2013 IL App (2d) 120665-U
No. 2-12-0665
Order filed May 21, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF CYNTHIA RAINE, Petitioner-Appellee, and TALMAGE RAINE, Respondent-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 08-D-1207 Honorable Paul A. Marchese, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke concurred in the judgment.
Justice McLaren specially concurred.

ORDER

¶ 1 *Held*: Because the marital settlement agreement was not unconscionable or procured through fraud, the trial court properly denied respondent's motion to vacate the settlement agreement under section 2-1401. Therefore, we affirmed.

¶ 2 On February 27, 2009, the trial court entered a judgment dissolving the marriage of petitioner, Cynthia Raine, and respondent, Talmage Raine, and incorporating the parties' marital settlement agreement. On January 27, 2011, Talmage filed a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) for relief from the judgment on the basis

that the marital settlement agreement was unconscionable and/or procured by fraud. The trial court denied Talmage's section 2-1401 petition to vacate, and Talmage appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Talmage and Cynthia were married on October 4, 1980, and had two children, Tyler and Madelyn. On June 4, 2008, Cynthia petitioned for dissolution of marriage. Both children were emancipated by that time.

¶ 5 On January 8, 2009, Cynthia's attorney sent Talmage a letter and a proposed marital settlement agreement (initial agreement). Counsel for Cynthia stated in the letter that the initial agreement had been "preliminarily approved" by Cynthia, and that it was being forwarded to Talmage for his review and approval.

¶ 6 A. Initial Agreement

¶ 7 The initial agreement reflected that Cynthia was represented by an attorney whereas Talmage was representing himself. According to the initial agreement, the parties' assets would be divided as follows. The marital residence in Hinsdale and a marital condominium in Chicago were awarded to Cynthia. The property interest in a medical complex rental property, Hobson Medical Building, was awarded to Talmage. In addition, Talmage was awarded his interest in five business enterprises: Plastic Surgeons Association, Hinsdale Center for Surgery, Du Page Surgical Center, Skin Elegance, and Refine 360. Talmage's shares of stock in Du Page Doctors, Ltd., were to be sold, and the proceeds were to go to Cynthia. Cynthia was awarded the 2003 Toyota Forerunner and the 1999 Lexus. The initial agreement further provided that Talmage would pay maintenance to Cynthia in the amount of $12,000 per month. In addition, Talmage would pay for Cynthia's health insurance and maintain a $2 million life insurance policy naming Cynthia as trustee for the benefit of the

children. The initial agreement gave Cynthia four retirement accounts and Talmage one account. Cynthia also received the money market account, savings and checking accounts, and a CD. Finally, each party was to pay their own attorney fees.

¶ 8 On February 12, 2009, Cynthia e-mailed Talmage that the initial agreement was being rewritten. She stated that there were "[s]everal reasons for the rewrite: to remove me from any liability or guarantee associated with the collateral guarantee on the PSA credit line/loan by the house. It removes me but, obviously, removing the house as collateral is up to Harris Bank." Cynthia went on to say in her e-mail that "[a]lso, now that you have cashed in and spent the stock from CFS, that verbiage will be taken out." Cynthia continued in her e-mail that once the initial agreement was rewritten, she would go with Talmage to the "notary for [his] signature and take it immediately to the attorney so there is not delay." Cynthia hoped that the February 20, 2009, court date was "still on."

¶ 9 A second e-mail from Cynthia to Talmage was dated February 18, 2009. Cynthia stated:

> "We will present the [final] settlement [agreement] (the new one will have to be signed and notarized prior to Friday) and I don't know if there will be any questions. Presumably the judge may want to know why you don't have an attorney but, if the settlement is signed this means we both agree to the terms and conditions."

In her e-mail, Cynthia informed Talmage that the final agreement would be e-mailed to him. Talmage received the final agreement on February 25, 2009, and signed it the next day, on February 26, 2009.

¶ 10 B. Final Agreement

¶ 11 The final agreement contained some changes from the initial agreement. Two of the changes consisted of awarding the Hinsdale residence to Talmage and awarding the property interest in the Hobson Medical Building to Cynthia. Another change concerned Talmage's shares of stock in Du Page Doctors, Ltd. Whereas the initial agreement required him to sell the stock and give the proceeds to Cynthia, the final agreement reflected that Talmage had sold the stock and retained the money. In addition, the final agreement required Talmage to pay Cynthia $300,000 on or before 36 months from the date of the dissolution judgment as a reimbursement for the depletion of approximately $600,000 from the marital estate. Like the initial agreement, the final agreement required Talmage to pay $12,000 per month in maintenance, but it eliminated a condition for termination, which was Cynthia's cohabitation with another person on a continuing, conjugal basis. The final agreement also added a provision that as long as Talmage was licensed as a practicing physician, he would perform or cover any cost of cosmetic procedures requested by Cynthia. Regarding the $2 million life insurance policy that Talmage was to maintain, the final agreement stated that Cynthia would be named co-trustee for the benefit of the children to the extent of $1 million. The final agreement also gave the beneficiaries a valid and subsisting claim against Talmage's estate in the event they did not receive the full amount of insurance proceeds.

¶ 12 B. Entry of Final Agreement

¶ 13 The court conducted a prove-up hearing for the final agreement on February 27, 2009. Cynthia appeared but Talmage did not. Cynthia's attorney advised the court that Talmage had signed an affidavit acknowledging his awareness of the proceeding. According to Cynthia's attorney, Talmage chose not to be present but voluntarily signed the final agreement.

¶ 14 At the hearing, Cynthia testified briefly as follows. She and Talmage negotiated the final agreement with her attorney's aid. According to Cynthia, much discovery had not been completed at her request, such as a renewal or update of a valuation of Talmage's businesses. Talmage, a plastic surgeon, owned several businesses that Cynthia had good reason to believe might be in trouble. Cynthia testified this was taken into consideration in formulating the final agreement, which Talmage had signed the day before, on February 26, 2009.

¶ 15 Following Cynthia's brief testimony, the court said that it had looked at the petition at one point, and that it stated that Talmage was unemployed. Cynthia clarified that Talmage was currently employed, though he had been unemployed at one time. The court inquired as to Talmage's income, which Cynthia thought was over $150,000 per year. When the court asked how was Talmage "going to pay this" maintenance, Cynthia responded that Talmage had other sources of income, "through many affiliations with medical companies." Cynthia said that Talmage received stipends for being a representative of those companies. Determining that the agreement was freely and voluntarily entered, the court stated that "[a]ll of the provisions for the allocation of marital assets and liabilities are specifically approved, found to be fair and equitable." In addition, the court stated that Talmage would pay maintenance to Cynthia in the amount set forth in the final agreement. The final agreement was incorporated into the judgment of dissolution of marriage, dated February 27, 2009.

¶ 16 On August 19, 2010, Talmage, now represented by counsel, filed a motion to modify maintenance. In his petition, Talmage argued that there had been a substantial change in his circumstances in that his income had involuntarily decreased and he had filed for bankruptcy on November 25, 2009.

¶ 17 C. Section 2-1401 Petition to Vacate

¶ 18 While the motion to modify maintenance was still pending, Talmage filed a petition to vacate the final agreement on January 27, 2011. In his petition, Talmage argued that in the process of moving to modify maintenance, discovery had been initiated by both parties relative to their financial situation for the past two years. Talmage argued that in the course of discovery, information had come to light that would lead "a reasonable trier of fact" to conclude that the February 27, 2009, final agreement was unconscionable and inequitable in that it essentially allocated all of the viable assets and income to Cynthia. Talmage admitted that he did not appear in court on February 27, 2009, when the dissolution judgment incorporating the final agreement was entered. However, he argued that the final agreement contained no values as to any of the alleged assets or liabilities that would inform the trial court of the true nature of the division of the assets. Talmage pointed out that the trial court on its own questioned the award of maintenance at $12,000 per month. While Cynthia testified at the prove-up hearing that Talmage's income was over $150,000 per year, she also testified that many of his businesses were in trouble.

¶ 19 Regarding the property division of the final agreement, Talmage argued that recent discovery had uncovered the values of several assets as of December 31, 2008. In an itemized list, Talmage valued the assets to Cynthia as a Liberty Mining CD to Cynthia ($125,000), the interest in the Hobson Medical Building ($50,000), Du Page Doctors, Ltd., stock ($17,277), Talmage's "SEP" ($310,150), vehicles ($15,000), and the Chicago condominium ($180,000). On the other hand, Talmage received his interest in one of his business enterprises, the Du Page Surgical Center ($7,657), but all the other businesses awarded to him were either insolvent or undergoing bankruptcy proceedings. The other asset awarded to him was the Hinsdale residence ($80,000).

¶ 20 Talmage further alleged in his petition that in addition to the "blatant inequity" of the final agreement, it was entered into through fraud that was committed against him and the court. Talmage alleged that "upon a critical reading of both" the initial and final agreements, in less than two months, significant portions were altered to further skew the division of the assets in favor of Cynthia. According to Talmage, he was never "specifically notified of any of the changes" from the initial agreement, dated January 8, 2009, to the final agreement, dated February 27, 2009. Contrary to Cynthia's testimony, "no negotiations took place between the parties that would lead [Talmage] to believe that" the initial agreement would be altered. Talmage further alleged that at the time of the dissolution proceedings, he was undergoing counseling for severe depression, and that Cynthia was aware of his "fragile mental state."

¶ 21 Talmage went on to allege in his petition that on February 26, 2009, he was presented with and signed the final agreement after meeting with Cynthia at a notary public so that the signature could be notarized. According to Talmage, he was not allowed time at the notary public to compare the initial agreement to the final agreement. Talmage pointed out that a number of paragraphs (12) were altered or added to in the final agreement. In addition, other than the $300,000 claim of dissipation in the final agreement, no claim of dissipation was ever filed or served upon him.

¶ 22 1. Hearing

¶ 23 A hearing on Talmage's section 2-1401 petition to vacate was held on April 20, 2012. Talmage's attorney called Cynthia to testify first, and she testified as follows. From the time she petitioned for dissolution of marriage in 2008 to the time the dissolution judgment was entered in 2009, Cynthia retained an attorney but Talmage did not. Cynthia and Talmage never met together with an attorney, and Talmage never met independently with Cynthia's attorney.

¶ 24 On January 8, 2009, an initial agreement was sent to Talmage. The initial agreement was based on information that Cynthia gave to her attorney after Cynthia had numerous conversations with Talmage. At the time she filed the petition for dissolution, Cynthia was working with a real estate developer but was not paid. Talmage was employed by several entities, including Plastic Surgeons Association, Skin Elegance, and Hinsdale Center for Surgery, and he received a stipend from the medical companies for which he worked. Talmage expressed to Cynthia that he wanted her to have "everything"; the only thing he wanted was his business, Refine 360.

¶ 25 During their marriage, Cynthia handled the bill paying and was aware of money coming in and out. Cynthia was aware of the couples' various accounts but did not know "exact dollar amounts." Cynthia was also aware of various properties the two had purchased during their marriage, and she gave this information to her attorney for the initial agreement. In addition, Cynthia was aware of the information in their joint tax returns that she signed off on each year.

¶ 26 Cynthia admitted that there were significant differences between the initial agreement and the final agreement. The changes were made based on Cynthia's instructions to her attorney and not based on any instructions from Talmage. Cynthia was not aware of any communication from her attorney to Talmage that specifically set forth every change to the initial agreement. Cynthia listed a few of the changes from the initial agreement to the final agreement in her e-mail to Talmage on February 12, 2009, but she did not list all of the changes. For example, Cynthia did not mention changes such as free plastic surgery, a $300,000 judgment, the deletion of a basis for terminating maintenance (the initial agreement terminated maintenance upon her cohabitation with another person on a continuing conjugal basis), the award of the Hinsdale residence to Talmage, and the

award of the Hobson Medical Building interest to her. The Hobson Medical Building was a rental property owned by investors from which she received about $750 per month.

¶ 27 Per the final agreement, Cynthia received a TIA CERF retirement account, which was valued at a little over $100,000. The Liberty Mining CD worth $125,000 that Cynthia was supposed to receive no longer existed; Talmage advised Cynthia that the bank had "called that CD back for lack of payment." Cynthia received Talmage's SEP IRA from Face and Body Plastic Surgery, valued at about $300,000. She also received a Charles Schwab account of about $9,700. In addition, Cynthia had her own life insurance policy that had a cash value of about $15,000.

¶ 28 Talmage received the final agreement on February 25, 2009. Then, Cynthia met with Talmage on February 26. The two met in the parking lot of his plastic surgery office in Hinsdale, and from there, walked to a building containing a notary public. Talmage had asked Cynthia to bring a copy of the final agreement because his printer had run out of ink. The final agreement was signed and then notarized, which took about 15 to 20 minutes. They did not discuss the changes that had been made to the final agreement that day. Before that, however, they often discussed the equity of the two properties, and how Cynthia was willing to give up the equity in the Hinsdale property because she could not afford it. Cynthia was aware that the Hinsdale residence was later "foreclosed on." Cynthia testified that the house was "foreclosed on" even though it was paid in full, minus the taxes.

¶ 29 Cynthia testified that Talmage did not appear in court at the prove-up hearing the next day, February 27, 2009, because he planned to go out of town for a plastic surgery seminar. Cynthia admitted testifying at that hearing that Talmage was able to make maintenance payments of $12,000 per month.

¶ 30 At this point, the parties' joint tax returns were admitted into evidence. A tax return for 2006 showed an adjusted gross income of $203,818, and a tax return for 2007 showed an adjusted gross income of negative $231,254. Cynthia was aware that Talmage had declared bankruptcy in December 2009. Cynthia's Chicago condominium was not in foreclosure but the mortgage was in default, with a remaining mortgage of about $248,000. In February 2009, there was a second mortgage of $50,000 on that property, but that mortgage was wiped out by Talmage's bankruptcy.

¶ 31 When asked if Talmage was going through a depression at the time the judgment was entered, Cynthia's counsel objected, and a sidebar conference occurred. Cynthia's counsel pointed out that this matter was the subject of subpoenaed documents, and that counsel for Talmage had said that "this was an avenue they were not pursuing." Talmage's counsel disagreed that he ever made this representation but ended up conferring with Talmage and withdrawing the question.

¶ 32 On cross-examination, Cynthia testified that at the time of the initial agreement, she did not have all the information regarding their property. It was not until February 2009 that she learned that Talmage had "tied a judgment up" in the Hinsdale residence. The $21,116.49 judgment, entered January 1, 2009, was one of the reasons that Cynthia requested revisions to the initial agreement. Cynthia's inability to pay for the Hinsdale residence and the Chicago condominium led her to talk with Talmage about rearranging the property division. Though the mortgage of the Hinsdale property was completely paid off in February 2009, Cynthia agreed to give up that equity.

¶ 33 Cynthia further testified that she discovered in February 2009 that Talmage had used marital assets to fund his businesses. Talmage obtained an equity loan on the Chicago condominium for $250,000 as part of his capital for starting Refine 360, and he also took the $90,000 from the sale of Du Page Doctors, Ltd., stock to invest in that business. Talmage took $200,000 from a retirement

account to pay back investors of Refine 360; he incurred credit card debt of $15,000 in relation to the business; and he prepaid $40,000 to an employee of Refine 360. In all, Talmage used approximately $595,000 in marital assets for Refine 360. The $300,000 that Cynthia sought in the final agreement was based on the marital funds that Talmage had used for Refine 360; she never alleged that the $300,000 were funds that Talmage had dissipated. As a result, there was a restraining order prohibiting Talmage from liquidating any and all retirement accounts. (The court located the restraining order in the file.) Shortly after Cynthia petitioned for dissolution, she and Talmage discussed the businesses. Talmage said repeatedly that she "could have everything"; the only thing he wanted was Refine 360. However, neither the initial or final agreements gave her "everything."

¶ 34 Cynthia explained the changes between the initial and final agreements and the overall division as follows. The final agreement gave Talmage all of the income-producing assets, except for the interest in the Hobson Medical Building, which amounted to about $750 per month. The final agreement gave Cynthia the interest in the Hobson Medical Building after Talmage liquidated the Du Page Doctors, Ltd., stock, worth $90,000, which she was supposed to receive in the initial agreement. In addition, the $125,000 Liberty Mining stock CD that was awarded to her was worthless because the stock had crashed. Regarding the Chicago condominium, she took responsibility for the $250,000 equity loan taken against it, and the equity in the condo at the time of the judgment was about $50,000. In terms of maintenance, Talmage agreed to pay $12,000 per month in maintenance, and the final agreement deleted the cohabitation termination factor because she wanted that change. The final agreement added the plastic surgery and other less invasive services because Talmage stated as recently as January 2009 that he would "always take care" of her,

and she could "always come into the office" for these procedures. The final agreement's change to the life insurance policy had the effect of limiting her power by naming her as a co-trustee of only $1 million of the $2 million policy.

¶ 35 After Talmage declared bankruptcy, Cynthia was contacted by a trustee of the bankruptcy court about the final agreement. As a result, Cynthia prepared a "schedule" of asset and debt valuation at the time of the February 2009 dissolution judgment. Talmage's counsel objected to the admission of the document as substantive evidence. The trial court admitted the document for a limited purpose; namely, as demonstrative evidence or a summary of Cynthia's perceived value of the assets and debts at the time of the dissolution judgment.

¶ 36 In the schedule, Cynthia did not know the value of certain assets, such as Talmage's businesses. For Skin Elegance, she used Talmage's projected income figures, which were $90,000 in 2009; $152,000 in 2010; and $262,000 in 2011. In addition, Cynthia valued the equipment and office location of his various businesses at $500,000. The schedule reflected Cynthia's credit card debt to be around $52,690. It also reflected the division of the retirement accounts, with four accounts going to Cynthia for a total value of $413,414, and one account going to Talmage for a value of $250,000. The estimated equity of the two vehicles Cynthia was awarded was $3,500 and $3,000 to $4,500. The schedule showed that Cynthia received a money market account ($978) and a checking account ($1,061).

¶ 37 On redirect examination, Cynthia admitted that she did not know what equipment was purchased as opposed to leased in Talmage's businesses, and that she did not know the actual value of the equipment. Cynthia based her $500,000 estimate on what Talmage sought from investors. Talmage was a 50% owner of Plastic Surgeons Association; a 50% owner of Hinsdale Center for

Surgery; a 50% owner of Skin Elegance; and a 60% owner of Refine 360. Cynthia did not know Talmage's interest in Du Page Surgical Center. All of these businesses had since closed.

¶ 38 Talmage testified as follows. Talmage did not hire an attorney during the dissolution proceedings because he did not think he could afford it; he was "going broke." Refine 360 did not exist by the end of 2008. Talmage's individual tax return for 2008 listed his wages as $91,590 and his total income as $66,402. In January 2009, Plastic Surgeons Association and its subsidiaries, Skin Elegance and Hinsdale Center for Surgery, were doing horribly, and the partners were not able to pay themselves. By the end of 2009, Plastic Surgeons Association and its subsidiaries were no longer in existence. Talmage looked at the initial agreement but did not review the final agreement because he was "overwhelmed with so many things." A "number of things" were "crushing" him "at that point." When he signed the final agreement on February 26, 2009, he did not have a chance to compare it with the initial agreement. Talmage did not recall Cynthia ever mentioning changes such as the $300,000 judgment or the cohabitation provision concerning maintenance. He did, however, agree to switching the award of the Hinsdale residence to him in the final agreement. Talmage filed for bankruptcy in 2009. At the time of the dissolution judgment, February 2009, Talmage did not have the ability to pay Cynthia $12,000 per month in maintenance.

¶ 39 On cross-examination, Talmage testified that he began working for another plastic surgery practice called Meridians in May 2009. He worked there until December 2009 and earned a salary during that period of $117,292. Regarding the change in the final agreement awarding the interest in the Hobson Medical Building to Cynthia, Talmage admitted sending Cynthia an e-mail on February 20, 2009, that forwarded the files for the Hobson Medical Building. Talmage admitted that he forwarded these files to Cynthia after they discussed making this change to the final agreement.

¶ 40 Talmage was asked about his testimony on direct examination in which he stated that he "looked at" the initial agreement. Exhibit H was the initial agreement that Talmage had signed and returned to Cynthia's attorney. The initial agreement stated that it was entered into on February 2, 2009, and it was notarized on February 5, 2009. Talmage admitted initialing each page of the initial agreement and later initialing each page of the final agreement.

¶ 41 2. Decision

¶ 42 On May 22, 2012, Talmage's section 2-1401 petition to vacate the final agreement portion of the judgment was denied. The court stated its rationale as follows, beginning with the "time context" of the case. Talmage initially filed his appearance in the case on June 8, 2008. After that, court hearings occurred on July 3, 2008; October 1, 2008; December 1, 2008; January 26, 2009; February 20, 2009; and February 27, 2009, during which there was a prove-up hearing and the judgment was entered. Therefore, "the case was pending before it proved up for approximately nine months and was in court on six different court dates."

¶ 43 Regarding the existence of a meritorious defense or claim, Talmage argued that the final agreement was unconscionable and also based on fraud. In assessing whether the final agreement was unconscionable, the court was concerned with the value of Talmage's assets at the time judgment was entered, on February 27, 2009. Though a lot of testimony and evidence of the subsequent value of the businesses was introduced, such as the bankruptcy and tax documents, the date that the court used to measure unconscionability was February 27, 2009. The court found that Talmage was an entrepreneur and a plastic surgeon, and he received many business entities "free and clear." While Talmage testified that these businesses were already failing at the time of the judgment, the court did not "think he would have entered into the [final] agreement were that the

case." According to the court, Talmage "thought that these businesses would turn around" or "eventually be successful." Talmage "took a risk when he did that." The court stated that contrary to Talmage's testimony, "he did carefully look at the Marital Settlement Agreement and took the property that was assigned to him being the various business entities for his plastic surgeon talents to be able to potentially make a lot more money down the road than the assets that [Cynthia] received." The court went on to say that while "[o]n its face it appears as though the value of [Cynthia's] assets was more than what [Talmage] was getting[,]" Talmage was "attempting to keep his business entities and hold those together so that perhaps down the road he would be able to make more money." Even though the value of the businesses decreased significantly, the decline was not immediate but over a period of time.

¶ 44 With respect to Talmage's claim of fraud as a basis for vacating the final agreement, the fraud was based on Cynthia's failure to point out specific changes made to the final agreement when she presented it to Talmage. The court found no case standing for the proposition that Cynthia's lack of specifying changes constituted fraud. Talmage had not demonstrated the existence of a meritorious claim of fraud, in that he "assigned property to him that was advantageous for him to keep and he made a bad gamble" by picking businesses that eventually failed.

¶ 45 Because Cynthia made no fraudulent statement and did not act fraudulently, "the bar of due diligence" of presenting this claim to the trial court at the time of the judgment was "not lowered." The court found Talmage to be an intelligent, educated man who decided to represent himself. Thus, the court did not believe that Talmage could not afford to hire an attorney. The court found that Talmage "did not meet his burden as to showing due diligence at the time the judgment was entered." Talmage knew what he was doing at the time. The court stated:

> "[H]e was taking a risk and it was a calculated risk because he wanted to have the businesses and he wanted to have the future opportunity to maintain those businesses and to make money off of the businesses and the different holdings that he had and that's why he assigned certain property to her and that's why he then kept the business interests that he did."

¶ 46 Last, the court considered Talmage's due diligence in filing the section 2-1401 petition to vacate. The judgment was entered on February 27, 2009, and Talmage waited until 23 months later to file his petition, which was "a long period of time." During this period of time, "the bottom fell out on some of the businesses that he owned and it required him then to declare bankruptcy. And even after that, he didn't file the petition." Finding no explanation for the delay, the court determined that Talmage had not met "his burden as to that element" either.

¶ 47 Noting that the order denying the petition to vacate was final and appealable, the case was continued until July 11, 2012, for status on Talmage's motion to modify maintenance.

¶ 48 Talmage timely appealed.

¶ 49 II. ANALYSIS

¶ 50 On appeal, Talmage argues that the trial court erred by denying his section 2-1401 petition to vacate the final agreement.

¶ 51 When a party seeks to vacate a settlement agreement incorporated in a dissolution judgment, all presumptions are in favor of the validity of the settlement agreement. *In re Marriage of Bielawski*, 328 Ill. App. 3d 243, 251 (2002). A settlement agreement is not generally subject to review because an agreed order is a recordation of the agreement between the parties and not a judicial determination of the parties' rights. *Id.* However, relief under section 2-1401 may be

available to set aside a settlement agreement that is unconscionable or was entered into because of duress, coercion or fraud. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 30.

¶ 52 Section 2-1401 of the Code sets forth a comprehensive statutory procedure by which final orders and judgments may be vacated more than 30 days after their entry. *In re Marriage of Lindjord*, 234 Ill. App. 3d 319, 325 (1992). In order to obtain relief under section 2-1401, a petitioner must affirmatively allege specific facts to support the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence presenting this defense or claim to the trial court; and (3) due diligence in filing the petition. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 30. Although a section 2-1401 petition is typically used to bring facts to the attention of the trial court, which if known at the time of judgment would have precluded its entry, it may also be used to challenge a purportedly defective judgment for legal reasons. *Id*. The quantum of proof required to succeed in a section 2-1401 petition is a preponderance of the evidence. *Domingo v. Guarino*, 402 Ill. App. 3d 690, 699 (2010).

¶ 53 At the outset, we note that the parties dispute the standard of review. Talmage argues that the applicable standard of review is whether the decision is against the manifest weight of the evidence, whereas Cynthia urges this court to apply an abuse-of-discretion standard. It is true that in the past, Illinois courts have left the issue of whether to grant or deny a petition under section 2-1401 to the sound discretion of the trial court. *S.I. Securities v. Powless*, 403 Ill. App. 3d 426, 439-40 (2010). However, the supreme court in *People v. Vincent*, 226 Ill. 2d 1 (2007), changed the standard of review from abuse of discretion to *de novo* where the trial court either dismisses the petition or grants or denies relief based on the pleadings alone. See *S.I. Securities*, 403 Ill. App. 3d at 439, citing *Vincent*, 226 Ill. 2d at 16. We note that after *Vincent*, second district cases have not

been uniform regarding the standard of review to be applied in cases resolving section 2-1401 petition *without* an evidentiary hearing. See *In re Haley D.*, 403 Ill. App. 3d 370, 378-79 (2010) (Zenoff, P.J., dissenting) (disagreeing with the majority's application of equitable principles where the trial court denied the 2-1401 petiti*Rockford*on based on the pleadings and affidavits and advocating *de novo* review); *Financial Systems, Inc., v. Borgetti*, 403 Ill. App. 3d 321, 331-32 (2010) (Jorgensen, J., specially concurring) (disagreeing with the majority's use of the abuse-of-discretion standard where the trial court granted the section 2-1401 petition based on the pleadings and an affidavit and advocating *de novo* review); *Mills v. McDuffa*, 393 Ill. App. 3d 940, 947-48 (2009) (applying *de novo* review where the trial court granted a section 2-1401 without an evidentiary hearing).

¶ 54 In this case, the trial court denied Talmage's section 2-1401 petition following an evidentiary hearing. *Vincent*, however, did not address the standard of review in cases where an evidentiary hearing was held. See *Domingo*, 402 Ill. App. 3d at 699 (discussing *Vincent's* lack of resolution of this issue). That said, the supreme court included a footnote in *Vincent* recognizing that appellate courts have applied an abuse-of-discretion standard and/or a manifest-weight-of-the-evidence standard in cases where a section 2-1401 evidentiary hearing was held. *Vincent*, 226 Ill. 2d at 17 n. 4; *Domingo*, 402 Ill. App. 3d at 699. In yet another footnote, the supreme indicated through *dicta* that the abuse-of-discretion standard does not match up with any other of the types of dispositions possible in 2-1401 proceedings because the abuse-of-discretion standard is not tied to any quantum of proof. *Vincent*, 226 Ill. 2d at 17 n. 5.

¶ 55 In *Domingo,* this court addressed the standard of review to be applied in a section 2-1401 proceeding following an evidentiary hearing. *Domingo*, 402 Ill. App. 3d at 699. In discussing

Vincent, we expressly stated that "we read *Vincent's dicta* to favor a manifest-weight-of-the-evidence standard" after an evidentiary hearing. *Id*., citing *Vincent*, 226 Ill. 2d at 17 n. 5. Other districts reviewing section 2-1401 proceedings after an evidentiary hearing have interpreted the *Vincent dicta* the same. See *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶¶ 34-35 (interpreting *Vincent's dicta* to mean that the manifest-weight-of-the-evidence standard was to be applied after an evidentiary hearing); *S.I. Securities*, 403 Ill. App. 3d at 440 (fifth district holding the same). Therefore, consistent with our decision in *Domingo* and other districts, we will not reverse the trial court's denial of Talmage's section 2-1401 petition unless that decision was against the manifest weight of the evidence.

¶ 56 Regarding the first element of a meritorious defense or claim, Talmage argues that the final agreement should be vacated under section 2-1401 because it is unconscionable and was procured by fraud. We begin with Talmage's claim that the final agreement is unconscionable.

¶ 57 "Unconscionable means that one party did not have a meaningful choice and the contract terms are unreasonably favorable to the other party." *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 31. The fact that a settlement agreement merely favors one party over the other does not make the agreement unconscionable. *Id.* To rise to the level of being unconscionable, the settlement agreement must be improvident, totally one-sided, or oppressive. *Id*. The court considers two factors in determining whether an agreement is unconscionable: (1) the conditions under which the agreement was made; and (2) the economic circumstances of the parties that result from the agreement. *Id*.

¶ 58 With respect to the first factor, Talmage argues that the court erred by failing to consider the conditions under which the agreement was made. Talmage argues that at the time of the dissolution,

he was undergoing counseling for severe depression, which the court failed to take into account. Regarding the second factor, he argues that "there is no dispute that very shortly *after* the entry of the [final] agreement Talmage was in a dire economic situation leading to his filing for bankruptcy in the fall of 2009." (Emphasis added.) Talmage argues that the court erred by assuming that he received his businesses "free and clear," because Refine 360 had ceased operating in the fall of 2008 and because the businesses were not owned by him personally and were having problems, as Cynthia recognized at the prove-up hearing. In addition, Talmage argues that the court erred by giving any weight to Cynthia's testimony regarding the assets of the marital estate. For the following reasons, Talmage's arguments are unpersuasive.

¶ 59 Talmage forfeited on appeal any argument regarding his mental health or depression during the dissolution proceedings by abandoning that issue in the trial court. When Talmage's counsel sought to elicit testimony to this effect during his direct examination of Cynthia, Cynthia's attorney objected to this line of questioning. After a sidebar conference, Talmage's attorney conferred with Talmage and elected to withdraw the question. Therefore, he may not raise this issue for the first time on appeal. See *Helping Others Maintain Environmental Standards v. Bos*, 406 Ill. App. 3d 669, 695 (2010) (a party who does not raise an issue in the trial court forfeits the issue and may not raise it for the first time on appeal).

¶ 60 Regarding the second factor, the economic circumstances of the parties that result from the agreement, we agree with the trial court that Talmage, a seasoned entrepreneur, made a "calculated risk" to receive his business entities in the final agreement in exchange for giving other property to Cynthia. Based on the future profitability of these businesses, the agreement was not one-sided. The trial court found Talmage to be an intelligent, educated man and an entrepreneur who elected to

represent himself. The trial court specifically rejected Talmage's testimony that he could not afford a lawyer during the dissolution proceedings. On the contrary, the court found that Talmage "did carefully look" at the final agreement, and in doing so, made the intentional decision to keep his business entities with the assumption that the businesses would "turn around" and make money in the future. According to the court, even if it appeared on the face of the final agreement that Cynthia received more valuable assets, this was not the case, because Talmage was "attempting to keep his business entities and hold those together so that perhaps down the road he would be able to make more money." See *Southwest Bank of St. Louis Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010) (a trial court is in a superior position to observe the witnesses while testifying, judge their credibility, and determine the weight of their testimony; thus, a trial court's findings of fact are entitled to great deference).

¶ 61 While Talmage argues that he did not receive the businesses "free and clear," the court specifically rejected Talmage's argument that the businesses were already failing at the time of the February 27, 2009, dissolution judgment; otherwise, Talmage would not have signed the agreement. Moreover, the trial court found that Talmage elected to take his businesses on the assumption that they would "turn around," meaning that even if they were in trouble, Talmage perceived them to have future value. Despite the fact that Refine 360 had ceased operating in 2008, Cynthia testified that Talmage insisted on keeping that business during their conversations regarding the division of the property. Also, Cynthia testified that Talmage had devoted a lot of marital assets to funding Refine 360, which she did not discover until after the initial agreement was drafted. Cynthia explained that the $300,000 judgment she received in the final agreement was half of the $595,000 that Talmage had spent in marital assets to fund Refine 360. Talmage's argument that he possessed

a 50% or 60% interest in some of the businesses, as opposed to 100%, does not somehow render the agreement one-sided or oppressive. With respect to Talmage's challenge to Cynthia's valuation of the assets, his argument makes little sense when she did not even attempt to place a value on his businesses. And though Talmage's businesses did decline, the decline was not immediate but over a period of time, as the trial court found, and this result was a "gamble" or "risk" that Talmage had decided to take.

¶ 62 Finally, the case at bar stands in marked contrast to other cases in which the marital settlement was found unconscionable. See *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 39 (the trial court's finding that the marital settlement agreement was unconscionable and procured by fraud was supported by the fact that the husband failed to disclose marital and personal assets); *In re Marriage of Johnson*, 339 Ill. App. 3d 237, 241-242 (2003) (where the trial court was not aware of a provision requiring the former husband to make weekly payments to his former wife totaling about $340,000 over nearly 15 years, which likely exceeded the value of the pension he retained, the court deemed the agreement unconscionable); *In re Marriage of Reines*, 184 Ill. App. 3d 392, 399-402 (1989) (the marital settlement agreement was unconscionable where the husband failed to disclose his interest in a pension and retirement plan and other investments prior to entering into the agreement, thus deceiving her into disclaiming any maintenance). Therefore, the trial court's determination that Talmage has not presented a meritorious claim that the final agreement was unconscionable was not against the manifest weight of the evidence.

¶ 63 Talmage's second argument regarding a meritorious claim is that the final agreement was procured by fraud on Cynthia's part. Talmage argues that the "false statement" was Cynthia's February 12, 2009, e-mail to Talmage in which she "intentionally did not mention the major changes

she ultimately made to the agreement," including the $300,000 that Talmage would have to pay her; the $12,000 per month maintenance that Talmage would have to pay even if she lived in cohabitation; and the unlimited cosmetic procedures that Talmage would have to provide for the rest of Cynthia's life. According to Talmage, Cynthia referenced only minor revisions and "obviously did this to induce Talmage to sign" the final agreement the next day without additional review. Talmage argues that the fraud was complete when he "did in fact rely on the truth of Cynthia's statements in her e-mail and signed the [final] agreement without fully reviewing it and he was damaged, accordingly." In addition, Talmage argues that Cynthia committed a fraud upon the court when she testified at the prove-up hearing on February 27, 2009, that he made over $150,000 per year based on stipends he received as a representative for medical companies. Talmage characterizes Cynthia's testimony as a "material misrepresentation of [his] earnings and financial situation" when she was aware that his businesses were in trouble and unable to satisfy the maintenance award.

¶ 64 To sustain a claim of fraud, it is necessary to prove the following elements: (1) false statement of material fact known or believed to be false by the party making it; (2) intent to induce another party to act; (3) action by the other party in reliance on the truth of the statement; and (4) damage to the other party relying on such statement. *In re Marriage of Roepenack*, 2012 IL App (3d) 110198, ¶ 33. We agree with the trial court that Talmage has not met his burden of showing a meritorious claim of fraud.

¶ 65 Other than a case citing the general elements of fraud, Talmage has cited no case for the proposition that Cynthia's actions in this case constituted fraud. First, Talmage does not explain how Cynthia's February 12, 2009, e-mail advising him that the initial agreement was being rewritten obligated her to specify each change simply because she referenced two of the changes that would

be made. To prove fraud, the complainant must show that the other party falsely stated a material fact or concealed a material that he or she *had a duty to disclose*. *In re Marriage of Travlos*, 218 Ill. App. 3d 1030, 1037 (1991). Cynthia's e-mail indicated that there were "[s]everal reasons for the rewrite," and then she listed two of them; namely, removing her from any liability associated with the Hinsdale residence and Talmage's cashing in of the Du Page Doctors, Ltd., stock that was supposed to go to her in the initial agreement. Cynthia's e-mail in no way communicated that these two changes were exhaustive or that she would in the future advise him of each change to the initial agreement. Because Talmage cannot show that Cynthia was under a duty to specify each change, and because her e-mail did not somehow raise such a duty to specify each change, Talmage has not shown any evidence of fraud. See *id*. at 1038 (mere silence or a failure to communicate information, absent a duty to do so, does not constitute fraud).

¶ 66 We further note that Talmage's testimony during the hearing on his section 2-1401 belies his argument that he was not aware of the changes to the final agreement and relied on the two changes represented in Cynthia's February 12, 2009, e-mail. During his testimony, Talmage admitted that he, instead of Cynthia, agreed to take the Hinsdale residence in the final agreement. In addition, he e-mailed Cynthia the necessary documents to allow her to take the interest in the Hobson Medical Building. Talmage's awareness of these changes from the initial agreement to the final agreement contradicts his claim that Cynthia intentionally failed to specify the changes.

¶ 67 Likewise, Cynthia's statement to the trial court that Talmage made over $150,000 per year was not a material misrepresentation, as Talmage argues. As stated, all presumptions are in favor of the settlement agreement, which is decided by the parties and not a judicial determination of the parties' rights. See *In re Marriage of Bielawski*, 328 Ill. App. 3d at 251. While Cynthia testified that

Talmage had several businesses that she had reason to believe might be in trouble, she testified that this factor was taken into consideration in formulating the final agreement. The parties' 2006 joint tax return showed an adjusted gross income of $203,818 and a negative gross income of $231,254 for 2007. The parties did not file jointly in 2008. At the prove-up hearing, Cynthia testified that much discovery had not been completed at her request, including an updated valuation of Talmage's businesses. When questioned by the court, Cynthia "thought" Talmage's income was over $150,000 per year, but that he had other sources of income, such as stipends he received from being a representative of various medical companies. There is no evidence that Cynthia did not believe this to be true at the time. See *In re Marriage of Lindjord*, 234 Ill. App. 3d at 327 (the respondent's alleged statement that there was a reduced chance that he would receive a bonus that he received on an annual basis was not fraudulent and could have been entirely true when made). Also, the $12,000 monthly maintenance amount did not change from the initial agreement to the final agreement, and Talmage agreed to pay that amount both times. Therefore, the trial court's finding that Talmage did not present a meritorious claim of fraud was not against the manifest weight of the evidence.

¶ 68 Though the lack of a meritorious defense or claim is fatal to Talmage's section 2-1401 petition (see *In re Marriage of Goldsmith*, 2011 IL App (1st) 93448, ¶ 49), we also briefly address Talmage's failure to satisfy the due diligence element as well. As the trial court determined, without evidence of fraud, there was no reason to relax the due diligence requirement. See *In re Marriage of Johnson*, 339 Ill. App. 3d at 243 (when justice and fairness require, a judgment may be vacated even though the requirement of due diligence has not been satisfied).

¶ 69 Due diligence requires a party seeking relief under section 2-1401 to have a reasonable excuse for failing to act within the appropriate time. *Domingo*, 402 Ill. App. 3d at 700. Because section 2-1401 does not afford a party relief from the consequences of his own mistake or negligence, a party relying on this section is not entitled to relief unless he shows that, through no fault or negligence of his own, a factual error or a valid defense was not presented to the trial court. *Id*; see also *In re Marriage of Himmel*, 285 Ill. App. 3d 145, 148 (1996) (a proceeding under section 2-1401 is not intended to give the party a new opportunity to do that which should have been done in an earlier proceeding or to relieve the party of the consequences of his mistake or negligence). "Furthermore, a settlement agreement will be set aside only if the misrepresentation of the assets could not reasonably have been discovered at the time of, or prior to, the entry of the judgment, and a litigant will not be relieved of the consequences of [his] lack of diligence in failing to discover such information relevant to the dissolution proceeding." *In re Marriage of Himmel*, 285 Ill. App. 3d at 148.

¶ 70 An additional basis for denying Talmage's section 2-1401 petition was his lack of diligence in presenting his claims to the trial court at the time of the judgment. As previously stated, the trial court did not believe that Talmage could not afford representation; instead, he was an intelligent, educated entrepreneur who decided to represent himself. We note that while Talmage testified that he "looked at" the initial agreement but did not review the final agreement, his initials appear on every page of both the initial and final agreements. According to the court, Talmage "carefully looked" at the agreement and "wanted to have the opportunity to maintain those businesses" and "to make money off of the businesses" and "that's why he assigned certain property to her and that's why he then kept the business interests that he did." In other words, Talmage "knew what he was

doing at the time" he entered the final agreement, and now he is dissatisfied with the outcome. Finally, Talmage made the choice to not attend the prove-up hearing. For all of these reasons, Talmage's section 2-1401 petition fails based on the element of diligence as well.

¶ 71 III. CONCLUSION

¶ 72 For the aforementioned reasons, the judgment of the Du Page County circuit court denying Talmage's section 2-1401 petition to vacate the final agreement is affirmed.

¶ 73 Affirmed.

¶ 74 Justice McLaren, specially concurring.

¶ 75 The majority has decided to follow *Domingo v. Guarino* and its holding based upon *obiter dictum* from *Vincen*t.[1] I believe it is more appropriate to follow the holdings of the Illinois Supreme Court in matters where the facts are the same or substantially the same and, thus, constitute prior precedent. I do not believe it is appropriate to elevate *dicta* over decades of prior precedent dating as far back as 1952. See *Ellman v. De Ruiter*, 412 Ill. 285 (1952) which references an 1881 U.S. Supreme Court case, *Bronson v. Schulten*, 104 U.S. 410 (1881).[2]

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[1] "*Obiter dictum* refers to a remark or expression of opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decisis* rule. *Cates v. Cates,* 156 Ill.2d 76, 80 (1993); *Department of Public Works & Buildings v. Butler Co.,* 13 Ill.2d 537, 545 (1958). As more fully stated: "A dictum is 'any statement made by a court for use in argument, illustration, analogy or suggestion. It is a remark, an aside, concerning some rule of law or legal proposition that is not necessarily essential to the decision and lacks the authority of adjudication." *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 277 (2009).

[2] *Ellman* was located by back citing from the famous case of *Smith v. Airoom, Inc*., 114 Ill.

¶ 76 I find it difficult to believe that *Vincent* intended to overrule a case the Illinois Supreme Court issued eight months prior (*Paul*) as well as six decades of precedent without more than a footnote. I submit that *Paul*, *Airoom,* and *Ellman* are consistent with the patent realization that a court is exercising discretion when it applies legal *and* equitable principles to grant or deny relief. Simply put, 60 years of precedent prevails over *obiter dictum*. For further discussion of the issue see the majority opinion in *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, (2010), whose holding and *ratio decidendi* was adopted by the First District Appellate Court in *Cavalry v. Rocha*, 2012 IL App (1st) 11690, ¶ 10.

¶ 77 Applying the standard of review of an abuse of discretion, I would also affirm the judgment of the circuit court.

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209, 221 (1986). *Airoom* was favorably cited by the Illinois Supreme Court in October 2006, as follows: " 'Accordingly, "[w]hether a section 2-1401 petition should be granted lies within the sound discretion of the circuit court, depending upon the facts and equities presented." *Airoom*, 114 Ill.2d at 221.' " *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d, 85, 95 (2006).