2016 IL App (1st) 153392-U

No. 1-15-3392

Third Division
September 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

FIFTH THIRD MORTGAGE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 2014 M1 719143
	)	
DEANNA WYAN-TRAUB,	)	Honorable
	)	Diana Rosario,
Defendant-Appellant.	)	Judge, presiding.
	)	

JUSTICE COBBS delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court's denial of defendant's second petition to vacate an agreed order was not erroneous where defendant's petition failed to allege any meritorious defenses supported by law, due diligence in presenting those defenses, or due diligence in filing the petition. The court did not abuse its discretion in assessing sanctions against defendant and her attorney where her petition was clearly meritless and unsupported in fact or law.

¶ 2 Defendant Deanna Wyan-Traub appeals the trial court's denial of her second petition to vacate an agreed order of possession between defendant and plaintiff Fifth Third Mortgage Company in a forcible detainer action. Defendant contends that the trial court improperly

denied the petition based upon its finding that an initial petition to vacate was voluntarily withdrawn "with prejudice." She also contends that the trial court abused its discretion when it imposed sanctions against her and Richard Jones, her attorney, pursuant to Illinois Supreme Court Rule 137 (eff. July 1, 2013). We affirm.

¶ 3 BACKGROUND

¶ 4 On March 25, 2005, plaintiff loaned Robert Traub a sum of money secured by a mortgage covering a single-family home at 2409 Indian Ridge Drive, Glenview, Illinois. Robert subsequently married defendant and the couple lived in the residence as their marital home. During the course of the marriage, defendant received an order of protection against Robert which prohibited him from entering the property.

¶ 5 Plaintiff initiated foreclosure proceedings against Robert on October 29, 2012. Defendant was not named in the foreclosure action. A judgment of foreclosure was entered in plaintiff's favor, the property was sold at a foreclosure sale in which plaintiff was the sole bidder, and plaintiff obtained a judicial deed conveying title to the property.

¶ 6 Following the conclusion of the foreclosure proceedings, plaintiff served a 90-day demand for possession on Robert via substitute service to defendant on April 24, 2014. Attorney Steve Bashaw contacted plaintiff's counsel on May 5, 2014, and stated that he was defendant's counsel. He stated that defendant was in sole and exclusive possession of the property and that the 90-day notice to Robert would not be effective as to defendant. The following day, Bashaw sent plaintiff's counsel a letter repeating his comments. Subsequently, plaintiff sent a second 90-day demand to defendant.

¶ 7 On August 21, 2014, plaintiff filed a forcible entry and detainer action against defendant. On September 10, 2014, the trial court entered an agreed order between the parties awarding

possession to plaintiff, but staying possession until October 8, 2014. The order bears defendant's signature.

¶ 8 Defendant, through her attorney Steven Bashaw, filed a petition to vacate the agreed order pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)) eight months later on May 15, 2015. The petition alleged that plaintiff's complaint for possession contained materially false statements that plaintiff had a right to possession of the property and that plaintiff knowingly filed its action in the wrong municipal district. The petition also sought sanctions under Illinois Supreme Court Rule 137 (eff. July 1, 2013).

¶ 9 Plaintiff's counsel subsequently sent Bashaw a letter informing him that plaintiff believed the petition to vacate contained factual inaccuracies and lacked any legal basis. The letter also indicated that plaintiff intended to seek Rule 137 sanctions. Shortly thereafter, Bashaw appeared in court and voluntarily withdrew the petition. The trial court's order accomplishing the withdrawal states that "the withdrawal is with prejudice."

¶ 10 On July 21, 2015, defendant filed a second petition to vacate the agreed order through new counsel, Richard Jones. The document is virtually identical to the withdrawn petition, containing only minor language changes in a few paragraphs. Defendant attached an affidavit to the second petition in which defendant averred that she went to the courtroom on September 10, 2014, and met with plaintiff's attorney outside of the courtroom. The attorney told defendant that she "had to sign the Order for Possession." She further averred that she was not represented by an attorney at the time, did not understand the meaning of the order, never appeared before a judge regarding the case, and never had the opportunity to present a defense.

¶ 11 Plaintiff's counsel sent Jones a letter on July 30, 2015, outlining alleged deficiencies and inaccuracies in the second petition and indicating that plaintiff intended to seek sanctions under Rule 137.[1] After filing a response to defendant's petition, plaintiff filed a motion seeking sanctions which argued that defendant's petition was frivolous with no basis in fact or in law.

¶ 12 Following a hearing, the trial court denied defendant's petition in a written order, stating: "1. The Court finds that Defendant's first motion to vacate was voluntarily withdrawn by Steven B. Bashaw, with prejudice on June 2, 2015,[2] and that the September 10, 2014 order for possession was an agreed order. 2. Defendant's motion to vacate is denied for the reasons in #1." The trial court also set a schedule for briefing and argument on plaintiff's motion for sanctions.

¶ 13 The trial court subsequently entered a written order granting plaintiff's motion for sanctions based upon the arguments set forth in the motion. It awarded plaintiff attorneys' fees of $7,185 "to be paid jointly and severally" by defendant and Jones. Defendant appeals.

¶ 14 ANALYSIS

¶ 15 Defendant's Appellate Brief

¶ 16 Before reaching the merits of defendant's appeal, we find it necessary to note several deficiencies found in defendant's brief on appeal. Illinois Supreme Court Rule 341(h)(6) requires an appellant's brief to contain a statement of facts "which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Ill. S. Ct. R.

[1] The letter also noted that the motion had been improperly served upon plaintiff. The motion was subsequently stricken for improper service and later properly served upon plaintiff.

[2] The phrase "by Steven B. Bashaw, with prejudice on June 2, 2015," is actually written above the main body of text in the court's handwritten order, with its intended location indicated through the use of an asterisk.

341(h)(6) (eff. Jan. 1, 2016). Defendant's statement of facts violates Rule 341(h)(6) in numerous ways, including: omitting facts relevant to our consideration, failing to support assertions of fact with citations to the record, and in some cases, arguably misrepresenting the facts contained within the record. For example, defendant's brief asserts that she retained Steven Bashaw as counsel subsequent to September 10, 2014. Not only is this assertion wholly unsupported by citation to the record, it is affirmatively rebutted by Bashaw's letter to plaintiff's counsel, which indicates the attorney was representing defendant as early as May 5, 2014.

¶ 17 Our supreme court's rules governing appellate briefs "are rules and not mere suggestions." *Niewold v. Fry*, 306 Ill. App. 3d 735, 737 (1999). The failure to adequately and accurately set forth the facts germane to the appellate court's consideration is not an inconsequential matter. See *Burmac Metal Finishing Co. v. West Bend Mutual Insurance Co.*, 356 Ill. App. 3d 471, 478 (2005). The errors in defendant's brief are sufficient to merit the striking of its statement of facts or even outright dismissal of defendant's appeal. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 9. However, such remedies are fully within this court's discretion, and rather than employ such harsh sanctions, we disregard any improper information and base our consideration of defendant's claims entirely on the information contained in the record. See *Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 171 (2008).

¶ 18 Denial of the Petition to Vacate

¶ 19 Defendant first contends that the trial court erroneously denied her second petition to vacate "based solely" on its finding that the original petition had been voluntarily withdrawn with prejudice. She argues that the voluntary withdrawal of a petition, regardless of any

designation of prejudice, does not serve as a procedural bar to future petitions. She further asserts that her petition put forth two substantive legal defenses to plaintiff's complaint of possession: (1) that her possessory rights were not terminated by the mortgage foreclosure proceeding, and (2) that the detainer action was filed in the wrong municipal district. Plaintiff responds that the denial of defendant's petition was proper because she failed to exercise due diligence in presenting her defenses or in filing her section 2-1401 petition. It also argues that the purported defenses are meritless and unsupported by legal citation.

¶ 20 We first note that the factual assertion underpinning defendant's argument is unsupported in the record. The trial court's order does not indicate that the court denied defendant's petition based solely on the fact that it was withdrawn "with prejudice." The court found that the petition was voluntarily withdrawn and that the order in question was an agreed order. It then noted that its holding was based on those findings. Although the court subsequently added that the order was withdrawn "by Steven B. Bashaw, with prejudice on June 2, 2015," in a note above the findings, there is no indication that the court found this additional information dispositive. Moreover, even if we accept defendant's explanation of the trial court's reasoning as correct, it would not alter our review. It is axiomatic that this court reviews the judgment and not the reasoning of the court below and we may affirm that court's decision on any basis evident from the record. See, *e.g.*, *US Bank, Nat. Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 18.

¶ 21 When there has been no evidentiary hearing, we review a trial court's denial of a section 2-1401 petition *de novo*. *DG Enterprises, LLC-Will Tax, LLC v. Cornelius*, 2015 IL 118975, ¶ 23. An agreed order is not an adjudication of parties' rights, but rather a record of a private, contractual agreement. *In re Marriage of Rolseth*, 389 Ill. App. 3d 969, 971 (2009).

However, such an order is generally still binding on the parties and cannot be altered without the consent of all parties. *Id.* The standards of section 2-1401 are equally applicable to a party's request to alter or vacate an agreed order. See *id.* at 972.

¶ 22 Section 2-1401 of the Code provides a statutory procedure which permits a circuit court to vacate or modify a final order or judgment more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2014); *Paul v. Gerald Adelman & Associates*, 223 Ill. 2d 85, 94 (2006). A section 2-1401 petition can present either a factual or legal challenge. *Warren County Soil & Water Conservation District*, 2015 IL 117783, ¶ 31. In general, to obtain relief under section 2-1401, a party 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.* ¶ 37. Having reviewed defendant's petition, we find that it failed to set forth any of the necessary elements required of a successful section 2-1401 petition.

¶ 23 Defendant's first purported defense to the forcible detainer action is that the previous foreclosure action against her husband, Robert, did not terminate her possessory rights in the property because she was not made a party. She cites subsection 15-1501(a) of the Code (735 ILCS 5/15-1501(a) (West 2014)) for the proposition that a foreclosure action only adjudicates the interests of individuals made a party to the proceedings. She also cites subsection 15-1501(b)(2) (735 ILCS 5/15-1501(b)(2) (West 2014)) to point out that "[a] mortgagor's spouse who has waived the right of homestead" is a permissible party to a foreclosure action.

¶ 24 A mortgage foreclosure and an action for forcible entry and detainer are necessarily separate and distinct, with each proceeding based upon different facts, involving different

parties, issues, and relief. *Norwest Mortgage, Inc. v. Ozuna*, 302 Ill. App. 3d 674, 680 (1998). Forcible entry actions are summary, statutory proceedings in which serious title disputes cannot be raised. *Avenaim v. Lubecke*, 347 Ill. App. 3d 855, 861-62 (2004). Only matters germane to the issue of possession may be litigated in such an action, particularly "which party is entitled to immediate possession and whether a defense which is germane to the distinctive purpose of the action defeats plaintiff's asserted right to possession." *First Illinois Bank & Trust v. Galuska*, 255 Ill. App. 3d 86, 90 (1993). Germane defenses generally fall into one of four categories: (1) claims asserting an affirmative and superior right of possession; (2) claims denying the breach of an agreement vesting possession in a party; (3) claims challenging the validity or enforceability of the agreement supplying plaintiff's right to possession; and (4) claims questioning the plaintiff's motivation for bringing the action. *Avenaim*, 347 Ill. App. 3d at 862. Consequently, attacks on a mortgage foreclosure are typically not germane in a forcible detainer action and cannot serve as a defense to eviction. *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, ¶ 16.

¶ 25 Defendant's attempt to attack plaintiff's foreclosure action against Robert is not germane to the forcible detainer action at issue. Whether or not the foreclosure was effective to terminate any right of defendant's, the relevant question in the case at bar is whether defendant had any affirmative and superior right to the property in the first place. Neither defendant's petition nor her argument on appeal has clearly identified any affirmative source for her supposed right to possession in the property purchased by Robert Traub before his marriage to defendant. At best, defendant's petition and reply brief on appeal make cursory and unexplained references to her "marital rights" and note that she obtained an order of protection which prohibited Robert from entering the property. However, defendant provides

no legal citation or authority to support any implied conclusion that either her marriage or the order of protection provided her a right to possession of the property, and thus the issue is waived. *Campbell v. Wagner*, 303 Ill. App. 3d 609, 613 (1999). (Appellate court "is not a depository into which the burden of research may be dumped and failure to cite legal authority in the argument section of a party's brief waives the issue for review.") Accordingly, as defendant has not put forth a legally-supported argument that she had an affirmative right of possession, she has not established a meritorious defense in the forcible detainer action, regardless of her arguments concerning the earlier foreclosure.

¶ 26 Defendant also argues that she has a meritorious defense because plaintiffs filed the forcible detainer action in the wrong municipal district, thus violating Cook County Circuit Court General Order 2.3(d) (Apr. 19, 2010). Defendant offers no legal citation that supports her argument that plaintiff's failure to follow the general order is a meritorious defense in a forcible detainer action. As such, this argument is also waived. See *Campbell*, 303 Ill. App. 3d at 613. Moreover, to the extent that defendant's petition challenged an improper venue, it was untimely given her agreeing to the entry of an order of possession. See *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 154 (2005).

¶ 27 Notwithstanding our finding that defendant's unsupported arguments are meritless, her petition must still fail as it does not adequately allege defendant's due diligence in presenting any defenses or in filing her petition. An allegation of due diligence "requires the petitioner to have a reasonable excuse for failing to act within the appropriate time." *Warren*, 2015 IL 117783, ¶ 38. A petitioner must "show that the failure to defend against the lawsuit was the result of an excusable mistake and that the petitioner acted reasonably under the circumstances and was not negligent." *Id.*

¶ 28 Neither defendant's petition nor her appellate brief provide any reasonable excuse to explain her failure to promptly present her purported defenses and her decision to wait nearly a year after the agreed order to file her second 2-1401 petition. Defendant instead seems to substantively address the issue of diligence for the first time in her reply brief, apparently arguing that her failure to present the defenses was due to the "unconscionable" nature of the agreed order and that her failure to promptly file the second 2-1401 petition was due to her prior attorney's withdrawal of the original petition without her knowledge. A party may not raise an argument for the first time in its reply brief, and thus each of these arguments regarding diligence are waived. *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 29.

¶ 29 Even if we were to excuse defendant's waiver, we note that the arguments are also without merit. A contract may be deemed unconscionable if some impropriety in its formation left a party without meaningful choice and its terms are excessively harsh or one-sided. *Draper & Kramer, Inc. v. King*, 2014 IL App (1st) 132073, ¶ 28. The bare assertions in defendant's affidavit that she was told to sign the agreed order and that she did not understand its terms do not rise to the level of unconscionability. Furthermore, defendant's argument explaining her delay in filing the second petition is similarly meritless. Regardless of whether defendant's asserted ignorance of the initial petition's withdrawal excuses the two month delay between that withdrawal and the filing of the second petition, it in no way explains or excuses the eight months it took defendant to file the initial petition. Without any explanation for that delay, we cannot find that defendant acted with due diligence. See *In re Marriage of Delk*, 281 Ill. App. 3d 303, 309 (1996) (Individual's petition "fails to contain factual allegations explaining her eight month delay in refiling, and, as such, fails to allege facts establishing that she acted with diligence in seeking section 2-1401 relief.")

¶ 30 Sanctions

¶ 31 Defendant next contends that the trial court erred in imposing sanctions against her and her attorney Richard Jones, arguing that her second section 2-1401 petition was not objectively unreasonable.[3] Plaintiff responds that the trial court acted within its discretion because defendant's assertions were neither well grounded in fact nor warranted by law.

¶ 32 Supreme Court Rule 137 provides for sanctions against a party or a party's attorney who signs a "pleading, motion[,] or other paper" that is not well grounded in fact or warranted by existing law. Ill. S. Ct. R. 137 (eff. July 1, 2013). The purpose of the rule is to penalize attorneys and parties who abuse the judicial process by filing frivolous or false matters without a basis in law or fact or for purposes of harassment. *DeRaedt v. Rabiola*, 2011 IL App (2d) 100719, ¶ 21. A trial court's decision to impose sanctions is entitled to significant deference, and we will not disturb the trial court's decision absent an abuse of discretion. *Feret v. Schillerstrom*, 363 Ill. App. 3d 534, 542 (2006). Our primary inquiries are whether (1) the trial court's decision was an informed one, (2) the decision was based on valid reasons that fit the case, and (3) the decision followed logically from the application of the reasons stated to the particular circumstances of the case. *North Shore Sign Co. v. Signature Design Group, Inc.*, 237 Ill. App. 3d 782, 790-91 (1992).

¶ 33 As previously discussed at length, defendant's second section 2-1401 petition to vacate her agreed motion failed to assert meritorious and legally supported defenses to her eviction, failed to allege due diligence in her presenting those defenses, and failed to allege due diligence in filing the petition itself. Both in the petition and on appeal defendant has failed to provide adequate legal citation to support her arguments. Thus, we cannot find the trial

[3] Defendant challenges only the imposition of sanctions and does not contest the amount awarded by the trial court.

court abused its discretion in finding that defendant's petition was without a basis in law or fact and imposing sanctions.

¶ 34 CONCLUSION

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

¶ 36 Affirmed.