FIRST DIVISION
SEPTEMBER 17, 2012

1-11-1201

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

1600 MUSEUM PARK, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CH 32750
	)	
PAULA WILLIAMS and LULA WILLIAMS,	)	Honorable
	)	Alexander P. White,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

ORDER

¶ 1 *Held:* Where one party to a written agreement signs as agent for another, and then signs a promissory note with only her name, the principal in the written agreement will not be liable on the note.

¶ 2 This appeal arises from a March 22, 2011 order by the circuit court of Cook County, which denied a section 2-1401 petition to vacate (735 ILCS 5/2-1401 (West 2008)) a May 20, 2010 order that entered judgment against defendants Lula and Paula Williams and in favor of plaintiff 1600 Museum Park, LLC. On appeal, Lula and Paula Williams argue that: (1) the trial court failed to properly address their section 2-1401 petition to vacate; (2) the trial court's application of collateral

estoppel was erroneous; (3) the trial court failed to vacate the original December 19, 2008 judgment by confession; and (4) the trial court's March 22, 2011 memorandum opinion and the May 20, 2010 entry of judgment in favor of 1600 Museum Park, LLC was an abuse of discretion. For the following reasons, we affirm in part and reverse in part the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On February 11, 2006, defendant Lula Williams (Lula) signed a written agreement to purchase a condominium unit and a parking space in a building located at 1621 South Prairie Avenue in Chicago, Illinois (the purchase agreement). In conjunction with the execution of the purchase agreement, Lula executed a promissory note for $24,125,which represented the amount of additional earnest money for the purchase of the condominium unit. The promissory note contained a confession of judgment clause, which allowed any attorney to appear in court "at any time [of] maturity, and confess a judgment, without process, in favor of the holder of the [n]ote." While Lula signed both her name and the name of defendant Paula Williams (Paula)[1] on the purchase agreement, Lula was the sole signatory to the promissory note. Lula and Paula paid $1,000 on the down payment but never took occupancy of the condominium unit. Plaintiff 1600 Museum Park, LLC (1600 Museum Park) is the owner of the condominium building, the designated seller of the property in the purchase agreement, and the payee on the promissory note. On June 28, 2006, Lula and Paula allegedly executed a termination letter that they had received when the written purchase agreement was signed. According to the purchase agreement, this termination letter gave them the right to

[1]The record does not disclose the relationship between Lula Williams and Paula Williams.

terminate the purchase agreement if received by 1600 Museum Park within seven days after the purchase agreement was signed. However, Lula and Paula waited four months after the execution of the purchase agreement before mailing the termination letter. 1600 Museum Park denies receiving this termination letter. The termination letter is entitled, "Receipt, Agent Certification and Cancellation Page," and the body of the letter states: "If you are entitled to cancel your purchase contract and wish to do so, you may cancel by personal notice or in writing ***. You may use the form below."

¶ 5 On September 4, 2008, 1600 Museum Park filed a "verified complaint for declaratory judgment and confession on judgment note" against Lula and Paula to secure the additional earnest money in the amount of $24,125. On December 19, 2008, the trial court entered an *ex parte* judgment against Lula and Paula jointly and severally in the amount of $32,045.25, which consisted of $24,125 for the principal balance of the earnest money, $7,531.25 for attorney's fees, and $389 for court costs.

¶ 6 Because 1600 Museum Park had difficulty serving Lula with the summons in order to confirm the judgment, the court authorized 1600 Museum Park to serve Lula via an alternative service of process by leaving the summons and copy of the complaint with Lula's doorman in the building in which she lived, and by mailing the papers by certified mail. Lula lived in a building that was only accessible to visitors whom the doorman allowed into the building.

¶ 7 On March 13, 2009, 1600 Museum Park filed a motion to confirm the judgment, with affidavits showing that substitute service had been accomplished. On May 18, 2009, the judgment by confession was confirmed. On September 15, 2009, Lula and Paula filed a "motion to open the

judgment by confession" pursuant to Illinois Supreme Court Rule 276 (eff. 1982), alleging: (1) that neither Lula nor Paula was properly served with the summons; (2) that Paula never executed the promissory note; and (3) that Lula and Paula terminated the purchase agreement.

¶ 8 On December 9, 2009, the trial court, upon an oral motion by Lula and Paula, converted the Rule 276 motion into a motion to vacate the judgment (motion to vacate). The trial court then vacated and set aside the judgment that same day. On February 26, 2010, 1600 Museum Park filed a motion for reconsideration of the court's December 9, 2009 order. On May 20, 2010, the trial court granted 1600 Museum Park's motion for reconsideration and again entered judgment against Lula and Paula and in favor of 1600 Museum Park. However, the trial court granted Lula and Paula leave to file a written "motion to vacate judgment." Subsequently, Lula and Paula filed a section 2-1401 petition to vacate (section 2-1401 petition) the May 20, 2010 order that granted 1600 Museum Park's motion for reconsideration and reinstated the judgment against them. 735 ILCS 5/2-1401 (West 2008). On March 22, 2011, the trial court denied Lula and Paula's section 2-1401 petition and issued a memorandum decision explaining the denial.

¶ 9 In the memorandum decision, the trial court first found that Lula and Paula were precluded under the doctrine of collateral estoppel from bringing a section 2-1401 petition to vacate the December 19, 2008 order because the arguments made in their section 2-1401 petition were identical to the arguments they raised in their original Rule 276 "motion to open the judgment by confession." Second, the trial court found that Lula and Paula were both properly served with process. Third, it found that the promissory note was executed by Lula and Paula because Lula was acting as Paula's agent. Fourth, the trial court found Lula and Paula's attempted termination of the purchase

agreement ineffective as time-barred.

¶ 10 ANALYSIS

¶ 11 On appeal, Lula and Paula argue that: (1) the trial court failed to address their section 2-1401 petition to vacate; (2) the trial court's application of collateral estoppel was erroneous; (3) the trial court failed to vacate the December 19, 2008 judgment by confession; and (4) the trial court's March 22, 2011 memorandum opinion and the May 20, 2010 entry of judgment in favor of 1600 Museum Park was an abuse of discretion.

¶ 12 We reject Lula and Paula's arguments with respect to the first claim. Lula and Paula argue that the trial court failed to rule on the section 2-1401 petition to vacate. The trial court's March 22, 2011 order stated that the "[section 2-1401 motion to vacate the May 20, 2010] order, granting [1600 Museum Park's] motion to reconsider, is DENIED." Although unclear, Lula and Paula appear to argue that because the section 2-1401 petition sought to vacate the December 19, 2008 judgment entered against them, rather than the May 20, 2010 order granting 1600 Museum Park's motion to reconsider and reinstating the judgment against them, the above quoted language shows that the trial court did not really address the section 2-1401 petition. We find this argument to be specious. The May 20, 2010 order reinstated the December 19, 2008 judgment against Lula and Paula and in favor of 1600 Museum Park. Therefore, it was immaterial how the trial court labeled the relief sought by the section 2-1401 petition–either to vacate the December 19, 2008 judgment or to vacate the May 20, 2010 order reinstating the December 19, 2008 judgment. We reject Lula and Paul's argument that the trial court did not rule on the section 2-1401 petition based on this parsing of language.

¶ 13 With respect to the second issue, we review the application of collateral estoppel under a *de*

novo standard of review. *In re A.W.*, 231 Ill. 2d 92, 99 (2008); *Illinois Health Maintenance Organization Gurantee Ass'n v. Department of Insurance*, 372 Ill. App. 3d 24, 31 (2007). Under *de novo* review, we perform the same analysis that a trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 14 Collateral estoppel is an equitable doctrine that generally prevents the "relitigation of issues that have already been resolved in earlier actions." *Du Page Forklift Service, Inc. v. Material Handling Service, Inc.*, 195 Ill. 2d 71 at 77 (2001). The Illinois Supreme Court explained the doctrine in *Nowak v. St. Rita High School*, 197 Ill. 2d 381 (2001), stating:

> "The doctrine of collateral estoppel applies when a party, or someone in privity with a party, participates in *two separate and consecutive cases arising on different causes of action* and some controlling fact or question material to the determination of both causes has been adjudicated against that party in the former suit by a court of competent jurisdiction. The adjudication of the fact or question in the first cause will, if properly presented, be conclusive of the same question in the later suit, but the judgment in the first suit operates as an estoppel only as to the point or question actually litigated and determined and not as to other matters which might have been litigated and determined." (Emphasis added.) *Novak*, 197 Ill. 2d at 389-90.

¶ 15 Collateral estoppel may be applied when: (1) there was a final, valid judgment on the merits

in a prior adjudication; (2) the issue in a prior adjudication is identical with the issue presented in the current action; and (3) the party against whom estoppel is asserted was a party to, or in privity with a party to, a prior adjudication. *Du Page Forklift Service, Inc.*, 195 Ill. 2d at 77. Further, collateral estoppel cannot be applied until the potential for appellate review has been exhausted. *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 113 (1986).

¶ 16 A judgment is final if it determines the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. *In re Marriage of Susman*, 2012 IL App (1st) 112068, ¶ 12. A judgment on the merits is defined as, "[o]ne rendered after argument and investigation, and when it is determined which party is right, as distinguished from a judgment upon some preliminary or formal or merely technical or procedural point." *Black's Law Dictionary* 843 (6th ed. 1990).

¶ 17 In this case, there was no prior adjudication of the same issues, and there is only one case involved here. Moreover, the confession of judgment was an *ex parte* proceeding and the trial court never considered the merits of the case at the time of the entry of judgment. Thus, the doctrine of collateral estoppel did not apply and we need not consider Lula and Paula's separate argument that the trial court erroneously raised the collateral estoppel issue *sua sponte*.

¶ 18 1600 Museum Park argues that even if collateral estoppel was inapplicable, the "law of the case" doctrine applied to preclude Lula and Paula from filing a successful section 2-1401 petition. Generally, the law of the case doctrine "bars relitigation of an issue previously decided in the same case." *People v. Hopkins*, 235 Ill. 2d 453, 469 (2009); *Maniez v. Citibank*, 404 Ill. App. 3d 941, 958 (2010). The purpose of the law of the case doctrine is to protect the settled expectations of the

parties, ensure the uniformity of decisions, maintain consistency during the course of a single case, effectuate the proper administration of justice, and bring litigation to an end. *See Long v. Elborno*, 397 Ill. App. 3d 982, 989 (2010); *Norris v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania*, 368 Ill. App. 3d 576, 581 (2006); *Petre v. Kucich*, 356 Ill. App. 3d 57, 63 (2005). The law of the case doctrine applies in situations where an appellate court decides an issue of law and then remands the case to the trial court. The law of the case doctrine prevents a subsequent appellate court from ruling inconsistently on the issue of law decided by the first appellate court. *Hopkins*, 235 Ill. 2d at 469. The facts of this case did not involve a prior adjudication of an issue of law by a reviewing court, nor was there a remandment of any issue to the trial court. Therefore, the law of the case doctrine is inapplicable here. Accordingly, we can proceed to determine the merits of the section 2-1401 petition and affirm the trial court on any basis found in the record. See *Doe v. PSI Upsilon International*, 2011 IL App (1st) 110306, ¶ 11 (a reviewing court may affirm the decision of the trial court on any basis supported by the record); *People v. Johnson*, 208 Ill. 2d 118, 128 (2003) ("[i]t is a fundamental principle of appellate law that when an appeal is taken from a judgment of a lower court, '[t]he question before [the] reviewing court is the correctness of the result reached by the lower court and not the correctness of the reasoning upon which that result was reached' ") (quoting *People v. Novak*, 163 Ill. 2d 93, 101 (1994)); accord *People v. Thompkins*, 121 Ill. 2d 401, 428 (1988); *People v. Tobe*, 49 Ill. 2d 538, 547 (1971); *People v. York*, 29 Ill. 2d 68, 71 (1963).

¶ 19 Lula and Paula's third claim challenges the merits of the trial court's denial of their section 2-1401 petition to vacate the trial court's May 20, 2010 order. They argue that the December 19,

2008 entry of judgment in favor of 1600 Museum Park was in error and that their section 2-1401 petition to vacate the May 20, 2010 order, which reinstated the December 19, 2008 judgment, should have been granted.

¶ 20 Section 2–1401 establishes a comprehensive, statutory procedure that allows courts to vacate a final judgment older than 30 days. 735 ILCS 5/2–1401 (West 2008). While the remedy in the statute has its roots in common law equity, the Illinois legislature abolished the common law writ system and replaced it with a statutory petition. See 735 ILCS 5/2–1401(a) (West 2008); see also *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007) ("section 2-1401 is a civil remedy that extends to criminal cases as well as to civil cases"). Section 2–1401 requires that the petition be filed in the same proceeding in which the order or judgment was entered, but it is not considered a continuation of the original action. 735 ILCS 5/2–1401(b) (West 2008). The statute further requires that the petition be supported by affidavit or other appropriate showing as to matters not of record. 735 ILCS 5/2–1401(b) (West 2008). Relief under section 2–1401 is predicated upon proof, by a preponderance of evidence, of a meritorious defense or claim that would have precluded entry of an order or judgment in the original action. *Babcock v. Wallace*, 2012 IL App (1st) 111090, ¶ 23. In addition, the movant must show diligence in both discovering the defense or claim and presenting the petition. *Id.*; *Vincent*, 226 Ill. 2d at 7-8, citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986). Finally, section 2–1401 petitions invite responsive pleadings and are subject to the usual rules of civil practice. *Vincent*, 226 Ill. 2d at 8, citing *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 279 (1982). Accordingly, there are several ways a trial court can reach a final disposition on a section 2-1401 petition. The trial court may: (1) dismiss the petition; (2) grant or deny the petition on the pleadings

alone; or (3) grant or deny relief after holding an evidentiary hearing where factual disputes are resolved. *Vincent*, 226 Ill. 2d at 9. The first two dispositions are subject to a *de novo* standard of review on appeal. *Id.* at 18. However, petitions decided after an evidentiary hearing are subject to an abuse of discretion standard of review on appeal. See *id.* at 17 n. 4 (an abuse of discretion standard would likely apply in cases involving section 2-1401 petitions that are decided after an evidentiary hearing).

¶ 21 Moreover, the grant or denial of a section 2-1401 petition on the pleadings is, in effect, a summary disposition on the matter. *R.M. Lucas Co. v. Peoples Gas Light & Coke Co.*, 2011 IL App (1st) 102955, ¶`12; accord *Vincent*, 226 Ill. 2d at 9. The relevant standard in such a situation is whether viewing the evidence in the light most favorable to the nonmoving party, "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS § 5/2-1005(c) (West 2008).

¶ 22 In this case, there were affidavits attached to Lula and Paula's section 2-1401 petition and the trial court heard oral arguments on the petition. However, the trial court did not conduct an evidentiary hearing. Therefore, the appropriate standard of review is *de novo* review. *R.M. Lucas Co.*, 2011 IL App (1st) 102955, ¶¶ 10-12 (holding that *de novo* review is appropriate where section 2-1401 petition had affidavits attached and court held oral arguments but not an evidentiary hearing).

¶ 23 Lula and Paula first argue that the absence of Paula's signature is a defense to either Paula or both Lula and Paula owing money to 1600 Museum Park on the promissory note. Lula and Paula argue that the signatures of both Lula and Paula were a condition precedent to the promissory note

being a legally enforceable written agreement. They cite *Lynge v. Kunstmann*, 94 Ill. App. 3d 689, 694 (1981), which does not support their position because the facts in *Lynge* do not involve a promissory note. Lula and Paula fail to cite any case law that supports their position that when one party signs a promissory note and the other does not, the second signature is a condition precedent to it becoming a binding instrument. See *In re Marriage of Johnson*, 2011 IL App (1st) 102826, ¶ 25 ("it is well settled that a contention that is supported by some argument but does not cite any authority does not satisfy the requirements of Supreme Court Rule 341(h)(7), and bare contentions that fail to cite any authority do not merit consideration on appeal"); *People ex rel. Aldworth v. Dutkanych*, 112 Ill. 2d 505, 511 (1986) (failure to cite authority for argument constitutes forfeiture of argument on appeal).

¶ 24 We further find that there is no language in the promissory note that establishes that the signature of both Lula and Paula on the promissory note was a condition precedent to the note becoming a legally enforceable contract. Given that intent in Illinois contract law does not deal with the parties' subjective state of mind but rather "the outward expression of their intent in the form of a written contract" (*Citadel Group Ltd. v. Washington Regional Medical Center*, 784 F. Supp. 2d 949, 958 (2011) (citing *Empro Manufacturing Co. v. Ball-Co Manufacturing Inc.*, 870 F. 2d 423, 425 (7th Cir. 1989) (Illinois law))), and that "a court must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent," (*Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007)), we cannot construe the promissory note to include a condition precedent that is not within the four corners of the document itself. Thus, the signature of both parties was not a condition precedent to the promissory note becoming an

enforceable document. Compare *Kilianek v. Kim*, 192 Ill. App. 3d 139, 142-43 (1989) (contractor not entitled to final payment from property owner where condition precedent, which was explicitly included in the language of the agreement, was not satisfied).

¶ 25 The absence of Paula's signature on the promissory note requires that Lula alone be liable for the amount due on the note. See *Breiling v. Hybl*, 167 Ill. App. 165, 167 (1912) (contract signed by husband was enforceable against him despite his claim that he did not mean to enter into the agreement without the signature of his wife because that condition was not part of the agreement itself). If Paula had intended to give Lula the authority to execute the promissory note as her agent, it is logical that she would have done so, as she did on the purchase agreement. Lula and Paula failed to offer any evidence in their section 2-1401 petition which would indicate that Lula would not be liable on her own; instead, they offer the bare conclusion that "a genuine issue of material fact exists." Moreover, they cite no case law to support their position. Although 1600 Museum Park argues in its brief that the question of whether just Lula or both Lula and Paula were liable under the promissory note is irrelevant because Lula and Paula were held jointly and severally liable under the purchase agreement for the earnest money due, we reject this argument because this action was brought on the confession of judgment clause in the promissory note, not the purchase agreement.

¶ 26 Finally, we find no merit to Lula and Paula's contention that they had cancelled the purchase agreement, and hence, the promissory note. Although they submitted a termination letter that they had received at the time they signed the purchase agreement, the body of the termination letter reads: "If you are entitled to cancel your purchase contract, and wish to do so, you may cancel by personal notice." The key word is "If." According to the purchase agreement, Lula and Paula, as buyers of

the property, had until midnight of the seventh day following the signing of the purchase agreement to use this termination letter to cancel the agreement. After this period, any "cancellation" was ineffective. Thus, Lula and Paula's submission of the termination letter four months after the execution of the purchase agreement did not effectively cancel the purchase agreement.

¶ 27 Moreover, Lula and Paula's contention that they submitted uncontested affidavits regarding the termination letter does not help them. It is true that "when facts contained in affidavits and other documents supporting a motion for summary judgment are not contradicted by counter-affidavit, such facts are admitted and must be taken as true for the purposes of the motion." *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 32 (1988). In this case, however, the "facts" that are taken as true from the face of the termination letter established that the attempted submission of the termination letter was ineffective as time-barred.

¶ 28 Having considered Lula and Paula's arguments, we find that they have only raised a meritorious defense in their section 2-1401 petition as to the promissory note being enforceable against Paula. We further find that, based on the preponderance of the record, Paula acted in due diligence in pursuing the defense that she was not liable for the amount due on the promissory note, on the basis that she did not execute the promissory note. The record shows that Paula raised this defense in the September 15, 2009 Rule 276 "motion to open judgment by confession," which was filed soon after her original attorney withdrew from representation and a new defense attorney entered his appearance on behalf of Lula and Paula on June 22, 2009. The record further shows that Paula was diligent in filing the instant section 2-1401 petition shortly after the trial court's May 20, 2010 order granted her leave to do so. Lula is still liable under the promissory note and has no

meritorious defense. Because Lula's arguments fail under a *de novo* standard of review, it is unnecessary to address her final claim that the trial court's memorandum opinion was an abuse of discretion.

¶ 29 Based on the foregoing, we hold that Lula and Paula's section 2-1401 petition to vacate the May 20, 2010 order that reinstated the December 19, 2008 judgment in favor of 1600 Museum Park, was not precluded by collateral estoppel or the law of the case doctrine. Additionally, Lula cannot establish a meritorious defense to the original entry of judgment against her. Therefore, the trial court did not err in denying the section 2-1401 petition to vacate as it pertained to Lula. However, in light of our finding that Paula had presented a meritorious defense to the enforcement of the promissory note against her, the trial court erred in denying the section 2-1401 petition as it pertained to Paula. Accordingly, we affirm the trial court's denial of the section 2-1401 petition with respect to Lula, but reverse with respect to Paula.

¶ 30 Affirmed in part and reversed in part.