2019 IL App (2d) 180895-U
No. 2-18-0895
Order filed June 13, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KRISTIN DEPPE,	)	Appeal from the Circuit Court
	)	of Jo Daviess County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-L-11
	)	
FRIED GREEN TOMATOES CO., FREDERICK BONNETT, NOAH OTTENHAUSEN, and TERRENCE SHERIDAN,	)	Honorable
	)	Kevin J. Ward,
Defendants-Appellants.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Birkett and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in granting plaintiff's section 2-1401 motion to vacate the dismissal of her case for want of prosecution. Therefore, we affirmed.

¶ 2 Defendants, Fried Green Tomatoes Company, Frederick Bonnett, Noah Ottenhausen, and Terrence Sheridan, appeal from the trial court's grant of the motion of plaintiff, Kristin Deepe, to vacate the dismissal of her case for want of prosecution. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed a suit against defendants on November 19, 2014. She alleged that she had been employed as a server at the Fried Green Tomatoes Company restaurant, and she asserted claims of sexual harassment, retaliation, intentional infliction of emotional distress, and negligent supervision and retention. On January 6, 2015, defendants filed a motion to dismiss Frederick Bonnett as a defendant in his personal capacity. The trial court granted the motion on February 23, 2015, and set a status date of May 28, 2015.

¶ 5 Plaintiff's counsel did not appear on that date or for status hearings on June 25, 2015, September 24, 2015, March 24, 2016, May 26, 2016, August 25, 2016, November 22, 2016, and February 23, 2017. The docket sheet states that a motion for dismissal for want of prosecution by defendants was set for a hearing on March 14, 2017; there is no written motion in the record or a transcript from that hearing. That day, plaintiff's counsel was not present, and the case was continued. Plaintiff's counsel also did not appear on April 13, 2017, at which time the trial court stated that there was a "mysterious sticky note, blue in color, on the outside of the file [that read] as follows: 'Shannon McDonald [plaintiff's attorney], 14-L-11, won't be able to attend.' " Defendants' attorney stated that plaintiff's attorney was in federal court that morning. The trial court then stated:

> "And we discussed at that point in time the possibility that you might be seeking a dismissal for want of prosecution. I hope I'm not contradicting myself; you're the one who is here, you're the one who has been here approximately eight times over the past two years, at this point *** this strikes me as a situation where if you want a dismissal for want of prosecution, I'd be inclined to give it to you."

The trial court stated that it did not "have a preference" and that "if somebody consisting [*sic*] avoids [status hearings] as opposed to reaches an agreement with opposing Counsel, that to me is

the difference between dismissing it for want of prosecution and giving it a new status date." Defendants' counsel asked for one more status date.

¶ 6 On May 25, 2017, plaintiff's counsel again did not appear. Defendant's counsel stated that the trial court had offered to dismiss the case at the last hearing. Counsel stated that he had not heard from plaintiff's attorney for more than one month, and asked that the case be dismissed for want of prosecution. The trial court granted the request.

¶ 7 Over one year later, on July 6, 2018, plaintiff filed a petition to vacate the dismissal pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)). She alleged as follows. Since filing her complaint, she had actively engaged in discovery including written discovery, depositions of defendants, and document subpoenas served on third parties. Most recently, in April 2018, she had scheduled the deposition of the last fact witness. He was living in Iowa, so she had to follow that state's rules governing service of a subpoena, including paying various costs and fees. Plaintiffs' counsel and defendants' counsel communicated by e-mail regarding the scheduling of the deposition, and it was not until June 29, 2018, that defendants' counsel stated that the case had been dismissed for want of prosecution. Plaintiff was shocked because the parties had been continuing to engage in discovery long after the dismissal. Also, she never received notice from the court or any other source that the case was in jeopardy of being dismissed for want of prosecution, or that it had in fact been dismissed. Throughout the litigation, defense counsel had agreed to appear at status hearings to inform the trial court that the parties were engaging in discovery, because plaintiff's counsel's office was located in Milwaukee. Plaintiff never received notice of future status hearings or feedback from defense counsel about the outcome of the hearings. Plaintiff at all times believed that the action was proceeding in the normal course of litigation.

¶ 8 A hearing on the section 2-1401 petition took place on August 9, 2018. Plaintiff's attorney submitted an affidavit that had attached numerous e-mail correspondences between the attorneys. He argued as follows. After the motion to dismiss Bonnett, defense counsel graciously offered to appear at the upcoming status hearing so that plaintiff's attorney would not have to drive from Milwaukee. Plaintiff's attorney did not know that there were subsequently more status hearings, which occurred without notice. Defense counsel then told him there was a status hearing set for April 13, 2017, and stated that he wanted to bring the case to a close. They corresponded regarding discovery and continued to do so in the months after the case was dismissed on May 25, 2017. Between that date and June 29, 2018, there were about 14 e-mails between the parties, including regarding scheduling the deposition of the Iowa witness at defense counsel's office. Plaintiff's attorney had no knowledge the case had been dismissed until defense counsel left two voicemails on June 29, 2018, stating that the deposition did not need to take place. Defense counsel relayed this information 13 months and four days after the dismissal date, barring plaintiff from re-filing within the 12-month savings clause period (735 ILCS 5/13-217 (West 2016)), and within the subsequent 30 day-period in which she could have filed a motion to vacate under section 2-1301 of the Code (735 ILCS 5/2-1301 (West 2016)).

¶ 9 Defense counsel disputed that there was an understanding that he would cover the status hearings. Defense counsel said that he initially did so as a courtesy. Defense counsel admitted writing the e-mails submitted by plaintiff's attorney. He stated that because a party may re-instate a case for a full year after it is dismissed for want of prosecution, he treated the case as a "live" case. He thought that informing plaintiff of the dismissal would be acting contrary to his duty to his client. Defense counsel agreed with the trial court that the court did not give notice of the pendency of dismissal or that the case was dismissed, which was required by local court

rules; defense counsel also did not provide such notice.

¶ 10 The court stated the following. The parties disputed whether there was an agreement for only defendants to appear for status hearings. No one had presented evidence at the section 2-1401 hearing, so it was going "to draw a negative inference against both parties," or, put another way, it was "effectively going to disregard it." There was a strong policy in the law for resolving matters on the merits rather than disposing of them on a technical basis, and achieving substantial justice between the parties was to be considered by the court. Plaintiff's complaint was sufficient to meet the requirement of having a meritorious claim, and she was diligent in bringing the section 2-1401 petition. There was a serious question of whether plaintiff's counsel was diligent in pursuing the underlying claim, because even if there was an agreement with opposing counsel, he had missed two years' worth of status hearings. The trial court would assume that defense counsel earnestly thought it was "zealous advocacy" to, "as the [trial court saw] it, create the impression post-dismissal that the case remained pending, discovery was still open, things were going to be worked out by agreement." However, the trial court though it "was creating a false impression deliberately and that [did not] favor the Defendants' position opposing the motion."[1] Considering the case as a whole, there was "a sufficient showing upon which it [was] appropriate to grant" the section 2-1401 petition.

¶ 11 Defendants filed a motion to reconsider on September 6, 2018, arguing, among other things, that the trial court acknowledged that plaintiff presented no evidence yet ruled as if it had made multiple factual findings in her favor.

¶ 12 The trial court held a hearing on the motion to reconsider on October 2, 2018. Defense

[1] Earlier in the hearing, the trial court stated that defense counsel's actions "could fairly be characterized as fraudulent concealment of the dismissal."

counsel asked to put the contents of his affidavit on the record under oath, as evidence. The trial court allowed him to do so, over plaintiff's objection. Defense counsel testified that there was no agreement that he would cover the status hearings for plaintiff's attorney, as shown by e-mails (which the trial court allowed into evidence). Defense counsel covered many hearings for him as a courtesy but then asked him to come to the status hearings.

¶ 13 The trial court denied the motion to reconsider, reasoning as follows. Defense counsel's testimony was not newly-discovered evidence, as would be required for a motion to reconsider. The trial court would still consider the evidence, but it did not make a difference with respect to the grant of plaintiff's section 2-1401 petition. The trial court's concern when ruling on the petition was whether plaintiff was diligent in pursuing the underlying claim. However, case law such as *In re Marriage of Callahan*, 2013 IL App (1st) 113751, provided that even where that standard had not been met, a court may grant a section 2-1401 petition where justice and fairness required it.

¶ 14 Defendants thereafter appealed.

¶ 15 II. ANALYSIS

¶ 16 We begin by addressing plaintiff's argument that we lack jurisdiction over this appeal. Plaintiff argues that an order granting a section 2-1401 petition is considered a posttrial motion under Illinois Supreme Court Rule 304(b) (eff. Mar. 8, 2016) and that an appeal under that rule must be filed within 30 days of the entry of the order giving rise to the appeal (see Ill. S. Ct. R. 303(a) (eff. July 1, 2017)). Plaintiff argues that defendants were therefore required to file their notice of appeal within 30 days after the trial court granted her section 2-1401 petition, which they did not. Plaintiff argues that defendants' motion to reconsider did not extend the deadline for appealing. She cites *Harris Bank, N.A. v. Harris*, 2015 IL App (1st) 133017, ¶ 44, for the

proposition that a motion to reconsider the grant of a section 2-1401 petition to vacate "should not be used to toll the time for appeal."

¶ 17 Plaintiff's quotation from *Harris* is taken out of context and represents a blatant misrepresentation of the case's holding; we admonish plaintiff's attorney to base arguments on more than a cursory glance at caselaw. In fact, *Harris* provides the precedent to reject plaintiff's position. In that case, the defendant filed a motion to reconsider the denial of her section 2-1401 petition. The trial court denied the motion to reconsider, and the defendant appealed. *Id.* ¶ 42. The plaintiff argued, as plaintiff does here, that the motion to reconsider did not toll the 30-day time period to appeal from the trial court's ruling on the section 2-1401 petition. The appellate court stated that a prior case held that a motion to reconsider a ruling on such a petition should not be used to toll the time for appeal (the statement that plaintiff quotes). *Id.* ¶ 42. The court then immediately stated:

> "However, our supreme court has since decided this question in favor of allowing appellate jurisdiction, holding that 'it is fairly inferable that the timing of a Rule 304(b)(3) appeal is to be governed by Rule 303(a)(1), *including its provision for a toll following a post-trial motion.*' (Emphasis added.)" *Id.* ¶ 45 (quoting *Elg v. Whittington*, 119 Ill.2d 344, 355 (1987)).

The *Harris* court stated that the defendant's notice of appeal was timely, because although she did not file a notice of appeal within 30 days of the denial of section 2-1401 petition, she filed a motion for rehearing within 30 days, such that under Rule 303(a)(1), her time to file a notice of appeal was extended to 30 days after the entry of the order disposing of the motion for rehearing. *Id.* ¶ 46.

¶ 18 In this case, the trial court granted plaintiff's section 2-1401 petition on August 9, 2018. Under Rule 304(b)(3) (Ill. S. Ct. R. 304(b) (eff. Mar. 8, 2016)), this ruling was a final order and was appealable as provided in Illinois Supreme Court Rule 303 (eff. July 1, 2017). Illinois Supreme Court Rule 303(a)(1) (eff. July 1, 2017) states that the notice of appeal must be filed "within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed *** within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order ***." Illinois Supreme Court Rule 303(a)(2) (eff. July 1, 2017) states that "[n]o request for reconsideration of a ruling on a postjudgment motion will toll the running of time within which a notice of appeal must be filed under this rule." However, a section 2-1401 petition is considered to be a new proceeding, as opposed to a post-judgment motion. *Jones v. Unknown Heirs or Legatees of Fox*, 313 Ill. App. 3d 249, 252 (2000). Therefore, if a party files a motion to reconsider the ruling on a section 2-1401 petition, it is not a successive postjudgment motion (*id.*), and the time to appeal begins to run after the court rules on the motion to reconsider (*Harris*, 2015 IL App (1st) 133017, ¶¶ 45-46). Defendants filed a motion to reconsider on September 6, 2018, which was within 30 days of the trial court's ruling on plaintiff's section 2-1401 petition, thereby extending the trial court's jurisdiction. The trial court denied the motion to reconsider on October 2, 2018, and defendants appealed within 30 days of that ruling. Pursuant to the stated analysis and the *Harris* decision, defendants' notice of appeal was timely, and we have jurisdiction over this case.

¶ 19 Turning to the merits of the appeal, defendants argue that the trial court erred in granting plaintiff's section 2-1401 petition. Section 2-1401 typically allows for relief from final orders and judgments more than 30 days but less than two years after their entry. 735 ILCS 5/2-1401

(West 2016). Under section 2-1401, a party may challenge a final judgment by bringing to the trial court's attention issues of fact outside the record which, if known when the judgment was entered, would have affected the judgment, or a party may argue that the judgment was legally defective. *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31. A party asserting a fact-dependent challenge must set forth specific factual allegations showing (1) the existence of a meritorious defense or claim; (2) due diligence in presenting the defense or claim in the original action; and (3) due diligence in filing the section 2-1401 petition. *Id.* ¶ 51. The allegations of a section 2-1401 petition must be proved by a preponderance of the evidence. *Id.* "When the opposing party challenges the facts supporting the petitioner's request for relief under section 2-1401, a full and fair evidentiary hearing must be held." *Id.* ¶ 38.

¶ 20 Defendants argue that we must review the trial court's ruling *de novo* because plaintiff presented no evidence, resulting in the trial court resolving the petition on the pleadings alone, as with a motion for summary judgment. See *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 18 (reviewing *de novo* the issue of whether section 2-1401 petition adequately set forth sufficient facts to entitle the petitioner to a grant of summary judgment). Plaintiff counters that we should review the ruling for an abuse of discretion because she presented a fact-dependent challenge to the dismissal, and the trial court resolved factual disputes in arriving at its conclusion. See *Warren County Soil & Water Conservation District*, 2015 IL 117783, ¶ 51 (when a section 2-1401 petition presents a fact-dependent challenge, the trial court's decision is reviewed for an abuse of discretion).

¶ 21 We agree with plaintiff that the abuse of discretion standard is appropriate here. The standard of review for a ruling on a section 2-1401 petition depends on the nature of the challenge presented. *Id.* ¶ 31. Plaintiff clearly raised a fact-dependent challenge to the dismissal

for want of prosecution, as opposed to a legal challenge. The trial court recognized that the parties disagreed whether defense counsel had an agreement with plaintiff's attorney to appear for the status hearings; we note that normally an evidentiary hearing would be necessary to resolve such disputes (see *id.* ¶ 38). However, the trial court then stated that it was "effectively going to disregard" that issue, and that the parties did not dispute the remaining facts. As clarified in the hearing on the motion to reconsider, the trial court then used its discretion to excuse plaintiff's lack of diligence in the underlying action, based on considerations of justice and fairness. A trial court may "consider equitable considerations to relax the applicable due diligence standards under the appropriate limited circumstances." *Id.* ¶ 51. Thus, while the trial court did not resolve disputed questions of fact, it clearly weighed the uncontested facts and applied equitable considerations. An abuse-of-discretion standard therefore applies. See *id.* ¶¶ 37, 50 (in resolving a fact-dependent section 2-1401 petition, the trial court must consider the particular facts, circumstances, and equities of the underlying case, and its ruling will not be reversed on appeal absent an abuse of discretion). A trial court abuses its discretion where its ruling is arbitrary, fanciful or unreasonable, such that no reasonable person would take the trial court's view. *Forest Preserve District of Cook County v. Chicago Title & Trust Co.*, 2015 IL App (1st) 131925, ¶ 70.

¶ 22 Defendants argue that the trial court improperly conducted a summary judgment type of proceeding when it ruled in plaintiffs' favor, because material facts were contested and plaintiff presented no evidence. Defendants point to the dispute about whether plaintiff's attorney had an agreement with defense counsel to cover missed court dates. Defendants take the position that only after a hearing at which factual disputes are resolved is the decision to grant or deny relief under section 2-1401 within the trial court's discretion.

¶ 23 As discussed, the trial court recognized that the parties disputed whether there was an agreement regarding status hearings, but it stated that it did not consider that issue in making its ruling. Indeed, it ultimately stated that although it had had "concern[s]" about whether plaintiff showed diligence in the underlying action, it granted the petition based on considerations of justice and fairness. Thus, an evidentiary hearing on the question of an agreement about the status hearings was not necessary, as it would not have affected the trial court's ruling. This is clearly illustrated by the fact that the trial court allowed defense counsel to present evidence at the hearing on the motion to reconsider, but then stated that it did not make a difference with respect to its ruling on plaintiff's section 2-1401 petition. Additionally, a trial court's ruling on a fact-dependent petition under section 2-1401 is discretionary, regardless of whether the trial court holds an evidentiary hearing. See *Illinois Neurospine Institute, P.C. v. Carson*, 2017 IL App (1st) 163386, ¶ 25 (even where trial court granted the section 2-1401 petition on the pleadings alone, the appellate court reviewed the ruling for an abuse of discretion because the petition raised a factual challenge to the underlying judgment).

¶ 24 Defendants next argue that even if plaintiff could meet her burden of proof without an evidentiary hearing, plaintiff presented no compelling evidence that she diligently prosecuted her case. Defendants argue that after four years of prosecution, plaintiff's participation in the litigation amounted to just: (1) filing a response to defendants' motion to dismiss Bonnett in his personal capacity; (2) showing up for a hearing on that motion; (3) serving written discovery around that time; and (4) scheduling multiple depositions on April 6, 2016. Defendants note that at the hearing on the motion to dismiss Bonnett, the trial court assigned the date for the next status hearing in plaintiff's presence, but plaintiff failed to appear. At that status hearing and all future status hearings, the trial court selected the next court date. Defendants argue that plaintiff

still missed court dates after becoming aware of them, and that anytime during the long pendency of the case, she could have called the courthouse or checked online to see the case's status. Defendants cites *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 222 (1986), where the supreme court stated that "section 2-1401 does not afford a litigant a remedy whereby he may be relieved of the consequences of his own mistake or negligence."

¶ 25 Defendants further argue that public policy supports the prompt disposition of legal matters and not rewarding attorneys directly responsible for dragging out litigation. Defendants maintain that setting aside final judgments is always the exception to the general rule, which is why section 2-1401 puts the burden on the movant. Defendants argue that a defendant should not have to pay an attorney to represent him where the plaintiff does not come to court and takes very limited action outside of court, as in this case. Defendants assert that even if the trial court could weigh equitable considerations, this is a situation where the prejudice, expense, and unfairness to them in vacating the judgment of dismissal far outweighs the injustice to plaintiff of dismissing a case she did not see fit to prosecute.

¶ 26 Plaintiff responds that the trial court applied the correct legal framework for a section 2-1401 petition to vacate, finding that she had demonstrated a meritorious claim and due diligence in filing her section 2-1401 petition. Plaintiff maintains that she prosecuted her claims diligently throughout the litigation, having completed almost all discovery by April 6, 2016. Plaintiff argues that although the trial court had "reservations" about her not appearing for a number of status hearings, it ultimately found that she acted reasonably under the circumstances.

¶ 27 Plaintiff contends that had she known that defendants were seeking a dismissal of the case at any point in the process, she would have appeared and objected to the motion. She argues that likewise, if she had been informed of the dismissal, she would have immediately re-filed her

action under the savings clause. Plaintiff argues that she never received notice of the motion or the dismissal from either the trial court or defendants.

¶ 28 Plaintiff maintains that the trial court was particularly concerned with defense counsel having intentionally concealed the dismissal order after its entry. Plaintiff points out that defense counsel first notified plaintiff of the dismissal on June 29, 2019, which was 13 months and four days after the dismissal, just past the 12 months under which she could have re-filed her action under section 13-217, and past the subsequent 30 days in which she could have filed a petition to vacate under section 2-1301, which has a less stringent standard than a section 2-1401 petition. Plaintiff argues that defense counsel went to great lengths to conceal the dismissal by continuing to communicate to plaintiff about discovery, including agreeing to host a deposition in his office on June 29, 2018. She argues that the trial court's decision to grant her petition was grounded in the strong public policy favoring resolution of matters on the merits and achieving substantial justice.

¶ 29 We conclude that the trial court acted within its discretion in granting plaintiff's section 2-1401 petition. Aside from challenging the lack of an evidentiary hearing, defendants do not challenge the trial court's findings that plaintiff sufficiently proved the existence of a meritorious claim in her underlying action and due diligence in filing the section 2-1401 petition. Rather, they focus on plaintiff's diligence in prosecuting her complaint. However, as discussed, the trial court did not find that plaintiff had proved such diligence. Instead, it granted the petition based on considerations of justice and fairness, which are equitable considerations. A trial court may use its equitable powers in ruling on a section 2-1401 petition, where necessary to prevent injustice. *Price v. Philip Morris, Inc.*, 2015 IL 117687, ¶ 118. "Because a section 2–1401 petition is addressed to equitable powers, courts have not considered themselves strictly bound

by precedent, and where justice and good conscience may require it a default judgment may be vacated even though the requirement of due diligence has not been satisfied." *Airoom*, 114 Ill. 2d 209, 225 (1986); see also *Warren County Soil & Water Conservation District*, 2015 IL 117783, ¶ 51 (trial court may take equitable considerations into account to relax the applicable due diligence standards "under the appropriate limited circumstances.")

In this case, it is undisputed that, contrary to local court rule, the court did not provide notice of the motion for dismissal for want of prosecution, or of the subsequent dismissal of her case. Previously, plaintiff had appeared when notified of a substantive motion, being the motion to dismiss Bonnett. Further, over the course of the next year after the dismissal, the parties corresponded about discovery, and defense counsel acted as if the case was still active, discussing the location of a witness and going so far as to agreeing to host the deposition of that witness at his office. It was only right after the time for re-filing the case had passed that defense counsel mentioned the dismissal to plaintiff's attorney; the trial court stated that defendants' actions "could fairly be characterized as fraudulent concealment of the dismissal." Under these circumstances, the trial court acted within its discretion in relaxing the due diligence normally required for the underlying action, and ruling that fairness and justice required granting plaintiff's section 2-1401 petition. *Cf. Airoom*, 114 Ill. 2d at 228 (equitable principles did not require that the judgment be vacated where there was no evidence that opposing counsel tried to mislead or lull the defendant into believing the case was proceeding normally while obtaining a default judgment, or that counsel fraudulently concealed the entry of the judgment or prevented the defendant from knowing about it through any trick or contrivance).

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the Jo Daviess County circuit court.

¶ 32 Affirmed.