2012 IL App (2d) 111230-U
No. 2-11-1230
Order filed August 3, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

R&W CLARK CONSTRUCTION, INC.,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-CH-2896
	)	
KANE COUNTY FOREST PRESERVE	)	
DISTRICT,	)	Honorable
	)	Mark A. Pheanis,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

Held: The trial court properly granted plaintiff's section 2-1401 petition to vacate a dismissal for want of prosecution: the petition was sufficient, as it alleged a defense to the entry of the dismissal (and did not need to allege a meritorious claim in the original action), and defendant waived, by not effectively raising it in the trial court, its objection to improper service of the petition.

¶ 1 Defendant, the Kane County Forest Preserve District (the District), appeals from the grant of the petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) in which plaintiff, R&W Clark Construction, Inc., asked the court to vacate the dismissal for want of prosecution (DWP) of its action against defendant. Defendant asserts that,

because the petition failed to set out a meritorious claim of plaintiff's in the underlying action, the petition was fatally deficient. We do not agree. We also hold that defendant waived any claim of insufficient service.

¶ 2 I. BACKGROUND

¶ 3 On September 16, 2008, plaintiff filed a three-count complaint against defendant, the gist of which was that defendant had contracted with plaintiff for certain construction work, plaintiff performed the work, but defendant did not pay the agreed amount. Plaintiff asserted that defendant owed it $505,130 and interest. Defendant appeared and answered, denying some critical allegations of each count of the complaint.

¶ 4 On September 30, 2009, the court set January 30, 2010, as the deadline for completing discovery, but the court later extended this several times. On April 15, 2011, discovery was extended until May 16, 2011, and a new status date of May 20, 2011, set.

¶ 5 On May 20, 2011, defendant appeared, but plaintiff did not. The court, on its own motion, continued the matter until June 28, 2011, for a hearing on a DWP. It required that a copy of that day's order be sent to plaintiff. On June 28, 2011, plaintiff again was absent; the court dismissed the action without prejudice.

¶ 6 Thirty-eight days later, on August 5, 2011, plaintiff filed a "Rule 2-1401 Motion to Vacate [*sic*]." In the filing, it asserted that counsel for plaintiff had been unable to appear at the June 28, 2011, hearing because he had a trial scheduled in Winnebago County. Counsel had arranged for another lawyer to appear, but, because of a miscommunication, that person went to the Winnebago County courthouse. Counsel for plaintiff did not receive the June 28, 2011, dismissal order until more than 30 days had passed. The filing alleged that plaintiff "ha[d] a meritorious action and

believe[d] that it [would] ultimately succeed in the matter." Further, "[t]he parties [were] ready for trial and failure to vacate the [dismissal] order [would] require the Plaintiff to re-file the case and delay the process to set the matter for trial."

¶ 7 Included with the filing was the affidavit of Raed Shalabi, the lawyer whom counsel for plaintiff had expected to appear in the matter on June 28, 2011. Shalabi averred that he and plaintiff's counsel had miscommunicated: he went to Winnebago County to assist plaintiff's counsel with a trial there when plaintiff's counsel expected him to appear in this matter. Also included was the affidavit of plaintiff's counsel, who averred that he had expected Shalabi to cover the June 28, 2011, hearing and that he had not received the notice of dismissal within 30 days.

¶ 8 On October 11, 2011, the court ordered plaintiff to "provide notice [of the '2-1401 Motion'] to Defendant [*sic*] attorney." Plaintiff mailed the "Motion" and notice of a November 23, 2011, hearing on it to defendant. Defendant responded with a motion to strike plaintiff's filing. Defendant asserted that plaintiff had failed to plead properly its assertion that it had a meritorious claim. It argued that, because a section 2-1401 petition is a new initial pleading, plaintiff had to plead all necessary facts, as it would in a complaint. In particular, defendant asserted that plaintiff had to allege all the facts needed to show the viability of its claim in the underlying action. Defendant also asserted that a further reason for striking the filing was that plaintiff had failed to have a summons issued. It did not ask that the court quash service. Contrary to what plaintiff suggests on appeal, it did not specifically assert a want of personal jurisdiction.

¶ 9 At the November 23, 2011, hearing, the court granted plaintiff's "2-1401 motion" and denied defendant's motion to strike; it vacated the DWP and set a new deadline for completion of discovery.

Transcripts of this hearing are *not* a part of the record on appeal. Defendant mailed a notice of appeal on the day that the court vacated the DWP.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues that plaintiff's section 2-1401 filing was insufficient because the allegations were insufficient to show that plaintiff had a meritorious claim *in the underlying action*. That is, because plaintiff did not plead facts relating to the contract dispute, it failed entirely to plead a necessary element of its cause of action. Defendant further asserts that the court did not obtain personal jurisdiction over it because notice to it was improper. The core issue here is the sufficiency of the section 2-1401 filing. That is an issue of law and thus subject to *de novo* review. *Blazyk v. Daman Express, Inc.*, 406 Ill. App. 3d 203, 206 (2010). On undisputed facts, the sufficiency of service is also an issue of law that is subject to *de novo* review. *Jayko v. Fraczek*, 2012 IL App (1st) 103665, ¶ 3.

¶ 12 Defendant is incorrect on both points. As to the sufficiency of the petition, the confusion is over what it means to have a meritorious claim or defense in a section 2-1401 action. As we will discuss, "[t]o prove the existence of a meritorious defense or claim, a petitioner must allege facts that would have *prevented entry of the judgment* if they had been known by the trial court." (Emphasis added.) *Blutcher v. EHS Trinity Hospital*, 321 Ill. App. 3d 131, 136 (2001). Thus, what plaintiff must show is a defense to the DWP. Further, we hold that defendant waived service. However, before we address these issues in detail, we explain why we have jurisdiction of this appeal. This is at issue because the DWP was not a final order, so that a section 2-1401 petition was not a proper mode of attack. Section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2010)) is the vehicle

with which a party can challenge an interlocutory order, and the grant of a section 2-1301(e) motion does not produce a final (and appealable) order.

¶ 13 A DWP is usually an interlocutory order for the year after the court enters it. Under section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)),[1] after a DWP, a plaintiff generally has a year in which to refile its complaint, even when the statute of limitations has otherwise run. Under the rule set out by the supreme court in *Flores v. Dugan*, 91 Ill. 2d 108 (1982), and clarified in *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489 (1998), a DWP is not final and appealable while section 13-217 permits refiling. The DWP's lack of finality is a bar to use of a section 2-1401 petition to attack the dismissal. *S.C. Vaughan*, 181 Ill. 2d at 497.

¶ 14 The holdings of *Flores* and *S.C. Vaughan* might be taken to imply that, in the year in which refiling under section 13-217 is possible, such refiling is the only way to reinstate a case after 30 days have passed. On the contrary, nonfinal DWPs—by virtue of their nonfinal status—are subject to vacatur under section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2010)). *Progressive Universal Insurance Co. v. Hallman*, 331 Ill. App. 3d 64, 67-68 (2002).

¶ 15 It is therefore natural to ask whether plaintiff's filing was *effectively* a motion under section 2-1301(e). If it was, the court's grant of the motion would produce an interlocutory order, not a final

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[1]The "current" version of section 13-217 (735 ILCS 5/13-217 (West 2010)) does not provide for refiling after a DWP. However, the supreme court, in *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997), held that the amendments that removed the provisions for refiling after a DWP were unconstitutional as not severable from other unconstitutional provisions of the Civil Justice Reform Amendments of 1995 Pub. Act 89-7, § 15 (eff. March 9, 1995)). Therefore, the unamended version is the effective version.

one, and appeal would be improper. See, *e.g.*, *Illinois Bone & Joint Institute v. Kime*, 396 Ill. App. 3d 881, 882 (2009) (appeal from the grant of a section 2-1301(e) motion had to be dismissed because the appealed order was interlocutory). The *S.C. Vaughan* court has answered this question: it held that its jurisdiction of the appeal from the grant of a section 2-1401 petition to vacate a DWP was independent of whether the DWP was a final order. *S.C. Vaughan*, 181 Ill. 2d at 496. Thus, the trial court's granting of the petition as a section 2-1401 petition was sufficient to confer jurisdiction on the reviewing court under Illinois Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010),which makes immediately appealable any "judgment or order granting or denying any of the relief prayed in a petition under section 2-1401 of the Code of Civil Procedure." *S.C. Vaughan*, 181 Ill. 2d at 496-97.

¶ 16 We note that the conclusion that plaintiff *should have* attacked the DWP through a section 2-1301(e) motion is not a basis for us to reverse the vacatur of the DWP. In *Jackson v. Hooker*, 397 Ill. App. 3d 614, 619 (2010), a First District panel held that, where a plaintiff attacked an interlocutory DWP through a section 2-1401 petition, the availability of relief under section 2-1301(e) made it proper for the trial court to vacate the DWP, at least when the defendant did not object to the use of a section 2-1401 petition. Fairness requires this result. If a defendant makes a prompt objection that a section 2-1401 petition is improper, a plaintiff can easily respond by filing a section 2-1301(e) motion in the underlying case. If the issue arises late, as on appeal, the time for a motion will have likely passed, as it now has here.

¶ 17 We turn now to defendant's claim that service was improper. Given that plaintiff's filing was a section 2-1401 petition, plaintiff had to obtain personal jurisdiction over defendant in the usual way for a section 2-1401 petition. However, defendant could waive that requirement, and it did so here.

¶ 18 Service of a section 2-1401 petition does not require a standard summons. Section 2-1401(b) (735 ILCS 5/2-1401(b) (West 2010)) provides that "[a]ll parties to the petition shall be notified as provided by rule." Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985) provides that "[n]otice of the filing of a petition under section 2-1401 *** shall be given by the same methods provided in [Illinois Supreme Court] Rule 105 [(eff. Jan. 1, 1989)] for the giving of notice of additional relief to parties in default." *That* rule allows such notice to be served by any method allowed for a summons or by publication, but also by certified or registered mail, return receipt requested.

¶ 19 Here, the record suggests that plaintiff served the petition by ordinary first-class mail. Defendant could have objected to that, but did not do so effectively. Section 2-301 of the Code (735 ILCS 5/2-301 (West 2010)) strictly limits when a defendant can challenge personal jurisdiction:

> "Prior to the filing of any other pleading or motion other than a motion for an extension of time to answer or otherwise appear, a party may object to the court's jurisdiction over the party's person *** on the ground of insufficiency of process or insufficiency of service of process, by filing a motion to dismiss the entire proceeding or any cause of action involved in the proceeding or by filing a motion to quash service of process." 735 ILCS 5/2-301(a) (West 2010).

Defendant's motion to strike the filing was neither a motion to dismiss the entire proceeding nor a motion to quash service. Further, even as the motion discussed the merits of plaintiff's filing, it did not deny the court's power over defendant. Defendant therefore waived the issue.

> "If the objecting party files a responsive pleading or a motion (other than a motion for an extension of time to answer or otherwise appear) prior to the filing of a motion in compliance

with subsection (a), that party waives all objections to the court's jurisdiction over the party's person." 735 ILCS 5/2-301(a-5) (West 2010).[2]

The differences between defendant's motion and what section 2-301(a) requires to preserve the issue could be described as technicalities. However, for a defendant that has received notice sufficient to bring it to court, knowing what matter is before the court, the form of the notice is also a technicality. The value in allowing objections is to protect others who do not have adequate notice. Here, defendant had adequate notice to raise any issues it desired.

¶ 20 Defendant asserts that plaintiff's filing was not a "pleading." Defendant incorrectly assumes that a "pleading" is defined by its form. A "pleading" is a filing that contains "a party's formal allegations of his claims or defenses." *In re Marriage of Wolff*, 355 Ill. App. 3d 403, 407 (2005). This is so even if the document is improperly labeled as a "motion." See *People ex rel. Ryan v. City of West Chicago*, 216 Ill. App. 3d 683, 688 (1991) (the substance of a filing, not the name the party gives it, determines the character of the document). Thus, a filing that raises a claim is an initial pleading, even if the party calls it a motion. *In re Marriage of Best*, 369 Ill. App. 3d 254, 260 (2006), *rev'd on other grounds*, *In re Marriage of Best*, 228 Ill. 2d 107 (2008). Defendant cites *Blazyk* for the proposition that a filing that raises a section 2-1401 claim *is supposed to be formatted* as a pleading. Defendant misreads the decision. In *Blazyk*, we held that a " 'Motion to Vacate

[2]Even if the motion had been one that preserved the jurisdictional objection under section 2-301, we would nevertheless rule against defendant on the matter. Per *In re Marriage of Gulla*, 234 Ill. 2d 414, 423-24 (2009), an issue of personal jurisdiction is forfeitable under the principles of *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In other words, where the record is insufficient to show otherwise, we presume that the trial court acted in conformity with the law.

Default Judgment,' " by virtue of its attempting to set out a section 2-1401 claim, *was* an initial pleading. Many, perhaps most, litigants place section 2-1401 claims in documents labeled as motions. Properly, they should be labeled as petitions and formatted accordingly, but the error in form is not inherently significant.

¶ 21 Defendant asserts that plaintiff failed to state a section 2-1401 claim because it failed to show that it had a meritorious claim in the underlying action. It argues that plaintiff needed to attach its complaint in the underlying action or otherwise set out facts showing that it would succeed in that action. This argument is mistaken in its premises.

¶ 22 The fundamental mistake is as to the kind of meritorious claim or defense that a petitioner must plead. The most basic formulation of what is required for the type of section 2-1401petition at issue here[3] is that a proper petition " 'serves to bring before the court that rendered judgment "facts not appearing of record which, if known to the court at the time judgment was entered, would have prevented its rendition." ' " *In re Marriage of Johnson*, 339 Ill. App. 3d 237, 241 (2003) (quoting *In re Marriage of Broday*, 256 Ill. App. 3d 699, 705 (1993), quoting *In re Marriage of Travlos*, 218 Ill. App. 3d 1030, 1035 (1991)). A formulation focusing on the elements of the claim states:

> "To be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the

[3]Illinois law recognizes at least three types of petitions that may be brought under section 2-1401. *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 15. The type at issue here is derived from writs of *coram nobis*. See *Pajor*, 2012 IL App (2d) 110899, ¶¶ 13, 16.

circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986).

Defendant assumes that the first element in this latter formulation must be the existence of a meritorious defense or claim *in the underlying action*. Such an assumption is overly simplistic. If a judgment is based other than on the merits, if it is, for instance, the result of a penalty for improper conduct, the merits of the underlying issue are of little relevance to whether the court should vacate the judgment. As we noted, "[t]o prove the existence of a meritorious defense or claim, a petitioner must allege facts that would have *prevented entry of the judgment"* if the trial court had known them. (Emphasis added.) *Blutcher*, 321 Ill. App. 3d at 136. Consistent with this reasoning, in decisions in which plaintiffs have asked courts to vacate DWPs under section 2-1401, the basis for allowing the vacatur has been the explanation for the failure to prosecute, and not the merits of the underlying case. *E.g.*, *Manning v. Meier*, 114 Ill. App. 3d 835, 838-39 (1983). Here, plaintiff's filing explained that it had tried to send a different lawyer to cover the case. That is a fact that was not of record and that, if known to the court when judgment was entered, would perhaps have prevented its rendition.[4]

[4]We do not specifically hold here that plaintiff adequately pleaded this point. Rather, defendant has not argued it and so has forfeited it. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 39. "[T]his court will not become the advocate for, as well as the judge of, points an appellant seeks to raise." *Skidis v. Industrial Comm'n*, 309 Ill. App. 3d 720, 724 (1999).

¶ 23 Further, even assuming for the sake of argument that plaintiff did need to show the merits of its underlying claim, the record was adequate to do that. The record in the underlying case is inherently a part of the section 2-1401 proceeding:

> "The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing *as to matters not of record*." (Emphasis added.) 735 ILCS 5/2-1401(b) (West 2010).

Indeed, certain forms of a section 2-1401 petition are based on essentially nothing but the record. *Pajor*, 2012 IL App (2d) 110899, ¶¶ 12, 17. Here, the complaint and the answer were before the court in the section 2-1401 proceedings. The record, the years of discovery, and the absence of a motion for summary judgment or judgment on the pleadings from defendant, are clear indicators that the underlying claim had merits sufficient to take it to trial. We also note that plaintiff alleged that the case was ready for trial, which is a brief way of making the same point.

¶ 24 We have addressed defendant's arguments raised on appeal. However, a further comment on procedure is in order. As we noted, plaintiff could properly have used section 2-1301(e) to seek vacatur of the DWP. Had it done so, the procedure that the court followed here would have been unexceptional. Plaintiff instead proceeded under section 2-1401. Defendant is entirely correct to cite *Blazyk* for the general point that a court should not treat a section 2-1401 petition like a motion. In that decision, we discussed proper procedure, noting that the respondent may move to dismiss the petition (or to strike it, as defendant did), but, if the petition stands, the respondent should have the opportunity to answer. *Blazyk*, 406 Ill. App. 3d at 207. Given that defendant is aware of our holding in *Blazyk*, we must assume that it is aware that it had the right to file a response to the petition. We

assume that it made a deliberate choice not to file a response as there was little basis to assume the factual allegations in the pleading were not true and it instead stood on the argument in the motion to strike: that plaintiff's filing was insufficient as a section 2-1401 petition.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the grant of plaintiff's section 2-1401 petition.

¶ 27 Affirmed.