2012 IL App (2d) 110969-U
No. 2-11-0969
Order filed June 6, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF DARLENE C. AUSTIN, n/k/a Darlene Lemming, Petitioner-Appellant, v. JAMES G. AUSTIN, Respondent-Appellee.	)))))))))))	Appeal from the Circuit Court of Du Page County. No. 96-D-693 Honorable Brian R. McKillip, Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: Petitioner showed prima facie reversible error in the trial court's denial of her section 2-1401 petition to vacate a judgment for dissolution of marriage: according to her petition's allegations, which respondent admitted by not filing a response, respondent fraudulently concealed assets, thereby excusing her purported lack of diligence.

¶ 1 Petitioner, Darlene C. Austin, appeals from the denial of her petition to vacate, under section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2010)), the judgment dissolving her marriage to respondent, James G. Austin. For the reasons that follow, we find that petitioner has shown *prima facie* reversible error in the trial court's ruling, because the petition (the

allegations in which respondent admitted by not filing a response) seems to adequately establish fraud. Thus, we reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 On July 11, 2011, petitioner filed a petition to vacate a final order, under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). The record reveals that a judgment for dissolution of petitioner's marriage to respondent was entered on August 13, 1996, and that incorporated into the judgment was a marital settlement agreement entered between the parties on May 31, 1996. According to the petition, petitioner learned in March 2011 that respondent had retired and was collecting retirement payments from his employer. Petitioner alleged that the marital settlement agreement made no reference to a pension and that it was not until March 2011 that she first learned of respondent's "fraudulent concealment of assets." She further alleged that the marital settlement agreement, signed by respondent, provided that "the parties have made full disclosure to each other of all properties owned by them as accumulated during the marriage, and the total income of each other from all sources." In an affidavit, petitioner averred that she learned of respondent's pension from her daughter and that, had she known of the pension, the settlement agreement would have been different. Petitioner asked the court to "vacate the final judgment due to Respondent's fraudulent concealment of assets and to correct a substantial injustice that should not be allowed to continue." Respondent did not file a response.

¶ 4 On August 30, 2011, the parties appeared before the court. Attorney Robert Boyd was present on behalf of respondent. Boyd told the court that he did not file an appearance but that he had previously represented respondent on other matters. When asked by the trial court whether he

wished to go to hearing, Boyd responded: "I think it would be subject to a motion to strike but rather than waste time doing all that, we can just do the hearing."

¶ 5 During the course of the hearing, petitioner argued that she first learned of respondent's pension account when petitioner retired in the prior year. In response, Boyd argued the following:

> "She makes an allegation that something wasn't disclosed but the representation made in the Marital Settlement Agreement is that, in fact, discovery has occurred. [Respondent] was employed. His pay stubs—if any pay stubs were examined at all, and I assume they were, the IMRF deduction comes right off of his paycheck and would have been available for the attorney to see.
>
> I'm not sure—and there's no allegation that interrogatories were ever issued, that a notice to produce documents were ever issued. I assume—I can only assume that pay stubs and tax returns were examined, but all of this is construed against the drafter of the Marital Settlement Agreement and that would be [petitioner] and her attorney.
>
> That having been said, in the last 15 years there have been court proceedings during which an increase in child support, I believe, was requested. At that time, tax returns and pay stubs were presented, and again, deductions for IMRF were included on those."

Boyd further stated:

> "The factual issues, if we need to get into that, are that [respondent] didn't become employed by the Oak Brook Park District until, I believe, 1991 or 1992. At that time, he became a member of the IMRF and that the divorce was in 1996. The amount that he receives now is approximately $1,200 a month. That's increased because he continued to

work for the park district and only retired in the last couple of years, so the value of the asset that we're talking about, even if there was a basis to vacate the judgment, is insignificant."

¶ 6 The trial court denied petitioner's petition. The court stated as follows:

"THE COURT: Your husband at the time of the proceedings was employed by the Oak Brook Park District. In fact, there was an order for withholding put in almost immediately after the judgment that shows that's where he's employed.

I don't think a party can just sit around for 15 years, do nothing to investigate what might be available to them in an adversarial proceeding and say that you have been misled by someone when your attorney had available to him all the subpoena powers that you're asking for now to find out what assets are available. Those powers were available to your attorney—

[PETITIONER]: At the time.

THE COURT: —in 1996.

You had been married for almost 20 years. You knew where he worked. You knew how much he made. Child support was set based on that. I think there has to be an end to litigation and I think it's long passed that time period. So I'm going to deny your petition to vacate the judgment."

¶ 7 Petitioner timely appealed. Respondent has not filed an appellee's brief. If the appellee does not file a brief, the reviewing court may do one of three things: (1) "if justice requires," it may "search the record for the purpose of sustaining the judgment of the trial court"; (2) "if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief," it may decide the merits of the appeal; or (3) "if the appellant's brief demonstrates

prima facie reversible error and the contentions of the brief find support in the record," it may reverse the judgment of the trial court. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 8 II. ANALYSIS

¶ 9 Petitioner's brief sets forth two arguments: (1) respondent counsel's "behavior as an attorney *** has done a disservice to the Court and has tainted th[e] proceeding[s]" such that petitioner was denied due process; and (2) her petition was not barred by a lack of diligence or by the two-year limitations period under section 2-1401 of the Code, where respondent fraudulently concealed his pension.

¶ 10 As an initial matter, we note the many ways in which petitioner's brief fails to comply with Illinois Supreme Court Rule 341 (eff. July 1, 2008), which sets forth the requirements to which parties to an appeal must adhere in presenting clear and orderly arguments for the reviewing court's consideration. *47th & State Currency Exchange, Inc. v. B. Coleman Corp.*, 56 Ill. App. 3d 229, 232 (1977). First, although petitioner included an introductory paragraph entitled "Nature of the Case," she failed to set forth "the nature of the action and of the judgment appealed from and whether the judgment is based upon the verdict of a jury" (Ill. S. Ct. R. 341(h)(2)(i) (eff. July 1, 2008)) and "whether any question is raised on the pleadings" (Ill. S. Ct. R. 341(h)(2)(ii) (eff. July 1, 2008)). Second, petitioner failed to include a jurisdictional statement (Ill. S. Ct. R. 341(h)(4)(ii) (eff. July 1, 2008)) and a concise statement of the applicable standard of review (Ill. S. Ct. R. 341(h)(3) (eff. July 1, 2008)). Next, petitioner's statement of facts, while containing a few citations to the record, does not contain citations for all of the facts set forth. See Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008) (statement of facts must make "appropriate reference to the pages of the record on appeal"). In

addition, the statement of facts includes improper argument and comments. See *id*. (the facts shall be "stated accurately and fairly without argument or comment"). Fourth, in violation of Rule 341(h)(7), petitioner's first argument does not contain a single citation to either the record or supporting authority. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (the appellant's brief shall include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on."). Last, petitioner failed to include an appendix. See Ill. S. Ct. R. 341(h)(9) (eff. July 1, 2008) (the appellant's brief shall contain "[a]n appendix as required by Rule 342"); Ill. S. Ct. R. 342(a) (eff. Jan. 1, 2005) ("The appellant's brief shall include, as an appendix, a table of contents to the appendix, a copy of the judgment appealed from, any opinion, memorandum, or findings of fact filed or entered by the trial judge ***, any pleadings or other materials from the record which are the basis of the appeal or pertinent to it, the notice of appeal, and a complete table of contents, with page references, of the record on appeal.").

¶ 11 Rule 341 is not a guideline. *Kerger v. Board of Trustees of Community College District No. 502*, 295 Ill. App. 3d 272, 275 (1997). "[A] reviewing court may determine whether or not its rules have been substantially complied with, and when there is a failure to comply with them, the appeal will not be entertained. To do so would nullify the rule." *Biggs v. Spader*, 411 Ill. 42, 45 (1951). However, " '[w]here violations of supreme court rules are not so flagrant as to hinder or preclude review, the striking of a brief in whole or in part may be unwarranted.' " *Hubert v. Consolidated Medical Laboratories*, 306 Ill. App. 3d 1118, 1120 (1999) (quoting *Merrifield v. Illinois State Police Merit Board*, 294 Ill. App. 3d 520, 527 (1997)). Petitioner's *pro se* status does not relieve her of the

obligation to submit a brief that complies with the applicable supreme court rules. *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001).

¶ 12 Notwithstanding the deficiencies in petitioner's brief, we will address petitioner's argument concerning the denial of her petition to vacate, because the record is small and the issue is relatively straightforward. Thus, the deficiencies in her brief do not hinder our review. However, we caution petitioner that, should she have occasion to file a brief with this court in the future, her failure to comply with the relevant rules may result in our dismissal of her appeal.

¶ 13 We will not address petitioner's argument relating to the behavior of respondent's counsel, because she has failed to cite any authority to support that argument and thus has forfeited it. See *People v. Ward*, 215 Ill. 2d 317, 332 (2005) (an appellant, whether proceeding *pro se* or with counsel, who fails to present cogent arguments supported by authority forfeits those contentions on appeal).

¶ 14 We now turn to the merits of petitioner's primary argument. Petitioner argues that the trial court erred in denying her petition to vacate under section 2-1401 of the Code, because respondent fraudulently concealed pension assets. Section 2-1401 provides a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days. 735 ILCS 5/2-1401 (West 2010); *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). The statute requires that a petition be supported by affidavit or other appropriate showing as to matters not of record. *Id.* It further provides that a petition must be filed not later than two years after the entry of the judgment, excluding time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed. *Id.* Relief under section 2-1401 is predicated upon proof,

by a preponderance of the evidence, of a meritorious claim or defense in the original action and of diligence in pursuing both the original action and the section 2-1401 petition. *Id.* at 7-8.

¶ 15 Proceedings under section 2-1401 are subject to the usual rules of civil practice. *Id.* at 8. "Section 2-1401 petitions are essentially complaints inviting responsive pleadings." *Id.* Five types of final dispositions are possible in section 2-1401 litigation: "the trial judge may dismiss the petition; the trial judge may grant or deny the petition on the pleadings alone (summary judgment); or the trial judge may grant or deny relief after holding a hearing at which factual disputes are resolved." *Id.* at 9. A properly served section 2-1401 petition may be disposed of without the benefit of responsive pleadings. *Id.* at 5. As proceedings under section 2-1401 are subject to the normal rules of civil practice, responsive pleadings are no more required in section 2-1401 proceedings than they are in any other civil action. *Id.* at 9. Here, respondent's failure to answer the petition simply constituted an admission of all well-pleaded facts, making the issue ripe for adjudication. See *id.* at 9-10. The *Vincent* court characterized a trial court's *sua sponte* dismissal of a section 2-1401 petition as "the functional equivalent of a dismissal for failure to state a cause of action." *Id.* at 14. Here, the court did not dismiss the petition, instead entering what can be characterized as a judgment on the pleadings (summary judgment). See *id.* at 9. The *de novo* standard of review applies to section 2-1401 dispositions where the trial court either dismisses the petition or grants or denies relief based on the pleadings alone. *Id.* at 14.

¶ 16 The trial court denied petitioner's petition (without a response from respondent), essentially finding as a matter of law that petitioner did not exercise due diligence during the dissolution proceedings or in filing her petition. However, as petitioner correctly points out, "the due diligence requirement has been relaxed in circumstances where there is fraud or unfair conduct by the

[respondent]." *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 566 (1995). "Fraud exists where one party's knowing and material misrepresentations induce detrimental reliance by the other party." *Id.* "[N]ondisclosure of a material fact is in essence a misrepresentation. [Citations.]" (Internal quotation marks omitted.) *Id.* Petitioner alleged in her petition that respondent fraudulently concealed his pension assets; specifically, that respondent "did not reveal any government pension" and, further, that respondent signed the marital settlement agreement, which provided that "the parties have made full disclosure." Petitioner's affidavit averred that during the divorce proceedings she "had never seen a pay stub." She also maintained that during a court proceeding on June 6, 2011, only a month before she filed her petition, respondent "admitted he did have such a pension worth $12,000 a year." Indeed, Boyd admitted at the hearing on petitioner's petition that respondent became employed at the Oak Brook Park District and became a member of the IMRF in 1991 or 1992. Petitioner's allegations, which respondent has admitted by not filing a response (see *Vincent*, 226 Ill. 2d at 9-10), seem to adequately establish fraud. Thus, petitioner has shown *prima facie* reversible error in the trial court's entry of summary judgment on the ground of lack of due diligence.

¶ 17 III. CONCLUSION

¶ 18 Based on the foregoing, we reverse the trial court's order denying petitioner's petition, and we remand for further proceedings.

¶ 19 Reversed and remanded.