No. 2—10—0750
Order filed June 17, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CINCINNATI INSURANCE COMPANY,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09—L—408
	)	
WILCOX CONSTRUCTION COMPANY,	)	
INC.,	)	Honorable
	)	Ronald L. Pirrello,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

Held: Whether under section 2—1401 or under a *nunc pro tunc* theory, the trial court did not err in converting a dismissal with prejudice to a dismissal without prejudice; the "with prejudice" language was a scrivener's error that made the enforcement of the judgment unconscionable (section 2—1401) and did not reflect the court's intent (*nunc pro tunc*).

Plaintiff, Cincinnati Insurance Company, sued defendant, Wilcox Construction Company, Inc. Plaintiff moved to dismiss the action voluntarily and the trial court entered an order prepared by plaintiff's counsel dismissing the action with prejudice. More than 30 days later, plaintiff petitioned the court to make the dismissal without prejudice. The trial court granted the petition and

defendant appeals. Defendant contends that the trial court either (1) improperly granted relief under section 2—1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2—1401 (West 2008)) despite plaintiff's negligence; or (2) improperly corrected the original order *nunc pro tunc* based on evidence outside the record. We affirm.

Plaintiff sued defendant in Winnebago County. The complaint alleged that defendant improperly constructed the roof of a commercial building. As a result, an accumulation of snow caused the roof to collapse, and plaintiff was required to pay under a policy that it issued to the building's owner. Defendant asserted that it had never done business in Winnebago County, so that venue there was improper. See 735 ILCS 5/2—102(a) (West 2008). Plaintiff's counsel agreed to dismiss the Winnebago County action and refile it in Whiteside County. To that end, plaintiff filed a "MOTION FOR VOLUNTARY DISMISSAL," invoking section 2—1009 of the Code (735 ILCS 5/2—1009 (West 2008)). However, the motion inadvertently requested dismissal "with prejudice." Plaintiff's counsel prepared an order for the trial court's signature, which provided that the action was dismissed "with prejudice."

When plaintiff refiled the action in Whiteside County, defendant moved to dismiss, contending that there had been a prior judgment on the merits. See 735 ILCS 5/2—619(a)(4) (West 2008). Plaintiff then filed its petition in Winnebago County to amend the judgment and make the dismissal without prejudice. Plaintiff invoked, alternatively, section 2—1401 or the court's inherent authority to amend its order *nunc pro tunc*.

The petition included as an exhibit a letter from defendant's counsel stating his "understanding that you will be dismissing the case and refiling in Whiteside County." Also attached was an affidavit of Timothy A. Muldowney, which averred as follows. Muldowney was

plaintiff's attorney. He spoke with defendant's counsel by phone on January 27, 2010, and agreed to dismiss the case voluntarily if defendant answered an interrogatory stating that it had no presence in Winnebago County. Accordingly, Muldowney had an associate prepare a motion for voluntary dismissal. He signed the final draft without reading it and filed it without realizing that it sought dismissal "with prejudice." On February 5, 2010, Muldowney presented the motion to the Winnebago County court. The trial court granted the motion. Muldowney then prepared an order for the court's signature, inadvertently copying the "with prejudice" language from the motion. A new complaint was then filed in Whiteside County.

The trial court granted the petition, although it did not state a basis for its ruling. Defendant timely appealed.

Defendant contends that, whether the trial court granted section 2—1401 relief or amended its earlier order *nunc pro tunc*, its decision was erroneous. Defendant contends that the only reason the original order provided for dismissal with prejudice was the mistake of plaintiff's attorney—who drafted it—and that section 2—1401 relief is not available to relieve a party of the consequences of its own negligence. Defendant further argues that, if the amended order is viewed as a *nunc pro tunc* amendment of the earlier order, it was improper because, in amending an order *nunc pro tunc*, the court may look only to the record to show its true intention, and the trial court here considered information outside the record. We consider each contention in turn.

The purpose of a section 2—1401 petition is to allow a litigant to bring to the attention of a trial court factual matters that would have prevented the court from entering the judgment had they been brought to the court's attention prior to the judgment. *Klose v. Mende*, 378 Ill. App. 3d 942, 947 (2008). In general, to be entitled to relief under section 2—1401, a petitioner must affirmatively

set forth specific factual allegations supporting: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting that defense or claim to the trial court in the original action; and (3) due diligence in filing the section 2—1401 petition. *Smith v. Airoom, Inc.,* 114 Ill. 2d 209, 220-21 (1986). Section 2—1401 "does not afford a litigant a remedy whereby he may be relieved of the consequences of his own mistake or negligence." *Airoom*, 114 Ill. 2d at 222. One of its "guiding principles," however, is that the petition invokes the court's equitable powers, which should be used to prevent the enforcement of a judgment when it would be "unfair, unjust, or unconscionable." *Airoom*, 114 Ill. 2d at 225. Such a petition is directed to the trial court's sound discretion, and its decision will not be disturbed on review unless the court has abused its discretion. *Engel v. Loyfman,* 383 Ill. App. 3d 191, 194 (2008).

Initially, it is not clear that the section 2—1401 requirements were meant to apply to a situation like this one, where the order was the result of a party's voluntary act, as opposed to a judgment that was imposed upon it by default or following a hearing of some kind. The requirements of a meritorious claim or defense and due diligence in presenting the claim or defense to the court do not fit neatly into a situation where a party presents an uncontested motion and merely prepares an order for the trial court's signature.

Assuming, as the parties do, that the section 2—1401 requirements apply to this case, the trial court did not abuse its discretion in granting plaintiff relief. Both parties understood and agreed that the voluntary dismissal was merely a vehicle to transfer the cause to Whiteside County. The dismissal motion invoked section 2—1009(a), which expressly provides for dismissals *without* prejudice. 735 ILCS 5/2—1009(a) (West 2008). Obviously, defendant will suffer no undue

prejudice by having to litigate the case on its merits, and the effect of the dismissal without prejudice is to transfer the cause to Whiteside County, which is what defendant wanted in the first place.

Defendant insists that section 2—1401 may never be used to relieve a party of the consequences of its own mistake or negligence. While *Airoom* and numerous subsequent cases contain this statement, defendant ignores the subsequent language that the ultimate goal is to prevent enforcement of a judgment that is "unfair, unjust, or unconscionable." *Airoom*, 114 Ill. 2d at 225. Defendant does not explain how enforcement of the dismissal with prejudice would not be unfair, unjust, or unconscionable.

At most, the dismissal with prejudice was the result of a momentary lapse by plaintiff's counsel. We agree with plaintiff that applying the absence-of-mistake language literally to mean that a party must be completely without fault in occasioning the adverse judgment would mean that section 2—1401 relief would seldom, if ever, be granted. Such a reading would be inconsistent with the equitable nature of the remedy. As we noted in *Safety-Kleen Corp. v. Canadian Universal Insurance Co.*, 258 Ill. App. 3d 298, 301 (1994), section 2—1401 requires that the petitioner show that the adverse judgment resulted from an "excusable mistake rather than negligence." Obviously, the line between an excusable mistake and negligence will not always be easy to draw in a given case, but this case clearly falls on the excusable-mistake side of the line.

Furthermore, if we consider the trial court's order to have been a *nunc pro tunc* correction of the earlier order, our conclusion would be the same. In general, a trial court loses jurisdiction to vacate or modify its judgment 30 days after entry of judgment (*Fox v. Department of Revenue*, 34 Ill. 2d 358, 362 (1966)), unless a timely postjudgment motion is filed (*Elg v. Whittington*, 119 Ill.2d 344, 358 (1987)). At any time, however, a court may modify its judgment *nunc pro tunc* to correct

a clerical error or matter of form so that the record conforms to the judgment the court actually rendered. *In re Estate of Young*, 414 Ill. 525, 534 (1953).

The purpose of a *nunc pro tunc* order is to correct the record of judgment, not to alter the court's actual judgment. A *nunc pro tunc* order may not be used to supply omitted judicial action, to correct judicial errors under the pretense of correcting clerical errors, or to cure a jurisdictional defect. *Beck v. Stepp*, 144 Ill. 2d 232, 238 (1991). Judgments may be modified *nunc pro tunc* only when the correcting order is based upon evidence such as a " 'note, memorandum or memorial paper remaining in the files or upon the records of the court.' " *Beck*, 144 Ill. 2d at 238 (quoting *Fox*, 34 Ill. 2d at 360).

Here, the court could have concluded solely from the record that the dismissal was meant to be without prejudice. As noted, the motion was brought pursuant to section 2—1009, which provides only for dismissals without prejudice.

Defendant insists that the dismissal with prejudice was a deliberate judicial action, but provides neither facts nor law in support of this conclusion. The record contains no transcript of the hearing at which the dismissal was granted. The common-law record contains no motion to dismiss by defendant. Defendant suggests no reason why the trial court would have decided, *sua sponte*, to dismiss the action with prejudice. The record amply supports the conclusion that the inclusion of the "with prejudice" language was indeed a scrivener's error and not a judicial decision on the merits of the action.

The judgment of the circuit court of Winnebago County is affirmed.

Affirmed.