

No. 1-13-0680

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTINA HUNKER,)	Appeal from the
)	Circuit Court of
Petitioner-Counter-Respondent-Appellee,)	Cook County.
)	
v.)	No. 09 D 9775
)	
HARVEY HUNKER,)	Honorable
)	Naomi H. Schuster,
Respondent-Counter-Petitioner-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice HOFFMAN and Justice LAMPKIN concurred in the judgment.

O R D E R

- ¶ 1 *Held:* The circuit court's order granting plaintiff's section 2-1401 motion to vacate the default judgment for dissolution of marriage affirmed where plaintiff met the due diligence requirement and presented allegations that established the existence of a meritorious claim.
- ¶ 2 Respondent/counter-petitioner Harvey Hunker appeals from an order of the circuit court granting the motion to vacate a default judgment for dissolution of marriage filed by petitioner, Christina Hunker. On appeal, respondent contends that the circuit court erred when it vacated the default judgment because its finding that petitioner acted with due diligence in following the

divorce case was unreasonable and arbitrary. Respondent also contends that the court erred when it found that petitioner presented a meritorious defense or claim that she was entitled to receive maintenance.

¶ 3 Documents contained in the common law record show that petitioner and respondent were married in 1976. In October 2009, petitioner, through counsel, filed petitions for legal separation and temporary maintenance. In January 2010, respondent was ordered to pay petitioner \$2,000 per month for maintenance, and the following month, respondent filed a counter-petition for dissolution of marriage.

¶ 4 On December 2, 2011, petitioner's counsel withdrew her representation and the case was continued to January 5, 2012, for status. Petitioner filed her *pro se* appearance in this case on December 20, 2011; however, she failed to appear in court on January 5, 2012, and the circuit court entered an order setting the case for trial on March 19, 2012, with a status date of March 12, 2012. On March 19, 2012, petitioner did not appear for trial, and the circuit court found her in default.

¶ 5 The court conducted a default prove-up hearing that same day and entered a judgment for dissolution of marriage. The judgment provided, *inter alia*, that both parties were barred from bringing any claim of maintenance against each other, and that the temporary maintenance order was terminated *instanter*. Respondent's counsel mailed copies of the default order and judgment for dissolution of marriage to petitioner at an address in Bolingbrook, Illinois, on April 20, 2012.

¶ 6 On April 27, 2012, petitioner filed an emergency *pro se* motion to vacate the default judgment stating that she never received the papers to appear in court, that she was disabled, and that she was without any income because her maintenance payments had stopped. On July 13, 2012, petitioner, through newly retained counsel, filed an amended petition to vacate the default

judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). Therein, petitioner stated that she never received a copy of the January 5, 2012, order setting the case for trial, and that she did not appear for trial on March 19, 2012, because she was in Glen Oaks alcohol rehabilitation center from February 16, 2012, through March 29, 2012. Petitioner asserted that respondent knew she was in rehabilitation on the date of trial because she told him she was entering the program before she enrolled and spoke to him while she was there. She argued that, had the court known that she was in rehabilitation, it would not have found her in default.

¶ 7 Petitioner also alleged that respondent's counsel never sent her a copy of the documents following entry of the default judgment, and that the clerk of the court never sent her a notice of default or notice that the default judgment was entered. Petitioner stated that following entry of the default judgment, she celebrated Christian and Orthodox Easters with respondent and their son on April 8, 2012, and April 15, 2012, and on the latter date, she asked respondent if he had heard any news about their case from his attorney. Respondent told her that nothing was happening in the case, and thus, petitioner argued, misrepresented the facts to her.

¶ 8 Petitioner further stated that on April 27, 2012, she attempted to use her debit card, which was funded by the temporary maintenance she received from respondent, and discovered that no money was available. When petitioner telephoned the clerk of the circuit court and learned that a default judgment was entered on March 19, 2012, she immediately went to the clerk's office to review her file, and saw the default judgment for the first time. She filed a motion to vacate the judgment that same day, and asserted that this showed that she acted with due diligence. Petitioner also asserted that respondent was not truthful with, and perpetrated a fraud on, the

court when he failed to disclose that petitioner was in rehabilitation, and that he acted in bad faith when he did not tell her the truth about the default judgment during their discussions on Easter.

¶ 9 Petitioner further argued that the default judgment was unconscionable because it barred her from seeking maintenance from respondent. She asserted that respondent misled the court at the prove-up hearing when he testified that she had been employed throughout their marriage, when, in fact, she was not employed for the majority of the marriage. In addition, respondent had testified that petitioner was capable of supporting herself, and failed to disclose to the court that she was disabled. Petitioner thus alleged that the default judgment was unfair and unjust, and that she had a meritorious defense and claim because respondent precluded her from receiving maintenance by inaccurately testifying about her ability to support herself.

¶ 10 Petitioner attached to her petition the transcript from the March 19, 2012, prove-up hearing showing that respondent testified, in relevant part, that petitioner had been employed throughout their marriage, although unemployed at the time, and that she should be barred from requesting maintenance because she was capable of supporting herself. Respondent further testified that the parties had already divided their personal property equally, their financial accounts were in their own names, respondent's pension would be equally divided between the parties, and respondent would have sole custody of their teenage son and petitioner would have visitation. The circuit court found that the agreement was not unconscionable and entered judgment for dissolution of marriage. Petitioner also attached her own affidavit to the petition, the content of which is substantially the same as that set forth in her amended petition to vacate the default judgment.

¶ 11 In his written response, respondent stated that he could not recall if petitioner was in court on January 5, 2012, and noted that there were subsequent court dates on March 2, 2012,

and March 12, 2012, at which she could have informed the court that she was unable to appear on the date set for trial. Respondent denied that petitioner told him she was entering a rehab program, that he knew she was in rehab on the date of trial, and that he spoke with her while she was in rehab. Respondent asserted that petitioner had an affirmative obligation to remain apprised of the status of the case, and had free access to the online court docket. Respondent further stated that notice of the March 19, 2012, orders was mailed to petitioner at the address listed on her appearance, but was returned as undeliverable by the post office.

¶ 12 Respondent denied that he misinformed petitioner about their case on Easter, and maintained that she arrived at his house that day under the influence of drugs or alcohol, and fell asleep on the couch almost immediately. When their son became upset, respondent woke petitioner and asked her to leave, and she became very hostile and asked if she could move in and stay forever. Respondent repeatedly asked petitioner to leave, and she left his house only after their son told her to do so. Respondent denied celebrating Greek Easter with petitioner.

¶ 13 Respondent further denied that he misled the court at the prove-up hearing and argued that petitioner held various positions of employment during their marriage, including selling products from home and working as a secretary at her father's office. He acknowledged that she had been found disabled, but asserted that finding was only for the purpose of receiving supplemental security income.

¶ 14 Respondent argued that, although petitioner acted with due diligence in filing her motion to vacate the default judgment, she failed to show that she had a meritorious claim or defense, and that she acted with due diligence in presenting that claim or defense to the circuit court in the original action. Respondent also denied that the judgment was unconscionable, unfair or unjust.

¶ 15 At the hearing on petitioner's motion to vacate the default judgment, petitioner's counsel argued that respondent knew petitioner was in rehab because she spoke with their son several times while there, and her medical insurance was through respondent's employer. Counsel maintained that petitioner was not capable of supporting herself as she had been unemployed for over 20 years and relied on the temporary maintenance respondent had been paying her while the divorce was pending. Counsel then argued that barring petitioner from receiving maintenance was unfair and unjust, and that equity demanded that the default judgment be vacated. Counsel further asserted that respondent could have informed petitioner about the default judgment, but failed to do so, and maintained that petitioner acted with due diligence when she filed her motion to vacate the default judgment on the same day she learned of its existence.

¶ 16 Petitioner, called by respondent's counsel, acknowledged that on her *pro se* appearance filed December 20, 2011, she indicated that her address was in Bolingbrook, Illinois, which was her boyfriend's home and where she resided at that time. When she entered the rehabilitation program on February 16, 2012, her boyfriend evicted her from his home. Petitioner testified that she had relapsed from alcohol and was very ill at the time. She testified that she did not appear for the January 5, 2012, court date because her former counsel did not notify her about that date. Petitioner acknowledged that she was able to leave the rehab facility to attend court, and testified that she would have done so had she known about the court dates. She further testified that she received no notifications in the mail, she repeatedly asked respondent if anything was happening in the case, and she was taking "heavy medications."

¶ 17 Petitioner testified that respondent was aware that she was in rehab because when she called to speak with her son, respondent always answered the phone, and she told him she was in a rehabilitation facility. She further testified that respondent complained to her when he received

the hospital bills related to her care. Petitioner transferred between three rehabilitation facilities and successfully completed her treatment on March 29, 2012. She spoke with respondent on the telephone that day, and commented that she was released from rehabilitation on his birthday.

¶ 18 Petitioner testified that she was never employed on a full-time basis during their marriage. She worked at part time jobs for a few months at a time in the late 1970s and early 1980s, but took years off when she had their children. In the early 1990s, she worked three days a week for about a year, then worked as a full-time secretary for her father for eight and a half months, ending in 1992, which was the last time she was employed.

¶ 19 Petitioner also testified that when she was 22 years old, she was diagnosed with ankylosing spondylitis, a progressive autoimmune disease, that she had been taking various medications for the disease for many years, and that she was recently approved to receive disability payments. She is under the care of a rheumatologist and expects to eventually be confined to a wheelchair, and she identified a letter from her physician stating that she is permanently disabled. Petitioner also testified that respondent was aware of her disease because he took her to her treatments for 30 years.

¶ 20 Petitioner testified that on Easter, she and respondent went to a restaurant together and ordered carry-out food to bring home for their son. They conversed at the restaurant's bar while they waited for their order, but never discussed the divorce. Petitioner had dinner at respondent's home again the following Sunday for Orthodox Easter. She then asked him if he had heard any news about their divorce, and he denied hearing anything and told her that if he had heard something, he would have told her.

¶ 21 Petitioner further testified that on April 27, 2012, she discovered that there was no money in her account, and she immediately filed her petition to vacate the default judgment that same

day. She had been receiving temporary maintenance from respondent for three years. Respondent testified that he and petitioner were involved in a prior divorce action that was dismissed by the court in 2008 when petitioner did not appear for the final court date.

¶ 22 In closing, respondent's counsel argued that petitioner's testimony showed that she stopped following the case for four months and did not act with due diligence in pursuing the original action as required for relief under section 2-1401. Counsel also argued that the judgment was equitable and not unconscionable. Petitioner's counsel argued that petitioner acted diligently in the underlying case and in filing her 2-1401 petition. He argued that her uncontradicted testimony showed that she had been in rehab since February 16, 2012, that respondent knew where she was, and that he never told her about the trial date. Counsel further argued that it was troubling that opposing counsel mailed the notice of the default judgment to petitioner 31 days after it was entered, and thus, she had no notice to challenge that judgment within 30 days. Counsel also argued that the main reason the default judgment should be vacated was because petitioner had not been employed in 20 years and needed the maintenance.

¶ 23 The circuit court stated that it read the pleadings and listened carefully to the testimony, then granted petitioner's amended petition to vacate the default judgment. The court noted that it was not "overly impressed" with petitioner's actions or conduct, but that she "just barely met" the requirement of acting with diligence in the underlying case. The court commented that the three-month period of time between the date on which petitioner filed her appearance and the date she was found in default was "a very short period of time," and if that gap had been any greater, it may not have found that she was diligent. The court also noted that petitioner was engaged in a treatment program from mid-February through the end of March which required her to remain at those facilities, and the unrebutted testimony showed that respondent was aware that she was in

rehab. The court further noted that the transcript from the prove-up hearing showed that the fact that petitioner was in rehab was never brought to the court's attention. On the other hand, the court observed that petitioner never filed an amended appearance to update her address, and stated that it was a "close call" as to whether petitioner acted with due diligence in pursuing the underlying case. The court found, however, that petitioner "narrowly" did so and that the principles of equitable justice required that the default judgment be vacated.

¶ 24 On appeal, respondent first contends that the circuit court erred when it vacated the default judgment because its finding that petitioner "barely" acted with due diligence in following the case was unreasonable and arbitrary. Respondent argues that petitioner's failure to appear for three court dates and update her mailing address with the court and his counsel shows that she did not take any steps to follow her case, and that he had no duty to verbally notify her of the court dates. Based on their schedule over the prior two years, respondent claims that petitioner should have known that they had a court date approximately every 30 days.

¶ 25 Petitioner responds that the circuit court did not err when it found that she acted diligently because she filed a timely *pro se* appearance in this case, and only three months elapsed from the date she filed her appearance to the date the default judgment was entered. Petitioner points out that she missed the court dates because she was in rehab, and although respondent knew she was in rehab, the court found her in default because it was unaware of that fact. Petitioner maintains that the fact that she asked respondent about the case on Easter shows that she tried to stay current, but that he misled her when he misinformed her that nothing had happened in the case. Petitioner also asserts that respondent did not contradict any of her testimony at the hearing.

¶ 26 To obtain relief under section 2-1401, a petitioner must present allegations that establish the existence of a meritorious claim or defense, due diligence in presenting that claim or defense to the circuit court in the original action, and due diligence in filing the section 2-1401 petition. *Domingo v. Guarino*, 402 Ill. App. 3d 690, 699 (2010). Generally, a petition must be filed within two years after the order or judgment is entered, and the allegations should be supported with an affidavit or other showing for matters not of record. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Relief may be granted when the allegations in the petition are established by a preponderance of the evidence. *Id.*

¶ 27 In this case, both parties assert that this court should review the circuit court's ruling on the section 2-1401 petition for an abuse of discretion. However, in *Vincent*, the supreme court found that the abuse of discretion standard does not apply in section 2-1401 proceedings, and that prior use of that standard resulted from the erroneous belief that such petitions invoke the equitable powers of the court to promote fairness and justice. *S.I. Securities v. Powless*, 403 Ill. App. 3d 426, 440 (2010), citing *Vincent*, 226 Ill. 2d at 15. The *Vincent* court did not determine the proper standard for reviewing a ruling on a section 2-1401 petition following an evidentiary hearing, but noted, in *dicta*, that the abuse of discretion standard was not attached to any quantum of proof, and thus, did not correspond with any possible disposition in a section 2-1401 proceeding. *Vincent*, 226 Ill. 2d at 17 n.5. The court expressly noted that the grant or denial of relief following a civil bench trial was traditionally reviewed under the manifest weight of the evidence standard. *Id.*

¶ 28 Since *Vincent*, most appellate court have used the *dicta* therein as guidance and applied the manifest weight of the evidence standard to review dispositions of section 2-1401 petitions following evidentiary hearings. See *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶

35; *Domingo*, 402 Ill. App. 3d at 699 (2d Dist.); *S.I. Securities*, 403 Ill. App. 3d at 440 (5th Dist.). A ruling is against the manifest weight of the evidence only when the opposite conclusion is clearly evident. *Roepenack*, 2012 IL App (3d) 110198, ¶ 35. We agree with the reasoning in these cases and similarly apply the manifest weight of the evidence standard for our review in this case. We note, however, that our determination would be the same if we reviewed the circuit court's ruling under the abuse of discretion standard.

¶ 29 There is no bright-line rule for determining whether a petitioner acted diligently, but instead, "due 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). Due diligence determinations are case specific and must consider all of the circumstances surrounding entry of the judgment. *Id.* at 101.

¶ 30 Here, we find that the circuit court's determination that petitioner acted with sufficient due diligence in following her case was not against the manifest weight of the evidence, nor was it arbitrary or unreasonable, but instead, was properly based on the circumstances in this case. Petitioner acknowledges that she did not appear in court on January 5, 2012, March 12, 2012, and March 19, 2012, and on the last date, the circuit court found her in default and entered the judgment for dissolution of marriage. Petitioner learned of that judgment on April 27, 2012, and immediately filed her section 2-1401 petition to vacate it that same day.

¶ 31 In her petition, affidavit and testimony at the hearing, petitioner consistently maintained that she was unaware of the court dates, and specifically, that she did not appear for trial on March 19, 2012, because she was enrolled in an in-patient alcohol rehabilitation program from February 16, 2012, through March 29, 2012. Petitioner averred and testified that respondent knew that she was in rehab because she told him that she was entering the program before she

enrolled, she spoke with him on the telephone while she was there, and he received bills for her treatment because she was covered under his medical insurance.

¶ 32 Petitioner further averred and testified that on Easter, she specifically asked respondent if he had heard any news about their case from his attorney. Although the default judgment had already been entered, respondent told petitioner that nothing had happened in the case.

Documents in the record show that respondent's counsel mailed copies of the default order and judgment for dissolution of marriage to petitioner on April 20, 2012, 32 days after those orders had been entered. Respondent filed a response to the section 2-1401 petition denying petitioner's allegations, but he did not submit an affidavit contradicting the averments in her sworn affidavit, nor did he contradict petitioner's testimony at the hearing on her petition.

¶ 33 The circuit court found that petitioner "just barely met" the requirement of acting with due diligence in the underlying case, and noted that only three months had passed between the date petitioner filed her appearance and the date she was found in default, which was "a very short period of time." The court noted that petitioner was engaged in a treatment program which required her to remain at the rehab facilities from mid-February through the end of March. The court expressly found that the unrebutted testimony showed that respondent was aware that petitioner was in rehab, and that the transcript from the prove-up hearing when the default judgment was entered showed that the fact that she was in rehab was never brought to the court's attention.

¶ 34 Based on this record, we find that the circuit court applied the proper criteria by considering all of the surrounding circumstances to determine whether petitioner acted with due diligence in this case. The court found that petitioner "narrowly" met the requirement for due diligence, but met it nonetheless, and we find no error by the court in reaching that decision.

¶ 35 Respondent next contends that the circuit court erred when it found that petitioner presented a meritorious defense or claim that she was entitled to receive maintenance.

Respondent notes that petitioner listed her then-boyfriend's address as her address on her appearance, and alleges that such action shows that petitioner was cohabitating with her boyfriend, and is therefore barred from receiving maintenance from respondent. Respondent claims that petitioner did not have a meritorious claim or defense, and consequently, the circuit court should have denied her section 2-1401 petition to vacate the default judgment.

¶ 36 We find that respondent's argument is without merit. In ruling on a section 2-1401 petition, it is not the circuit court's responsibility to determine whether the underlying cause of action has merit. *Paul*, 223 Ill. 2d at 107. The facts which petitioner was required to plead and prove in her petition were not the facts which would establish the merit of her claim in the underlying action, but instead, the facts which would show she was entitled to have the default judgment vacated. *Id.*

¶ 37 Here, petitioner was required to show that she had a meritorious claim or defense that was part of the underlying action which entitled her to have the default judgment vacated to consider that claim. Petitioner asserted that the default judgment should not have terminated her temporary maintenance nor barred her from ever receiving maintenance from respondent because she was not capable of supporting herself due to her disability and lack of employment history. The transcript from the prove-up hearing for the default judgment showed that respondent testified that petitioner had been employed throughout the marriage and was capable of supporting herself. In her petition, affidavit and testimony at the hearing on her motion to vacate the default judgment, petitioner demonstrated that she suffered from a progressive autoimmune disease, that she was diagnosed as disabled by her physician and was receiving

disability payments, and that she expected to be confined to a wheelchair in the future. Petitioner also established that her previous employment history consisted of part-time and short-term positions, and that she had not been employed in any capacity for over 20 years.

¶ 38 In addition, petitioner outlined the history of the litigation, her transition to *pro se* status, her lack of knowledge of the court dates, her treatment in a six-week inpatient alcohol rehabilitation program at the time of trial and the default finding, respondent's knowledge that she was in rehab when the default finding was entered, her attempt to learn the status of the case from respondent, and her discovery of the default judgment and immediate action to vacate that judgment. We find that petitioner's filings and testimony adequately established her entitlement to have the default judgment vacated. See *Paul*, 223 Ill. 2d at 107. The issue of whether or not petitioner should be barred from receiving maintenance due to a subsequent relationship was not at issue in the underlying action or during the section 2-1401 proceedings, and therefore, raises a new factual question more appropriate for resolution at trial. Accordingly, we find that the circuit court's determination that petitioner presented a meritorious claim or defense which required vacatur of the default judgment was not against the manifest weight of the evidence.

¶ 39 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 40 Affirmed.