2015 IL App (2d) 130495-U
No. 2-13-0495
Order filed March 5, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF GEORGE SCHWERTFEGER,	)	Appeal from the Circuit Court of Du Page County.
Petitioner-Appellee,	)	
and	)	No. 06-D-412
CINDY REGAN,	)	Honorable Robert A. Miller,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Schostok and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal of Cindy's section 2-1401 petition to vacate a judgment of dissolution was affirmed where (1) the dismissal of one of her two claims was properly based on affidavits establishing affirmative matter that defeated her claim, and (2) she failed to present any argument as to why the trial court's basis for dismissing the other of her two claims was improper.

¶ 2 Cindy Regan filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), seeking to vacate the October 31, 2007, judgment of dissolution that incorporated her marital settlement agreement (MSA) with her former husband, George Schwertfeger. Cindy alleged that she would not have

agreed to the MSA's property settlement provisions but for (1) George's alleged fraudulent misrepresentation of his ownership interest in a residence located at 6306 Martin Drive in Willowbrook, Illinois (the Martin Drive residence) and (2) his alleged fraudulent concealment of his ownership of a property located at 5109 West Washington Boulevard in Chicago, Illinois (the Washington Boulevard property). The trial court granted George's motion to dismiss the petition pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)), and Cindy appeals. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 George and Cindy were married in December 2003, and George petitioned for dissolution of marriage in February 2006. During the marriage, the parties lived in the Martin Drive residence. George retained possession of the residence following the parties' separation.

¶ 5 During the original dissolution proceedings, George represented in a financial affidavit that he had only a 10% ownership interest in the Martin Drive residence and that his parents owned the remaining 90%. He tendered in discovery a written partnership agreement between himself and his parents, dated November 12, 2001, evidencing this ownership arrangement. He did not disclose any ownership interest in the Washington Boulevard property.

¶ 6 On October 31, 2007, the court entered a judgment of dissolution that incorporated the parties' MSA. In the MSA, George agreed to pay Cindy $132,500 as her share of the parties' marital property. George received the Martin Drive residence, which the parties agreed was his nonmarital property, and he agreed to assume all debts associated with the property.

¶ 7 On August 29, 2012, Cindy filed a verified section 2-1401 petition to vacate the judgment of dissolution. Cindy alleged that, during the dissolution proceedings, George misrepresented that he had only a 10% interest in the Martin Drive residence. Attached to her petition were

subpoenaed loan application documents that George submitted to Inland Bank in 2008 and 2009, which, according to Cindy, indicated that he was the sole owner of the Martin Drive residence. Cindy further alleged that George sold the Washington Boulevard property in September 2007, only one month prior to entry of the judgment of dissolution, and realized a profit of $155,000 from the sale. According to Cindy, she would not have entered into the MSA if not for George's misrepresentation and concealment of his ownership interests in the two properties.

¶ 8 On October 26, 2012, George filed a combined motion to dismiss Cindy's petition pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)). In the portion of the motion brought under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)), George argued that Cindy's verified allegations were conclusory and not based upon her personal knowledge of the matters alleged, and that the petition failed to allege due diligence in investigating the claims and filing the petition. In the portion of the motion brought under section 2-619(a)(9) of the Code, George argued that the affidavits and documents attached to his motion established that, during the dissolution proceedings, he owned only 10% of the Martin Drive residence, and that his father had been the sole owner of the Washington Boulevard property prior to its sale in September 2007.

¶ 9 In his affidavit, George attested that, pursuant to the partnership agreement with his parents, he owned only 10% of the Martin Drive residence. He further attested that, during the dissolution proceedings, he borrowed $232,500 from his parents to pay his attorney fees and the $132,500 judgment owed to Cindy. As repayment of the debt, George transferred his interest in the Martin Drive residence to his parents via a quitclaim deed. Attached to George's affidavit[1]

[1] Although the deed was not attached to George's original affidavit, he later filed an amended affidavit with the deed attached.

was a quitclaim deed dated November 7, 2007, and recorded January 9, 2008, in which George released his interest in the property to his mother. George also attested that he had never had any ownership interest in the Washington Boulevard property.

¶ 10 In his affidavit, George's father corroborated that George had owned only 10% of the Martin Drive residence and had transferred his ownership interest to his parents in exchange for forgiveness of debt. George's father further attested that he had been the sole owner of the Washington Boulevard property and that he sold it in September 2007, without sharing any of the proceeds with George. Attached to the affidavit were two warranty deeds. One was dated November 3, 2005, and recorded December 7, 2005, and showed George's father as the grantee of the property. The other was dated September 7, 2007, and recorded September 25, 2007, and showed that George's father, as grantor, transferred the property to a third party.

¶ 11 Cindy responded to the motion to dismiss by arguing that "either George lied [on the Inland Bank loan documents] or [he] lied during his divorce proceedings to deny Cindy her fair share of the property." Cindy contended that "[t]he latter is a better explanation." She further argued that George's father must have shared the proceeds of the sale of the Washington Boulevard property with George, because he provided George with $232,500 during the divorce proceedings. She further asserted that the property "in reality was George's property in the first place." Cindy did not attach any counteraffidavits to her response.

¶ 12 On December 28, 2012, the trial court granted George's motion to dismiss in part. The court dismissed with prejudice Cindy's claim concerning the Washington Boulevard property pursuant to section 2-619(a)(9) of the Code. The court denied George's motion to dismiss with respect to the Martin Drive residence.

¶ 13 George timely filed a motion to reconsider, arguing that the doctrine of collateral estoppel barred Cindy's claim concerning the Martin Drive residence. He pointed out that, at a September 7, 2011, hearing on the parties' cross-petitions to modify child support, Cindy's counsel had examined George about the Inland Bank loan documents. At that hearing, the trial court had found that George lied on the loan documents with respect to his ownership of the Martin Drive residence. George also argued in his motion to reconsider that the trial court erroneously concluded that Cindy was diligent in bringing her section 2-1401 petition.

¶ 14 On April 16, 2013, the trial court granted George's motion to reconsider and dismissed the remainder of the section 2-1401 petition with prejudice pursuant to section 2-619(a)(9) of the Code. The court agreed that it had found at the September 7, 2011, hearing that George lied on the Inland Bank loan documents with respect to his ownership of the Martin Drive residence. The court concluded that its prior finding was "dispositive" of the issue of "whether or not [George] owned the property as stated in the bank documents." The court also agreed that Cindy had not been diligent in bringing the section 2-1401 petition, since she had obtained the loan documents prior to the September 7, 2011, hearing but had not filed her petition until more than 11 months later. Cindy timely filed a notice of appeal.

¶ 15 II. ANALYSIS

¶ 16 On appeal, Cindy argues that it was error to dismiss her section 2-1401 petition because (1) she alleged with particularity facts supporting her claims, (2) the affidavits attached to George's motion to dismiss were deficient under Illinois Supreme Court Rule 191 (eff. Jan. 4, 2013), (3) George failed to present an affirmative matter pursuant to section 2-619(a)(9) of the Code, and (4) George improperly raised his collateral estoppel argument for the first time in his motion to reconsider. She also argues (5) that the trial court should have permitted her to amend

her section 2-1401 petition to add another claim regarding George's alleged concealment of a third property, even though she never asked the trial court for leave to amend her petition.

¶ 17 Section 2-1401 of the Code outlines a procedure for obtaining relief from a final judgment more than 30 days, but less than 2 years, following its entry. 735 ILCS 5/2-1401 (West 2012). Time during which the ground for relief is fraudulently concealed is excluded in computing the 2-year period. 735 ILCS 5/2-1401(c) (West 2012). "To present a claim for relief under section 2-1401, the petitioner must set forth allegations supporting: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting the defense or claim in the original proceedings; and (3) due diligence in filing the section 2-1401 petition." *In re Marriage of Arjmand*, 2013 IL App (2d) 120639, ¶ 29. "Relief under section 2–1401 is available to set aside a marital settlement agreement that is unconscionable or was entered into as a result of duress, coercion, or fraud." *Arjmand*, 2013 IL App (2d) 120639, ¶ 29.

¶ 18 A motion to dismiss under section 2-619(a)(9) of the Code admits the legal sufficiency of the complaint but asserts some "affirmative matter" as a defense. *Lawson v. Schmitt Boulder Hill, Inc.*, 398 Ill. App. 3d 127, 130 (2010). " 'Affirmative matter' is defined as a defense that either negates the alleged cause of action completely or refutes a crucial conclusion of law or conclusion of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 274 (2007). In ruling on a section 2-619(a)(9) motion to dismiss, all well-pleaded facts and the inferences arising from those facts must be taken as true. *Lawson*, 398 Ill. App. 3d at 130. "The question on appeal is 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Sandholm v. Kuecker*, 2012 IL

111443, ¶ 55 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). Our review is *de novo*. *Sandholm*, 2012 IL 111443, ¶ 55.

¶ 19 A. Forfeiture

¶ 20 As an initial matter, George argues that Cindy has forfeited four of her five arguments by failing to raise them below. Cindy does not respond to the forfeiture arguments in her reply brief. We agree with George with respect to three of Cindy's arguments. In the trial court, Cindy did not challenge the sufficiency of George's affidavits or the authenticity of the documents attached to the affidavits, nor did she argue that George improperly raised his collateral estoppel argument for the first time in his motion to reconsider. She also did not ask for leave to amend her section 2-1401 petition. Therefore, Cindy has forfeited these issues. See *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85 ("[I]ssues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal.").

¶ 21 We note that Cindy contends that Illinois Supreme Court Rule 362 (eff. Feb. 1, 1994) permits her to amend her petition on appeal. However, "[t]he purpose of Rule 362 is to amend the pleadings to conform to the evidence presented at trial." *Sylvester v. Chicago Park District*, 179 Ill. 2d 500, 511 (1997). It " 'is not a vehicle to raise wholly new issues on appeal.' " *Sylvester*, 179 Ill. 2d at 511 (quoting *Local 165 v. Bradley*, 149 Ill. App. 3d 193, 213 (1986)).

¶ 22 B. Dismissal of Washington Boulevard Claim

¶ 23 We first address the trial court's dismissal of Cindy's claim concerning the Washington Boulevard property. Cindy's surviving arguments are that she alleged with particularity facts supporting her claim and that George failed to present an affirmative matter pursuant to section 2-619(a)(9) of the Code, instead presenting evidence to contest her claim.

¶ 24 We reject both arguments. Cindy's allegations with respect to the Washington Boulevard property were conclusory and not supported by well-pleaded facts. She alleged in her petition that she had "uncovered properties that were transferred and/or sold by George during the parties' divorce litigation." She then alleged, "One property, 5109 W. Washington Blvd., was sold on September 25, 2007, only two weeks prior to George's deposition and one month prior to entry of the [MSA]. Said property afforded George a total gross profit of approximately [$155,000]." Implicit in Cindy's allegations was the unsupported contention that George owned the Washington Boulevard property prior to its sale, and thus had a right to the proceeds of the sale. However, Cindy alleged no facts supporting this contention.

¶ 25 The affirmative matter that George raised in his motion to dismiss, which essentially was uncontested by Cindy, defeated Cindy's claim. The affidavits and warranty deeds attached to George's section 2-619(a)(9) motion to dismiss established that George's father, not George, had been the sole owner of the Washington Boulevard property. This was a defense that refuted a crucial conclusion of material fact unsupported by allegations of specific fact contained in or inferred from Cindy's petition. *Gilley*, 372 Ill. App. 3d at 274. Once George filed the affidavits and warranty deeds, the burden shifted to Cindy to establish that the affirmative matter was unfounded or required resolution of an issue of material fact. *Lawson*, 398 Ill. App. 3d at 130. However, Cindy did not file any counteraffidavits in response or invoke Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013) to request discovery. Instead, she responded with a new theory—also unsupported by allegations of specific fact and different than the one alleged her complaint—that even if George's father owned the property, he must have shared the proceeds of the sale with George. She further asserted, again without support, that the property "in reality was George's property in the first place."

¶ 26 Cindy correctly contends that, for purposes of section 2-619(a)(9) of the Code, "affirmative matter" does not include evidence upon which a party expects to contest an ultimate fact stated in the complaint. See *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 34. This principle might have been applicable here if Cindy had alleged any specific facts or pointed to any evidence—either in her possession or obtainable through discovery—that might have created an issue of material fact with respect to the ownership of the Washington Boulevard property. However, Cindy has failed to do so. Instead, she relies on unsupported speculation and conclusory allegations. Therefore, we hold that the trial court properly granted George's section 2-619(a)(9) motion with respect to the Washington Boulevard property.

¶ 27 C. Dismissal of Martin Drive Claim

¶ 28 We now turn to Cindy's claim regarding the Martin Drive residence. Again, the trial court initially denied George's motion to dismiss with respect to the Martin Drive residence. However, after George filed a motion to reconsider arguing collateral estoppel and lack of due diligence, the trial court granted the motion and dismissed with prejudice Cindy's claim regarding the Martin Drive residence. The court found that Cindy had not been diligent in bringing her petition and that its finding at the September 7, 2011, hearing that George had lied on the Inland Bank loan documents with respect to his ownership of the residence was dispositive of Cindy's claim.

¶ 29 On appeal, Cindy argues that the court erred in concluding that she was not diligent in bringing her section 2-1401 petition. However, she does not challenge the court's determination that its finding at the September 7, 2011, hearing was "dispositive" of the issue of George's ownership of the Martin Drive residence. Cindy's only argument concerning this aspect of the court's ruling is that George raised his collateral estoppel argument for the first time in his

motion to reconsider. However, as we discussed above, Cindy did not object to George's motion to reconsider on this basis in the trial court, and she cannot do so for the first time on appeal. See *Romano*, 2012 IL App (2d) 091339, ¶ 85 ("[I]ssues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal.").

¶ 30 This court can affirm on any basis supported by the record. *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 33. Because Cindy essentially leaves unchallenged one of the two bases for the trial court's ruling on George's motion to reconsider, we affirm the court's order. Other than her one argument, which she failed to raise below, Cindy fails to offer any reason for why the trial court was incorrect when it determined that its prior finding that George lied on the Inland Bank loan documents was dispositive of the issues raised in her section 2-1401 petition with respect to the Martin Drive residence. Therefore, Cindy has forfeited any additional arguments she could have made. See *Petrik*, 2012 IL App (2d) 110495, ¶ 39 (when a party fails to present argument supported by authority, the reviewing court will not "*sua sponte* research the issues, formulate arguments, and then decide the issues").

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 33 Affirmed.