

2013 IL App (2d) 121119-U
No. 2-12-1119
Order filed July 15, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

NANCY J. FISHER,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellee,)	
)	
v.)	No. 08-L-192
)	
NANCY BENNETT,)	
)	
Defendant-Appellant)	Honorable
)	Jorge L. Ortiz,
(Adrian Bennett, Defendant).)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting plaintiff's section 2-1401 petition to vacate a dismissal for want of prosecution: plaintiff did not show diligence in filing the petition, as she filed the petition nearly two years after the dismissal and the delay was due only to her failure to monitor her case.

¶ 2 Defendant, Nancy Bennett, appeals from an order in which the court granted the relief that plaintiff, Nancy J. Fisher, sought in her petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) and thereby vacated the dismissal for want of prosecution (DWP) of plaintiff's personal injury suit. Defendant asserts that the court erred in granting relief

because the petition failed to state a claim under section 2-1401. We agree, and we therefore reverse the grant of the petition and thus reinstate the DWP.

¶ 3

I. BACKGROUND

¶ 4 Plaintiff filed a personal injury complaint based on a March 5, 2008, traffic accident. She originally named Adrian Bennett as the sole defendant. Nancy Bennett (defendant) became the sole defendant after plaintiff learned that defendant was the driver and the court granted summary judgment in favor of Adrian. The record suggests extensive discovery relating to plaintiff's injuries.

¶ 5 On November 19, 2009, plaintiff (or, perhaps more accurately, plaintiff's counsel) moved to continue the matter based on plaintiff's pending personal bankruptcy. The motion stated that delay was necessary because the bankruptcy trustee needed to seek bankruptcy court approval of counsel's representation of the bankruptcy estate's interests in the claim. The court granted the motion and placed the matter on the bankruptcy call.

¶ 6 On July 14, 2010, the court dismissed the matter for want of prosecution.

¶ 7 On July 8, 2011, plaintiff filed a petition seeking waiver of copying fees for court documents; the court granted this petition.

¶ 8 On June 5, 2012, plaintiff filed a section 2-1401 petition in which she sought to vacate the DWP. She asserted that her amended complaint had stated a meritorious tort claim. Further, she had been diligent in the original proceedings, in that plaintiff's counsel did not receive notice of the July 14, 2010, court date, and, at the time of the dismissal, her bankruptcy still was pending. Finally, she argued that, because counsel first learned of the dismissal on May 14, 2012, she had been diligent in filing her petition. The petition was in ordinary prose, not the point-by-point format of a standard pleading.

¶ 9 Defendant filed a document entitled “Defendant’s Response to Plaintiff’s 2-1401 Petition to Reinstate.” Like the petition, the “Response” was in ordinary prose. In this filing, defendant argued that counsel had never filed a proper appearance form after substituting for plaintiff’s original counsel. She asserted that plaintiff had been dilatory in discovery—for instance, missing a deposition. She contended that plaintiff had placed the case on the bankruptcy call solely to delay a trial for which counsel was unprepared. She noted that plaintiff had received her discharge on April 29, 2009. Further, bankruptcy court records that she provided suggested that the trustee had, before the DWP, obtained the appointment of plaintiff’s counsel to represent the bankruptcy estate’s interest in the action.

¶ 10 Plaintiff filed a document entitled “Plaintiff’s Reply to Defendant’s 2-1401 Petition [*sic*] to Reinstate.” To this, she attached documents showing that the trustee’s motion in the bankruptcy court to appoint her counsel to represent the estate was presented to that court only on April 23, 2010. The filing also pointed to a “Trial Lawyer’s Appearance” that defense counsel had filed in the underlying case and noted that the electronic court records for the underlying case listed as plaintiff’s lawyer a lawyer from defense counsel’s firm.

¶ 11 The court granted the petition on September 12, 2012. The record shows that argument, but no evidentiary hearing, took place. Defendant argued that plaintiff should have learned of the DWP no later than when she filed the petition for waiver of copying fees on July 8, 2011. Plaintiff argued that there was no evidence that she should have noticed the DWP at that time. The court ruled that the lack of official notice of the DWP was sufficient reason for the time of the petition’s filing. Defendant filed a timely notice of appeal of the order granting the petition.

¶ 12

II. ANALYSIS

¶ 13 On appeal, defendant asserts that, because the petition failed to plead any of the three elements of a section 2-1401 claim, the court erred in granting the petition. She asks that we reinstate the DWP. Plaintiff responds that the court did not abuse its discretion in finding that she had pled the two diligence elements. She also argues that she stated a meritorious claim in the original action.

¶ 14 Defendant is correct that plaintiff did not present the facts necessary to prove a section 2-1401 cause of action. Whether plaintiff showed the existence of (1) meritorious claim or defense and (2) diligence in presenting that claim or defense is at least debatable. However, the facts set out are clearly inadequate to show diligence in filing the petition. Therefore, the court erred in granting the petition.

¶ 15 Initially, we must decide how to categorize what occurred procedurally in this case. The supreme court, in *People v. Vincent*, 226 Ill. 2d 1, 9 (2007), recognized five possible dispositions of section 2-1401 petitions: “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.” Given that no evidentiary hearing occurred, the only possible categorization of the disposition here was judgment on the pleadings alone for plaintiff and the denial of the same for defendant. This is so although both parties’ filings were notably amorphous; none had the structure of a standard pleading.

¶ 16 The parties here disagree on the applicable standard of review. Defendant argues that, under *Vincent*, 226 Ill. 2d at 15-18, the rule is that any section 2-1401 judgment not involving an evidentiary hearing receive *de novo* review. Plaintiff argues that the court has discretion as to the application of section 2-1401 diligence standards. Defendant is correct: the applicable standard of

review is that of *Vincent*. The supreme court there held that “when a court enters *** a judgment on the pleadings *** in a section 2-1401 proceeding, that order will be reviewed, on appeal, *de novo*.” *Vincent*, 226 Ill. 2d at 18. In *Mills v. McDuffa*, 393 Ill. App. 3d 940, 945-49 (2009), we held that, when the court granted a section 2-1401 petition after the parties had filed all pleadings, the judgment was as if on cross-motions for summary judgment, and that, following *Vincent*, our review was *de novo*. “Where parties file cross-motions for summary judgment, they invite the court to decide the issues as questions of law.” *Mills*, 393 Ill. App. 3d at 949. Where ruling as a matter of law is possible, it is proper to do so. *Mills*, 393 Ill. App. 3d at 949.

¶ 17 With these preliminary matters addressed, we can turn to the merits of the matter. The elements of the kind of section 2-1401 claim at issue here derive from case law. The three-element standard of *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986), is well established:

“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 circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.”

¶ 18 Plaintiff nowhere asserted facts sufficient to show her diligence in the filing of the petition. Nothing explains why counsel did not monitor the case after he had it placed on the bankruptcy call. In particular, nothing explains why counsel did not act after the bankruptcy court appointed him to act as special counsel to the bankruptcy trustee. Nothing explains why he made no status checks on the case, for instance when he went to the court to get copying fees waived.

¶ 19 The law makes it “the duty of every litigant to follow the progress of his case rather than to merely assume that his counsel is doing everything which is necessary and proper in the conduct thereof.” *Sakun v. Taffer*, 268 Ill. App. 3d 343, 353 (1994). *A fortiori*, counsel has a duty to follow the progress of his or her cases. Here, none of the facts suggest that he followed this case. Between November 19, 2009 and May 14, 2012—essentially 2½ years—counsel allowed the case to sit, apparently without checking its status. Plaintiff’s pleadings do nothing to explain this lack of action.

¶ 20 The record and plaintiff’s brief both contain suggestions that plaintiff assumes that the bankruptcy case offers an obvious explanation for counsel’s failure to act. Plaintiff cannot rely on hidden assumptions; whatever counsel’s basis for inaction, nothing shows what it was. The failure of the court to send notices of the July 14, 2010, court date and of the DWP to plaintiff or counsel explains why there was no immediate response to the DWP. It does not, however, explain why he did not respond for nearly two years.

¶ 21 Because the petition was insufficient as a matter of law, the court could properly dispose of it as if on cross-motions for summary judgment. However, because the petition was insufficient as a matter of law, the court’s granting of it was error. Moreover, for the same reason, defendant was entitled to judgment in her favor. The court should have denied the petition and left the DWP in place.

¶ 22 Plaintiff suggests that it was within the court’s discretion to deem her to have been sufficiently diligent. In *Mills*, we plainly rejected the proposition that the court has any discretion when it decides a section 2-1401 petition. *Mills*, 393 Ill. App. 3d at 949. That said, had the court had any discretion in the matter, this could not have been an appropriate place for its exercise, as the petition provided no bases for even a discretionary finding of diligence.

¶ 23

III. CONCLUSION

¶ 24 For the reasons stated, we reverse the grant of plaintiff's section 2-1401 petition and thereby reinstate the DWP of plaintiff's personal injury suit.

¶ 25 Reversed.