2019 IL App (2d) 180785-U
No. 2-18-0785
Order filed July 18, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MASUD M. ARJMAND, Plaintiff-Appellant, v. MORGAN STANLEY SMITH BARNEY, LLC, MORGAN STANLEY AND CO., LLC, MORGAN STANLEY AND CO., INC., MORGAN STANLEY INVESTMENT MANAGEMENT, INC., BRODY W. WEICHBRODT, NEAL, GERBER AND EISENBERG, LLP, BRYAN S. ESTES, and THE STOGSDILL LAW FIRM, P.C., Defendants-Appellees.	)	Appeal from the Circuit Court of Du Page County. No. 16-L-153 Honorable Ronald D. Sutter, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Birkett and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Although the manner in which the trial court denied the plaintiff's petition may have violated due process, any error was harmless in light of the petition's insufficiency as a matter of law.

¶ 2 The plaintiff, Masud M. Arjmand, appeals from the judgment of the circuit court of Du Page County that denied the petition he filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2009, Arjmand filed an action to dissolve his marriage to his wife, Muneeza Arjmand. That dissolution action was still ongoing as of September 2018.

¶ 5 In 2013, the trial judge hearing the dissolution case, Judge Timothy McJoynt, entered an order (2013 Dissolution Order) restricting Arjmand's ability to cash in, transfer, encumber, or otherwise dispose of certain shares he held in Accenture, despite Arjmand's argument that the shares were nonmarital assets which he should be free to control. After the entry of that order, Muneeza's attorneys, the defendants Bryan S. Estes and The Stogsdill Law Firm (collectively, Stogsdill) wrote to Morgan Stanley, which held the shares at issue, to assert that Morgan Stanley should comply with the terms of the 2013 Dissolution Order. Morgan Stanley thereafter restricted Arjmand's access to his shares.

¶ 6 In 2015, Arjmand (acting *pro se*) filed the present lawsuit against Stogsdill and the various defendants affiliated with Morgan Stanley Smith Barney, LLC, along with those entities' attorneys, the defendants Brody W. Weichbrodt and Neal, Gerber & Eisenberg, LLP (collectively, Morgan Stanley). The complaint asserted claims of breach of contract, breach of fiduciary duty, tortious interference with prospective economic advantage, tortious interference with contract, and conversion. The two sets of defendants filed motions to dismiss the suit pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2014)), arguing that the complaint failed to state a cause of action and also that it should be dismissed as an improper collateral attack on the 2013 Dissolution Order. Those motions were fully briefed.

¶ 7 On August 17, 2016, after hearing oral arguments on the motions and stating that it had read and considered the briefs, pleadings, and exhibits submitted by the parties as well as the relevant case law they cited and "a good portion" of the pleadings in the dissolution action, the trial court granted the motions to dismiss this case (August 2016 Order). It noted that both Stogsdill and Morgan Stanley (which had been brought into the dissolution case as respondents to a citation to discover assets) were before Judge McJoynt, who was the proper person to address the scope of the 2013 Dissolution Order. In fact, Arjmand had filed, in the dissolution case, a motion to compel those defendants to restore access to his account and that motion was scheduled for hearing in a few weeks. The trial court then cited legal authority for the proposition that arguments about an order entered in a dissolution case should be heard by the judge presiding over that case, and that an attempt to challenge the effects of a dissolution order in a different proceeding should be dismissed as improper. It therefore dismissed Arjmand's complaint with prejudice as an improper collateral attack on the 2013 Dissolution Order. Arjmand did not appeal the dismissal.

¶ 8 On August 16, 2018, nearly two years after the entry of the August 2016 Order dismissing his complaint in this case, Arjmand (now represented by counsel) filed a section 2-1401 petition to "partially vacate" the August 2016 Order. The petition alleged that, in December 2017 and February 2018, Judge McJoynt had entered two orders in the dissolution case (New Orders) that bolstered Arjmand's previous arguments in this case about the proper scope of the 2013 Dissolution Order (and thus his arguments that the defendants' actions exceeded that scope). The New Orders were attached as exhibits to the petition. Arjmand also attached an affidavit detailing his efforts in the dissolution action between August 2016 and

December 2017 that ultimately resulted in his obtaining the pertinent rulings contained in the New Orders.

¶ 9 The petition included allegations regarding the three elements required for section 2-1401 relief: a meritorious defense, diligence in presenting that defense to the trial court, and diligence in filing the section 2-1401 petition. See *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007) ("Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition"). Specifically, the petition alleged that Arjmand had a meritorious defense that the August 2016 Order should not have been entered as a final order because, had the New Orders "been available" to the trial court before it granted the defendants' motions to dismiss, the trial court "would not have dismissed" the complaint "*with prejudice*" (emphasis in original). Regarding his diligence in discovering this defense or evidence, Arjmand stated that he could not have discovered it earlier because the New Orders did not come into existence until well after the August 2016 Order was entered. As to his diligence in filing the section 2-1401 petition, Arjmand simply stated that he "acted with due diligence in filing this Petition to Vacate." The petition also stated that Arjmand would "soon file a memorandum of law in support" of the petition. Finally, Arjmand asked that the trial court "[p]artially vacate" the August 2016 Order, "removing the words 'with prejudice' " and inserting the phrase "without prejudice," and allow him to file a memorandum of law in excess of the usual ten-page limit. Arjmand noticed the petition for presentation to the trial court 11 days later, on August 27, 2018.

¶ 10 On that date, all of the parties appeared before the trial court. Arjmand's counsel began by requesting 14 days to file his memorandum in support. Morgan Stanley took a different tack,

suggesting that the trial court had the power to deny the petition *sua sponte* and should take the opportunity to do so. In support, Morgan Stanley cited *People v. Rucker*, 2018 IL App (2d) 150855. The trial court temporarily adjourned the proceeding to allow it to read that case. When it returned to the bench, it commented that it had also found another case, *People v. Ryburn*, 378 Ill. App. 3d 972 (2008), which it believed to be relevant.

¶ 11 Before discussing the applicable law and its ruling, the trial court began by denying Arjmand's request for additional time to file a memorandum in support of his petition. Instead, the trial court instructed the parties to make any oral arguments they wished. Arjmand's attorney laid out the procedural history and that the case had been dismissed because it was a collateral attack on the 2013 Dissolution Order. He stated: "And I am not suggesting that the Court did anything wrong other than that I don't think it was a decision on the merits, the case against Morgan Stanley in particular, because that case had to do with a similar issue which was never ruled upon by the Court." He then reiterated that the claims against Morgan Stanley should not have been dismissed with prejudice because they were "not determined on the merits. That is it. No other change in the Court's ruling. Nothing else."

¶ 12 Morgan Stanley described recent proceedings in the dissolution action and argued that the trial court had correctly determined that Judge McJoynt was the proper person to rule on the meaning and effect of the 2013 Dissolution Order. It also argued that Arjmand had not shown diligence in filing the petition, as the New Orders were issued no later than February 2018 and he had waited six months before filing the petition. Stogsdill stood on Morgan Stanley's arguments.

¶ 13 The trial court issued its ruling. It began by stating that, "[b]ased on the Supreme Court's ruling in *Vincent*, the law is now settled in Illinois that the trial court may dismiss a petition for relief from judgment on its own motion without first providing the defendant with notice and an

opportunity to be heard." It noted that it had "given counsel an opportunity to be heard this morning." It then stated:

> "But I will tell you this, and this is based on my recollection, and Counsel mentioned his memory of [the prior proceedings in this case] was not a pleasant one; neither is mine. All right. And I find this just like I felt last time that, frankly, it's frivolous, vexatious, and harassing.
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> And I also feel that the petition itself fails to state a cause of action. So it's dismissed with prejudice."

The written order entered that day stated that the petition was denied with prejudice "for the reasons stated on the record." Arjmand then filed this appeal.

¶ 14 II. ANALYSIS

¶ 15 On appeal, Arjmand contends that the trial court's denial of his petition without notifying him in advance that it would consider the merits of his petition or allowing him to file a memorandum in support violated his right to due process.

¶ 16 In *Vincent*, our supreme court held that "a trial court may, on its own motion, dispose of" a section 2-1401 petition "when it is clear on its face that the requesting party is not entitled to relief as a matter of law." *Vincent*, 226 Ill. 2d at 12. Such a disposition may be viewed either as a dismissal of the petition with prejudice or as a denial of the petition on the pleadings. *Id*. Either way, such a disposition is reviewed *de novo*. *Id*. at 14. In assessing whether the trial court's disposition was correct, we must take the allegations of the petition as true. See *id*. at 8-9 (court must evaluate whether "the facts alleged *** state a legal basis for the relief requested, *i.e.*, the petition is insufficient as a matter of law").

¶ 17 In *Vincent*, the petitioner argued that, even if the trial court had the power to dismiss or deny a section 2-1401 petition *sua sponte*, doing so jeopardized his ability to be heard and deprived him of due process. The supreme court rejected this argument:

> "It is unclear to us in what way Vincent's opportunity to be heard has been compromised. He has not been denied access to the courts, as his petition was filed in the circuit court and considered by a judge. *** In addition, adequate procedural safeguards exist to prevent erroneous *sua sponte* terminations. A section 2-1401 petitioner whose petition has been disposed of by the court *sua sponte* could file a motion for rehearing under section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2002)). In addition, a litigant whose cause of action has been terminated by the court *sua sponte* may bring an appeal, which invites *de novo* review of the legal sufficiency of the complaint. See *Mitchell*, 291 Ill. App. 3d at 932. Thus, the availability of corrective remedies, such as a motion to reconsider, renders the lack of notice prior to the ruling less of a concern." *Id*. at 12-13.

¶ 18 *Vincent* would seem to dispose of Arjmand's argument that he was denied due process. However, there are certain irregularities in the trial court's procedure here that make *Vincent*'s application less clear. For instance, although the parties at different times refer to the trial court's action as being taken *sua sponte*, that is, on the court's own motion, that action was first proposed by Morgan Stanley, not by the court itself. In fact, Morgan Stanley argues on appeal that the trial court's action was *not* taken *sua sponte*, citing Black's Law Dictionary 1650 (10th ed. 2014), which defines that term to mean "without prompting or suggestion." The trial court also permitted all parties to present oral argument about the merits of the petition. In both these respects, the proceeding partook of some aspects of an oral motion to dismiss brought by Morgan

Stanley. And our court has held that, once a section 2-1401 respondent has moved to dismiss the petition, granting that motion without affording the petitioner a meaningful opportunity to respond is a violation of due process. *Rucker*, 2018 IL App (2d) 150855, ¶ 29 (distinguishing *Vincent* on the basis that there, no motion to dismiss had been filed). Viewing the proceedings in this light raises the possibility that, by denying Arjmand's request for time to file written support for his petition (and by failing to require Morgan Stanley to put its arguments in support of dismissal in writing, so that Arjmand could more meaningfully respond to those arguments), the trial court denied Arjmand due process. See *id*.; see also *People v. Bradley*, 2017 IL App (4th) 150527, ¶ 21.

¶ 19 Nevertheless, even if we were to find that the trial court proceedings here violated due process, that error would not require us to reverse the trial court's judgment if the error was harmless. In *People v. Stoecker*, 2019 IL App (3d) 160781, ¶ 11, the court explained that most errors, even those of constitutional dimension such as violations of due process, do not require automatic reversal. Instead, such errors are subject to "harmless error" analysis, under which only "structural" defects that render the proceeding unreliable and unfair, such as the deprivation of the right to counsel in criminal cases or partiality by the trier of fact, require reversal. *Id*. (citing *People v. Shaw*, 186 Ill. 2d 301, 344-45 (1999)). *Stoecker* held that, even if a petitioner's due process rights are violated by dismissing his petition without allowing him a meaningful opportunity to respond, such an error "does not rise to the level of structural error and is, therefore, subject to harmless error analysis." *Id*. ¶ 12. It noted that *Rucker* addressed only whether a due process violation had occurred, not whether that violation was a structural error. *Id*. at 14.

¶ 20 Under harmless error analysis, we must consider whether the outcome would have been the same regardless of the error. An issue is harmless when no reasonable probability exists that the result would have been different absent the error. See *In re E.H.,* 224 Ill. 2d 172, 180 (2006). Here, the contents of Arjmand's section 2-1401 petition are such that "it is clear on its face that the requesting party is not entitled to relief as a matter of law" (*Vincent*, 226 Ill. 2d at 12), regardless of how much notice and opportunity to respond Arjmand had received.

¶ 21 As we have noted, relief under section 2-1401 requires "proof, by a preponderance of evidence," of (1) a meritorious defense, *i.e.*, "a defense or claim that would have precluded entry of the judgment in the original action," as well as (2) "diligence in *** discovering the defense or claim" and (3) diligence in presenting the petition. *Id*. at 7-8. Arjmand's petition lacks both the first and third of these elements.[1] First, it did not allege anything that could be considered a meritorious defense that would have prevented the entry of the August 2016 Order. That order dismissed the case as an improper collateral attack on the 2013 Dissolution Order. Even accepting as true the allegations in the petition about the New Orders, nothing about the entry of those orders undermines the basis for dismissal—that is, the New Orders do not show that this case was not an improper collateral attack. The New Orders might have supported Arjmand's position if this case had gone to trial, but they do not show that the trial court erred in dismissing the case. Indeed, Arjmand's attorney admitted as much, stating that he was "not suggesting that the Court did anything wrong" substantively in dismissing the case, he simply believed that the

[1] On appeal, Morgan Stanley argues that the petition is also defective for another reason—because events that occur after the entry of a judgment can never support a section 2-1401 petition. We do not consider this argument, which Morgan Stanley did not raise before the trial court. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 127 (2010).

dismissal should have been without prejudice. But the New Orders do not support that proposition, either. A case is properly dismissed with prejudice when it is clear that the plaintiff "is not entitled to relief as a matter of law." *Id*. at 12. Arjmand made no effort to explain or argue that the dismissal of a case as a collateral attack on another court's ruling should properly be entered without prejudice, or that the New Orders demonstrated this proposition.

¶ 22 Second, the petition's bare-bones statement that Arjmand was diligent in filing the petition was refuted by the facts (contained in the petition itself) that the latest of the New Orders was entered in February 2018, but Arjmand did not file his petition until six months later, in August 2018. Courts have held that delays of half this long demonstrate a lack of diligence. See *Diacou v. Palos State Bank*, 65 Ill. 2d 304, 309-10 (1976) (no diligence where petition not filed until three months after plaintiffs learned of dismissal); *Cooper v. United Development Co.*, 122 Ill. App. 3d 850, 857 (1984) (delay of approximately three months); *Department of Public Works & Buildings ex rel. People v. O'Hare Int'l Bank*, 44 Ill. App. 3d 934, 937 (1976) (same); see also *Elmwood Ford Motors, Inc. v. Mardegan*, 42 Ill. App. 2d 342 (1963) (delay of 47 days). On appeal, Arjmand did not even attempt to address or present legal authority for the proposition that he exhibited diligence in filing his petition despite the six-month delay. Accordingly, the section 2-1401 petition was properly denied, and any error arising from the nature of the proceedings that led to the trial court's judgment was harmless.

¶ 23 Arjmand devotes much of his efforts on appeal to showing that the trial court offered no adequate explanation of its disposition of his petition, simply stating that the petition was "frivolous" and failed to state a cause of action without any explanation of these findings. Further, the trial court's comments that its memory of the earlier proceedings in the case "was not a pleasant one" suggested that its decision could have been based on antipathy toward

Arjmand, which would not be proper. But these flaws in the trial court's account of its ruling do not dictate our decision on appeal. It is well-settled that we review the judgment of the trial court, not its rationale. *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 192 (2007) ("the reasons given for a judgment or order are not material if the judgment or order itself is correct"). Here, the trial court's judgment was correct, because the petition lacked merit as a matter of law. *Vincent*, 226 Ill. 2d at 12.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 26 Affirmed.