2013 IL App (2d) 120610-U
No. 2-12-0610
Order filed January 10, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

BAXTER CREDIT UNION, Plaintiff-Appellee, v. KEVIN FRYSTAK, Defendant-Appellant (Chicago Title Land Trust Co., as Successor Trustee to Harris Trust and Savings Bank, as Trustee under a Trust Agreement Dated November 14, 2002, and Known as Trust No. HTB1244. Patrick R. Barrett, Ketric Enterprises, Inc., the Board of Managers of the Emerald Shores Subdivision, Unknown Owners and Nonrecord Claimants, Defendants).	)	Appeal from the Circuit Court of Lake County. No. 11-CH-1664 Honorable Mitchell L. Hoffman, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied on the pleadings (without a motion to strike or dismiss) defendant's section 2-1401 petition, which conceded that defendant had no meritorious defense, asserting instead that discovery might reveal one.

¶ 2 Kevin Frystak, a defendant in a foreclosure action filed by plaintiff, Baxter Credit Union, appeals from the denial of his petition (under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010))) in which he attacked the foreclosure judgment. He states that the "matter [on appeal] does *not* relate to the outcome" of the hearing on the petition, but "[i]nstead challenges the manner in which the Petition was considered by the Presiding Judge." (Emphasis in original.) He does not attempt to show any prejudice from the supposed procedural error, and, indeed, he fails to persuade us that any substantial error occurred. We therefore affirm the denial.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed a foreclosure complaint relating to a Lake County rental property on April 6, 2011. According to the documents attached to the complaint, plaintiff was the original mortgagee. The defendants were Chicago Title Land Trust Co., as successor trustee to Harris Trust and Savings Bank, as trustee under a trust agreement dated November 14, 2002, and known as trust No. HTB1244, Kevin Frystak, Patrick R. Barrett, Ketric Enterprises, Inc., the Board of Managers of the Emerald Shores Subdivision, unknown owners, and nonrecord claimants. On October 3, 2011, attorney Peter T. Silvern filed an appearance on Frystak's behalf, but did not file any proof of mailing along with it. Frystak did not answer the complaint or otherwise respond. The court entered a judgment for foreclosure and sale on October 18, 2011. On February 24, 2012, the court entered an order that confirmed the sheriff's sale.

¶ 5 On April 9, 2012, Frystak filed a petition for relief from judgment under section 2-1401. He alleged that counsel had not received the notices required by law; they had gone instead to Frystak personally. With respect to the existence of a meritorious defense, he stated:

> "FRYSTAK is unable to relay details of claims and defenses he may have against Plaintiff at this stage because Defendant has not been able to tender discovery or review a full copy of the loan file to make such a determination."

He included a proposed answer in which he fully admitted all claims except three: (1) he denied that the loan documents were authentic without the originals and evidence concerning "any Allonge, Assignments, or related Documents," (2) he denied "without additional proof" that plaintiff was the mortgagee; and (3) he denied "without a full accounting" that the mortgage was in default and that specific amounts were due. Further:

> "Defendant has a reasonable belief that limited discovery would reveal the details for any basis for defenses and claims, such as matters related to the origination of the loan or servicing there upon, matters that cannot be determined with the record before the parties."

The petition argued that courts have the equitable power to grant section 2-1401 petitions even when "the requirement of due diligence has not been completely satisfied." It did not include any authority or argument for the proposition that a court could grant the petition or allow discovery without the allegation of a meritorious defense.

¶ 6 On the same day, Frystak also filed an "Emergency Motion to Stay Possession and for Other Relief Based upon Filing of 2-1401 Petition for Relief."

¶ 7 Plaintiff, on April 12, 2012, filed "Plaintiff's Response to Defendant's Emergency Motion to Stay Possession and Defendant's 2-1401 Petition for Relief from Judgment." In this document, it argued that Frystak had failed to state the elements of a section 2-1401 claim. In particular, it noted that Frystak had not attempted to plead the existence of a meritorious defense and that "[t]he existence of a meritorious defense is *indispensable* regardless of the petitioner's diligence."

(Emphasis in original.) It also noted that Frystak was seeking to conduct a "fishing expedition," which it argued no authority permitted. The response also discussed the mailing of notices in the original case, arguing both that counsel had not properly served his appearance and that the facts described by Frystak were insufficient as a matter of law to establish Frystak's diligence. Plaintiff asked the court to deny the petition.

¶ 8 At an April 12, 2012, hearing, Silvern argued for Frystak that "the proper response for a 1401 petition is a motion to strike or dismiss, which will include its own briefing schedule under most circumstances." Most of the discussion focused on issues of notice during the original proceedings. The court noted that plaintiff had "effectively already responded to the 2-1401 petition," but said that Frystak should have the opportunity to reply.

¶ 9 On May 1, 2012, Frystak filed his "Reply to Plaintiff's Response to Defendant's 2-1401 Petition." He asserted that the court should have required plaintiff to file a motion to either strike or dismiss and then should have set a briefing schedule for the motion. The reply contained eight pages of discussion of notice issues and the law of section 2-1401. These pages touched on the existence of a meritorious defense only to reassert that, if he had a defense, the evidence would "lie largely in the loan file, which only the Plaintiff has in its possession."

¶ 10 At the next hearing, Frystak made a more specific version of his earlier argument, namely that plaintiff more properly should have raised its response in a motion to strike or dismiss. The court allowed extended argument on notice and diligence before ruling that it would deny the petition. Frystak filed a timely notice of appeal.

¶ 11 II. ANALYSIS

¶ 12 On appeal, Frystak, again represented by Silvern, makes the same claim of improper procedure that he made in the trial court. As we noted, he states that the "matter before this Court does *not* relate to the outcome" of the hearing on the petition, but "[i]nstead it challenges the manner in which the Petition was considered by the Presiding Judge." (Emphasis in original.) This admission is an effective concession of the meritlessness of the appeal and is akin to the admission in the section 2-1401 petition that he could not plead one of the elements of a section 2-1401 claim. A procedural impropriety by the court is not a basis for reversal unless it prejudices the appellant. " ' "Where it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment or decree will not be disturbed." ' " *Simmons v. Garces*, 198 Ill. 2d 541, 566-67 (2002) (quoting *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 559 (1976), quoting *Both v. Nelson*, 31 Ill. 2d 511, 514 (1964)). Frystak is correct, however, that under *People v. Vincent*, 226 Ill. 2d 1, 18 (2007), our review is *de novo.*

¶ 13 Despite his concession, Frystak argues that "a proper handling of the Petition would have allowed the Defendant/Appellant to properly present all potential claims and defenses for the Trial Court's consideration." "Proper consideration of a 2-1401 Petition may include additional evidence, hearings and testimony." "By virtue of the manner in which the Petition was considered here, Appellant lost the opportunity to present and defend the Petition *in the proper setting*, where a motion to dismiss should *not* be granted unless it clearly appears that no set of facts could ever be proved that would entitle the Movant [*sic*] to relief." (Emphases in original.)

¶ 14 Given Frystak's concessions here and in the trial court, it is hard to avoid reading this argument as anything other than a complaint that the process was insufficiently drawn out. Not only is insufficient delay not a form of prejudice we recognize, it is an entirely improper purpose. "In

representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person[.]" Ill. S. Ct. Rs. Prof. Conduct. R. 4.4(a) (eff. Jan. 1, 2010). Further:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Ill. S. Ct. R. 137 (eff. Feb. 1, 1994).

Both the original pleading and this appeal give every sign of being filed without regard for these rules. No exception exists for a filing that openly concedes its own inadequacy. We admonish counsel that such filings are potentially sanctionable.

¶ 15 Moreover, the procedure here was substantially proper. First, our rules for pleadings assume an initial pleading that at least purports to state a claim. Where a petition is self-admittedly insufficient, that assumption fails. In such a case, we see no reason that a respondent cannot properly file a response (in the sense of the counterpart to an answer) agreeing that the petition is indeed insufficient. See People ex rel. Huff v. Palmer, 356 Ill. 563, 569 - 571, (1934) for a short discussion on the nature and extent of general and special demurrers. Second, when section 2-1401 pleadings are complete (a petition, a response, and, where the petitioner obtains leave, a reply), the court may review them in a procedure akin to the deciding of a motion for summary judgment. *Klein v. La Salle National Bank*, 155 Ill. 2d 201, 205 (1993). (No motion is required, however.) Here, where

the parties agreed that the petition was insufficient on its face, no reason existed for the court not to grant judgment for plaintiff.

¶ 16 Frystak cites authority for the proposition that a court should not grant a motion to dismiss with prejudice unless it is clear that a person who has filed the initial pleading could not prove any set of facts that would entitle him or her to relief. Those cases assume that the pleading contained an attempt to set out some specific claim. If the only allegation is that the filer thinks that he might possibly have a claim at some unknown time, the suggestion that such a standard applies is meritless.

¶ 17 III. CONCLUSION

¶ 18 For the reasons stated, we affirm the denial of Frystak's section 2-1401 petition.

¶ 19 Affirmed.