

No. 1-13-1564

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

CITIBANK SOUTH DAKOTA, N.A.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 M1 178781
)	
RITA GALARZA,)	Honorable
)	Cynthia Y. Cobbs,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Denial of defendant's section 2-1401 petition was proper where claim that plaintiff submitted fraudulent affidavit was irrelevant to evidentiary basis for trial court's judgment for plaintiff and where defendant's allegations of trial judge's misconduct had not been raised prior to appeal.

¶ 2 In this debt collection action, defendant Rita Galarza appeals the denial of her petition pursuant to section 2-1401 of the Code of Civil Procedure, 735 ILCS 5/2-1401, to vacate the trial court's judgment against her in favor of plaintiff, Citibank South Dakota, N.A. (Citibank). On appeal, Galarza contends: (1) that the circuit court erred in denying her section 2-1401 petition due to its mistaken belief that it did not have jurisdiction to consider the petition; (2) that her

section 2-1401 petition should not have been dismissed because it presented a meritorious claim, *i.e.*, newly discovered evidence that Citibank had submitted affidavits completed by "employees who robo-signed and forged the names of affiants and notaries" in her case and other debt collection actions; (3) that the trial court's judgment in favor of Citibank is void due to the "robo-signed and forged" affidavit supporting Citibank's complaint; and (4) that the trial court's original judgment for Citibank was erroneous and void because the trial judge was prejudiced against Galarza and violated the Illinois Code of Judicial Conduct. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 In the action underlying the instant appeal, Citibank filed a complaint against Galarza on August 24, 2010, alleging that she obtained a credit card account from Citibank and subsequently defaulted by failing to pay the balance due of \$16,579.46. Citibank's complaint attached a supporting affidavit executed by Cheryl Preston, an employee of Citicorp Credit Services, Inc., a subsidiary of Citibank that services Citibank credit card accounts. Among other things, Preston attested that she was a custodian of records concerning Galarza's Citibank account. According to Preston's affidavit, Citibank's records reflected that Galarza used the account for purchases or cash advances, with Galarza's agreement to the terms and conditions of the account by her use of it, and that Galarza was in default by failing to make timely payments on the account. Preston's affidavit attached an account statement for Galarza's account reflecting an outstanding \$16,579.46 balance. Preston's affidavit was signed and notarized by Walter R. Todd, a Notary Public in the state of Missouri.

¶ 5 Galarza filed a *pro se* appearance and an answer on December 17, 2010, denying the allegations in Citibank's complaint. Two months later, she filed a motion to dismiss the

complaint pursuant to sections 2-606 and 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-606, 2-615 (West 2010). The trial court denied the motion to dismiss. Following a bench trial before Judge Pamela E. Hill-Veal on April 28, 2011, the trial court entered judgment in favor of Citibank and against Galarza for the outstanding account balance of \$16,579.46 plus costs. There is no transcript or record of proceedings from the bench trial. In May 2011, Galarza filed a post-trial motion to reconsider that argued, among several other theories, that Preston's affidavit was "hearsay" not based on Preston's personal knowledge and that the affidavit and supporting account statement failed to establish a contract between Galarza and Citibank. Galarza's motion to reconsider was denied by the trial court on July 28, 2011.

¶ 6 On direct appeal, Galarza contended that the trial court erred in denying her motion to dismiss Citibank's complaint, entering judgment for Citibank, and denying her request for a continuance of the trial date. We affirmed the judgment of the trial court on December 28, 2012. *Citibank South Dakota, N.A. v. Galarza*, 2012 IL App (1st) 112397-U. With respect to the trial court's denial of the motion to dismiss, we noted that Galarza had waived any objection to defects in Citibank's complaint by filing an answer that Galarza did not withdraw before filing her motion to dismiss. Furthermore, under the doctrine of aider by verdict, we held that the judgment against Galarza cured any formal or purely technical defects in the complaint. With respect to the entry of judgment for Citibank, and denial of Galarza's request for a continuance, we noted that Galarza had not submitted a transcript or other record of the relevant proceedings and thus the presumption was that the trial court acted in conformity with the law and evidence.

¶ 7 On April 26, 2013, Galarza filed her section 2-1401 petition seeking to vacate the judgment which had been entered against her and in favor of Citibank. Her petition alleged the existence of newly discovered facts and evidence that, if known at the time, would have

prevented the entry of judgment for Citibank. In particular, Galarza's section 2-1401 petition alleged that the Preston affidavit supporting Citibank's complaint was "robo-signed and forged" both "in the notary part and the affiant part of the affidavit." According to Galarza's section 2-1401 petition, "robo-signing" occurs when "an individual signs documents without reviewing them"; the signer "assume[s] the paperwork to be correct and sign[s] it automatically, like robots, sometimes signing hundreds of documents per day." The section 2-1401 petition alleges that Preston had no personal knowledge about the credit card account attributed to Galarza but simply robo-signed the affidavit. Galarza further alleges that in the same affidavit, the signature of notary public Walter R. Todd was forged by someone other than Todd. Galarza claims that Citibank has engaged in such robo-signing and forgery "not only in [her] case but also in many other similar civil court cases in various counties across the United States." The section 2-1401 petition further alleged that "the writing and signatures" on affidavits submitted by Citibank in various collections actions are "clearly dissimilar."

¶ 8 In support of her allegations, Galarza's section 2-1401 petition attached an affidavit executed by Warren Spencer, whom Galarza identified as a "Certified Fraud Examiner and Forensic Handwriting Examiner." In his affidavit, Spencer averred that he had examined signatures of "Walter R. Todd" appearing on Citibank affidavits used in Galarza's case and 42 other civil cases, comparing each to the "standard" signature appearing on Todd's Missouri notary public application. According to Spencer, the "Walter R. Todd" signatures in the affidavits from these 43 actions were "similar in 0 comparisons, inconclusive in 2 comparisons, different in 25 comparisons and [there were] indications that [the] signature does not match in 16 comparisons when compared to the standard." In particular, Spencer opined that the authenticity

of Todd's signature on the affidavit submitted by Citibank in Galarza's case was "[i]nconclusive, subject to further review."

¶ 9 A hearing was held on Galarza's section 2-1401 petition on May 7, 2013, before Judge Cynthia Y. Cobbs.¹ Although there is no transcript of that hearing, pursuant to Illinois Supreme Court Rule 323(d) the appellate record includes an agreed statement of facts signed by both Galarza and Citibank's counsel. According to the agreed statement of facts, at the hearing the trial court reviewed the procedural history of the case and stated that the trial court did not have jurisdiction to consider Galarza's section 2-1401 petition because the underlying judgment in Citibank's favor had already been affirmed on appeal. On the same date, the trial court entered a written order denying Galarza's section 2-1401 petition as "moot."

¶ 10 On appeal, Galarza contends: (1) that the trial court erred in denying her section 2-1401 petition due to its mistaken belief that it did not have jurisdiction to consider the section 2-1401 petition; (2) that her section 2-1401 petition presented a meritorious claim based on newly discovered evidence that Citibank had submitted affidavits prepared by "employees who robo-signed and forged the names of affiants and notaries" in this and other civil actions; (3) that the trial court's judgment in favor of Citibank is void due to the "phony affidavit" submitted by Citibank in support of its complaint; and (4) that the judgment for Citibank is erroneous and void because the temperament and prejudice of Judge Hill-Veal towards Galarza impeded her effectiveness as a judge and violated the Illinois Code of Judicial Conduct.

¶ 11 As to Galarza's first contention, assuming that the agreed statement of facts accurately reflects the trial court's reasoning in denying the section 2-1401 petition at the May 2013 hearing, we agree that the trial court was incorrect in stating that it lacked jurisdiction to decide

¹ Judge Hill-Veal, who presided over pre-trial proceedings and trial, retired prior to the filing of the section 2-1401 petition at issue.

the petition. The fact that we had already affirmed the original trial judgment in favor of Citibank did not preclude the circuit court from considering a timely section 2-1401 petition seeking to vacate the judgment. Nevertheless, we may affirm the decision of the trial court on any basis supported by the record, regardless of whether that basis was relied upon by the trial court. *Doe v. PSI Upsilon International*, 2011 IL App (1st) 110306, ¶ 11. As set forth below, in this case we find that there are other grounds for affirming the trial court's denial of Galarza's section 2-1401 petition.

¶ 12 With respect to Galarza's second and third contentions, we disagree that the petition's allegations of "robo-signing" and forgery presented a meritorious claim under section 2-1401. Relief under that statute is predicated upon proof, by a preponderance of evidence, of a "defense or claim that would have precluded entry of judgment in the original action." *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). Additionally, the petitioner must show "diligence in both discovering the defense or claim and presenting the petition." *Id.* Where, as here, a trial court denies a section 2-1401 petition without an evidentiary hearing, our review is *de novo*. See *id.* at 18 ("[W]hen a court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, that order will be reviewed, on appeal, *de novo*.").

¶ 13 In conducting our *de novo* review, we agree with Citibank's argument succinctly stated in its appellate brief as follows:

"[Galarza's] sole basis raised in her 735 ILCS 5/2-1401 petition for vacating the judgment against her pertained to the verification affidavit attached to [Citibank's] Complaint. It should be noted, as a practical consideration, that a verification affidavit is only relevant insofar as a party is seeking default judgment.

Verification affidavits are used to attest to the contents of a pleading and 'do not constitute evidence except by way of admission.' 735 ILCS 5/2-605(a). In this case, judgment was entered against [Galarza] following a bench trial. During that trial, [Citibank] presented sufficient evidence to substantiate its claims. The verification affidavit referenced by [Galarza] was not entered into evidence or considered by the court in reaching its decision. Therefore, the verification affidavit is irrelevant to [Galarza's] claim. This is a collateral issue that in no way impacts [Citibank's] liability in this case." Appellee's Br. at 5.

Accordingly, although Galarza makes lengthy arguments premised on Citibank's affidavits, those arguments are irrelevant. The affidavit upon which her arguments are premised cannot be the seminal evidentiary link upon which she bases her entire section 2-1401 argument. Therefore, we agree with Citibank that those arguments have no legitimate place in the resolution of this appeal.

¶ 14 Galarza's final contention on appeal is that the original judgment for Citibank is "erroneous" and void because the temperament of the trial court, Judge Hill-Veal, "seriously impeded her effectiveness as a judge." Galarza asserts that the judge was "extremely prejudiced" against Galarza throughout the proceedings and thus should have disqualified herself pursuant to the Illinois Code of Judicial Conduct. Galarza also argues that we "should have given more weight to [her] brief and reply brief in the original appeal" because the Judicial Performance Commission of Cook County issued a performance improvement plan for Judge Hill-Veal in 2012, and because the judge was not recommended for retention by certain organizations.

¶ 15 This appeal is the first time that Galarza has raised arguments regarding the trial judge's temperament. The parties' agreed statement of facts from the circuit court's hearing on the section 2-1401 petition contains no indication that Galarza raised such arguments at that time. "Arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal." *U.S. Bank National Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, ¶ 24 (on appeal from denial of section 2-1401 petition, defendant in foreclosure action forfeited argument asserted for first time on appeal); see also *People v. Gray*, 2013 IL App (1st) 112572, ¶ 12 (affirming dismissal of section 2-1401 petition as untimely but noting "the original claim set forth in defendant's section 2-1401 petition is different from the claim before us on appeal and *** would be another basis for affirming the dismissal of defendant's section 2-1401 petition."). Thus, we will not consider Galarza's arguments regarding the trial judge's temperament for the first time in this appeal. Moreover, to the extent Galarza could have raised such arguments in her direct appeal from the original judgment, *res judicata* would also apply to bar our consideration of those claims in this appeal regarding her section 2-1401 petition.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 17 Affirmed.