded that Bobbi Jo had failed to prove her allegations that the MSA was unconscionable or the result of duress/coercion. As we previously noted, a section 2-615 motion only considers the allegations of the pleadings to determine whether the complaint, or, in this case, the section 2-1401 petition to vacate, has sufficiently stated a cause of action. It does not consider the merits. Looking at the section 2-1401 allegations in the light most favorable to Bobbi Jo, we conclude that her allegations were

sufficient to allege the existence of a meritorious claim and due diligence. Because we find that Bobbi Jo has made sufficient allegations to survive a section 2-615 motion to dismiss and that the facts supporting the section 2-1401 petition are challenged by Kenneth, we conclude that Bobbi Jo is entitled to a full and fair evidentiary hearing on her factual allegations.

¶ 25 Moreover, although we note that, at the May 2017 hearing, Bobbi Jo's counsel did not request an evidentiary hearing to resolve these factual disputes, the hearing was on Kenneth's section 2-615 motion to dismiss, not the section 2-1401 petition. Thus, we conclude that Bobbi Jo, unlike the petitioner in *Smith*, did not forfeit her right to an evidentiary hearing involving the testimony of witnesses and the opportunity to cross-examine. Accordingly, because Bobbi Jo was entitled to an evidentiary hearing to resolve the factual disputes raised by her section 2-1401 petition to vacate, we reverse the order of the circuit court denying her petition to vacate the property settlement award.

¶ 26 For the foregoing reasons, we reverse the order of the circuit court of St. Clair County and remand this cause for further proceedings in accordance with this order.

¶ 27 Reversed and remanded.