2015 IL App (4th) 130563-U

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FILED
January 23, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: MARRIAGE OF	)	Appeal from
DAVID L. SAMUEL,	)	Circuit Court of
Petitioner-Appellant,	)	Sangamon County
and	)	No. 93D554
JEANNE SAMUEL, n/k/a JEANNE EILERING,	)	
Respondent-Appellee.	)	Honorable
	)	Brian Otwell
	)	John Madonia,
	)	Judges Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted respondent's motion to dismiss petitioner's motion to vacate the court's prior child-support judgment.

¶ 2 In January 2004, petitioner, David L. Samuel, filed a petition for modification of his child-support payments to respondent, Jeanne Samuel, now known as Jeanne Eilering. In September 2005, petitioner also filed a motion for temporary relief, seeking modification of his child-support payments. Neither the petition nor the motion was heard. In January 2007, respondent filed a motion to set petitioner's child-support arrearage. After a February 2007 hearing, the Sangamon County circuit court set the arrearage at $86,290, "together with accrued interest." In a September 2007 docket entry, the court noted petitioner's January 2004 motion had either been abandoned or rendered moot by the February 2007 order. It further noted no pleading had been filed objecting to the entry of the February 2007 order.

¶ 3 In July 2008, petitioner filed a two-count motion to vacate or modify the "nonfinal" orders entered in February and September 2007. The first count asserted the orders should be vacated to allow a hearing on petitioner's earlier requests to modify child support because they were nonfinal, and the second count contended that, if the orders were final, then the orders should be vacated under section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2008)) due to fraud. In August 2008, respondent filed a motion to dismiss petitioner's July 2008 motion. The next month, petitioner filed a motion to strike respondent's motion to dismiss. After a January 2013 hearing, the trial court denied petitioner's motion to strike respondent's motion to dismiss. At a June 2013 hearing, the court granted respondent's motion to dismiss petitioner's July 2008 motion, finding the February 2007 order was final and disposed of all the pending motions regarding financial issues.

¶ 4 Petitioner appeals, asserting the trial court erred by (1) denying petitioner's motion to strike respondent's motion to dismiss; (2) finding the trial court's February 7, 2007, order setting the child-support arrearage disposed of petitioner's petitions to modify child support; (3) determining the February 7, 2007, order was a final order; (4) ruling on respondent's motion to set the child-support arrearage before ruling on petitioner's modification petitions; and (5) failing to rule on petitioner's section 2-1401 claim. We affirm.

¶ 5 I. BACKGROUND

¶ 6 The parties were married in October 1978, and they had three children, Nathan (born in 1984), Lauren (born in 1987), and Madelyn (born in 1989). In June 1993, petitioner filed his petition for dissolution of the parties' marriage. In March 1994, the trial court entered a dissolution judgment that approved the parties' marital-settlement agreement. Under the parties' agreement, petitioner was to pay respondent $2,750 in monthly child support. At the time of the

judgment, petitioner was a physician employed at the Southern Illinois University School of Medicine. After the dissolution, petitioner moved to Louisiana.

¶ 7 In April 2000, respondent filed a petition for rule to show cause, asserting petitioner had not been paying his child support. In June 2000, the trial court entered a judgment against petitioner, requiring him to pay $11,000 to respondent for outstanding child support. In August 2000, petitioner filed a motion to modify the dissolution judgment, seeking to modify the amount of child support. The record does not show the court ever ruled on petitioner's motion, and petitioner does not contend it is still pending. In October 2000, the court ordered petitioner to pay $750 per month toward the child support arrearage, which had increased to $17,500.

¶ 8 In January 2004, petitioner filed a petition for the modification of child support and health and life insurance, seeking, *inter alia*, to have his child support reduced due to both his income being reduced and Nathan turning 18 years old. In February 2004, respondent filed a petition for post-high school educational support for Nathan. In September 2005, petitioner filed a petition for temporary relief, asserting his medical practice and income had been reduced to nothing as a result of damage caused in connection with Hurricane Katrina. Respondent filed a motion to dismiss the petition for temporary relief. On October 26, 2005, the trial court continued the cause for further hearing in November 2005. In November 2005, the court continued the cause for a December 19, 2005, trial. On December 15, 2005, respondent filed a motion for post-high school expenses for Nathan and Lauren. The record on appeal contains no docket entry for December 19, 2005. In March 2006, petitioner's counsel moved to withdraw as counsel, and the court granted his counsel's request in April 2006.

¶ 9 In January 2007, respondent filed a motion to establish an arrearage in the payments due from petitioner for child support. In the prayer for relief, respondent asked the

court to (1) enter an order declaring the child-support arrearage as of January 1, 2007, in the amount of $86,290 plus interest and (2) award "her reasonable attorney fees and costs for having to pursue the matter." Respondent's counsel set the hearing on the arrearage motion for February 1, 2007. The trial court held a hearing on that date, at which petitioner appeared *pro se*. The record contains no report of proceedings for the hearing. The court's docket entry indicates respondent moved to withdraw her December 2005 motion for educational expenses, the court granted respondent's January 2007 petition, and it ordered respondent's counsel to prepare a written order. The entry makes no mention of petitioner's January 2004 and September 2005 requests for modification of child support. On February 7, 2007, the court entered a written judgment against petitioner for the arrearage of child support payments as of January 1, 2007, in the amount of $86,290, "together with accrued interest." The order did not contain any language from Illinois Supreme Court Rule 304(a) (eff. Jan. 1, 2006).

¶ 10 On July 6, 2007, respondent's counsel filed a motion to continue the July 16, 2007, "hearing," of which petitioner scheduled *pro se* and did not provide formal notice. According to the July 16, 2007, docket entry, respondent's counsel appeared on July 16, 2007, but petitioner did not. The trial court continued the cause for a "setting." On September 17, 2007, petitioner appeared *pro se* and respondent and her counsel appeared. The court's docket entry states no pleading was noticed up for a hearing. It further stated the following: "It appears that the motion filed by the Petitioner on Jan. 8, 2004 has either been abandoned or has been rendered moot by the judgment entered 2/7/07. No pleading was filed objecting to the entry of the judgment. The petitioner was admonished that he must obey the rules relating to pleadings and notice before this Court will consider any of his requests."

¶ 11 On July 11, 2008, attorney Samuel Cahnman entered his appearance on

petitioner's behalf and filed a motion to vacate or modify the "nonfinal" orders entered on February 7 and September 17, 2007. As stated, count I alleged the orders were not final, and count II sought relief under section 2-1401. The gist of the motion was petitioner, acting *pro se*, had made numerous attempts to obtain settings on his petition for temporary relief but had not received any cooperation from respondent's attorney. Specifically, the motion alleged that a hearing had been scheduled for March 1, 2007, and respondent's attorney unilaterally canceled the hearing. Attached to the motion was (1) a letter from petitioner to respondent's counsel notifying him of a March 1, 2007, hearing; (2) an appointment-book page for March 1, 2007, with the name "Samuel" and the case number crossed out; (3) a letter from petitioner to respondent's counsel notifying him of a July 16, 2007, hearing; and (4) a letter from petitioner to respondent's counsel notifying him of a September 17, 2007, hearing. On July 17, 2008, the parties appeared before Judge Charles Gramlich on petitioner's July 2008 motion, and the judge continued the hearing on petitioner's motion and ordered respondent to file a response.

¶ 12 On August 6, 2008, Judge Gramlich entered a rule to show cause requiring Cahnman to appear on August 15, 2008, and "show cause why he should not be held in willful indirect civil contempt for his false response to this Court's question concerning how Cahnman came into possession of a page from Judge Gramlich's appointment book, which page was attached to a motion filed in the above case on July 11, 2008." At the August 15, 2008, hearing, the court found Cahnman in indirect criminal contempt of court, imposed a $100 fine, and required him to make a written apology to the court. Cahnman appealed the August 2008 judgment. On appeal, this court vacated the imposition of the $100 fine, modified the finding of contempt entered by the trial court to one of indirect civil contempt, and affirmed the judgment in all other respects. *In re Marriage of Samuel*, 394 Ill. App. 3d 398, 915 N.E.2d 821 (2009).

Cahnman filed a petition for leave to appeal, which our supreme court denied. *Samuel v. Cahnman*, 235 Ill. 2d 604, 924 N.E.2d 460 (2010).

¶ 13 On August 20, 2008, respondent filed a motion to dismiss petitioner's July 2008 motion to vacate the trial court's February and September 2007 orders. The motion to dismiss was brought under both sections 2-615 and 2-619 of the Procedure Code (735 ILCS 5/2-615, 2-619 (West 2008)). In September 2008, petitioner filed a motion to strike respondent's motion to dismiss. The next month, petitioner filed a petition for substitution or disqualification of Judge Gramlich for cause. After a December 30, 2008, hearing, Judge Rudolph Braud denied the petition for substitution of Judge Gramlich.

¶ 14 In November 2012, petitioner's counsel, Cahnman, filed a notice of a hearing on petitioner's motion to strike respondent's motion to dismiss. After a January 8, 2013, hearing, Judge Brian Otwell denied petitioner's motion to strike. The cause was then reassigned to Judge John Madonia. The parties filed written memoranda addressing respondent's motion to dismiss.

¶ 15 On June 4, 2013, Judge Madonia held a hearing on respondent's motion to dismiss petitioner's July 2008 motion. A report of proceedings for that hearing is not included in the record on appeal. At the conclusion of the hearing, Judge Madonia granted respondent's motion to dismiss. The docket entry for the June 2013 hearing states, in pertinent part, the following:

> "[T]he Court rules that the hearing conducted Feb. 1, 2007 considered all pending financial issues pending before the Court and the Court set an arrearage total in an order that considered all pending child support related issues, including Petitioner Motions for Modification of Support and Petition for Temporary Relief. Court determines the order entered Feb. 7, 2007 to be Judge

> Gramlich's final order on the pending financial issues and that Petitioner had 30 days to file additional motions to address the Court's order, including a Motion to Reconsider. Court further finds that Petitioner did not file any motions within the 30 day period to preserve a right to address the Court's order of Feb. 7, 2007."

¶ 16 On July 5, 2013, petitioner filed a timely notice of appeal that stated he was appealing the June 2013 order, the January 2013 order, the September 2007 order, and the February 2007 order. However, petitioner only sought reversal of the June 2013 order. Also, on July 5, 2013, petitioner filed a posttrial motion, asking the trial court to amend its June 4, 2013, order to include language from Rule 304(a) (eff. Feb, 26, 2010). On July 8, 2013, the trial court amended its June 4, 2013, order by adding the following: "There is no just reason for delaying with enforcement or appeal or both." On August 7, 2013, petitioner filed another timely notice of appeal that added the July 8, 2013, order amending the June 4, 2013, order to the list of appealed orders. Accordingly, this court has jurisdiction of the trial court's January 8, 2013, order and June 4, 2013, order as amended by its July 8, 2013, order.

¶ 17 II. ANALYSIS

¶ 18 A. Petitioner's Motion To Strike

¶ 19 Petitioner first asserts the trial court erred by denying his motion to strike respondent's motion to dismiss. Specifically, he contends the motion to dismiss (1) needed an affidavit to support the portion of the motion brought under section 2-619 of the Procedure Code (735 ILCS 5/2-619 (West 2008)), (2) failed to specify how petitioner's count II was insufficient as a matter of law, and (3) improperly mixed its section 2-615 and 2-619 claims. Respondent

fails to address petitioner's motion-to-strike argument. We review *de novo* a trial court's ruling on a motion to strike. See *Jackson v. Graham*, 323 Ill. App. 3d 766, 773, 753 N.E.2d 525, 531 (2001) (applying a *de novo* standard of review to a motion to strike an affidavit).

¶ 20 As to the affidavit, section 2-619(a) of the Procedure Code (735 ILCS 5/2-619(a) (West 2008)) states that, "[i]f the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit." In this case, respondent supported her motion to dismiss with her January 2007 motion to set the child-support arrearage, a prior pleading in this case. Any affidavit would be duplicative of that document. "Even if an affidavit should have been filed, the absence of an affidavit may not be fatal." *Asset Acceptance, LLC v. Tyler*, 2012 IL App (1st) 093559, ¶ 24, 966 N.E.2d 1039. "[T]he Civil Practice Law *** needs to be construed liberally to fulfill its purpose of providing substantial justice and resolution on the merits, rather than imposing seemingly insurmountable procedural obstacles to litigation." *Doe v. Montessori School of Lake Forest*, 287 Ill. App. 3d 289, 296, 678 N.E.2d 1082, 1088 (1997) (overlooking the failure to support with affidavits motions brought under sections 2-619(a)(5), (a)(9)). Accordingly, the lack of an affidavit was not a sufficient reason to strike respondent's motion to dismiss.

¶ 21 Petitioner next asserts the trial court erred by not striking respondent's dismissal argument as to petitioner's count II, which was a section 2-1401 claim. In her motion to dismiss, respondent had argued petitioner's count II was insufficient as a matter of law to be the basis for a section 2-1401 petition. In his motion to strike, petitioner asserted respondent's aforementioned allegation was not specific enough because it failed to point out which element of the section 2-1401 claim was missing. He cites section 2-615(b) of the Procedure Code (735 ILCS 5/2-615(b) (West 2008)), which states the following: "If a pleading or a division thereof is

objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient." Respondent's motion to dismiss clearly indicates it is the section 2-1401 portion of petitioner's pleading that is insufficient. It also notes the allegations in count II were insufficient as a matter of law to be the basis for a claim under section 2-1401. Thus, respondent's motion to dismiss put petitioner on notice she claimed the allegations in the section 2-1401 petition could not be the basis for such a cause of action. Petitioner cites no authority respondent's aforementioned statement was insufficient under section 2-615(b). Accordingly, petitioner has not established respondent's challenge to count II of his July 2008 petition should have been stricken for not being specific enough as to count II's insufficiencies.

¶ 22 As to the last contention, challenging the trial court's denial of petitioner's motion to strike, we find petitioner forfeited the issue by failing to raise it in the trial court. See *Robidoux v. Oliphant*, 201 Ill. 2d 324, 344, 775 N.E.2d 987, 998-99 (2002) (stating issues not argued in the trial court cannot be raised for the first time on appeal).

¶ 23 Accordingly, we find the trial court did not err by denying petitioner's motion to strike respondent's motion to dismiss.

¶ 24 B. Respondent's Motion To Dismiss

¶ 25 Respondent's August 2008 motion to dismiss sought dismissal pursuant to both sections 2-615 and 2-619 of the Procedure Code (735 ILCS 5/2-615, 2-619 (West 2008)). We review *de novo* a trial court's grant of a motion to dismiss under either section 2-615 or 2-619. *Illinois Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079, ¶ 16, 5 N.E.3d 267.

¶ 26 1. *Nonfinal Order Claim (Count I)*

¶ 27 Petitioner argues the trial court erred in its June 2013 order by dismissing count I

of his motion because it found the February 7, 2007, order (1) disposed of petitioner's modification petition and (2) was a final order. Additionally, petitioner raises an opaque claim the trial court erred by deciding respondent's motion to set the child-support arrearage before his petitions for modification, which were filed before respondent's motion to set the child-support arrearage.

¶ 28 Respondent sought to dismiss count I under section 2-619 of the Procedure Code. In reviewing such a dismissal, reviewing courts must construe the pleadings and supporting documents in the light most favorable to the nonmoving party. *Cortright v. Doyle*, 386 Ill. App. 3d 895, 899, 898 N.E.2d 1153, 1157 (2008). We consider whether the parties present a genuine issue of material fact and, if not, whether the facts set forth in the complaint entitle the defendant to judgment as a matter of law. *Saathoff v. Country Mutual Insurance Co.*, 379 Ill. App. 3d 398, 402, 886 N.E.2d 370, 374 (2008). Moreover in reviewing the dismissal, we rely on the well-pled facts and on any reasonable inferences drawn from the record. *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 772, 919 N.E.2d 76, 85 (2009).

¶ 29 As to the February 2007 order's disposition of petitioner's January 2004 and September 2005 requests to modify child support, petitioner contends his petitions were not considered by Judge Gramlich at the February 1, 2007, hearing because Judge Gramlich refused to hear them since they were not on the docket. Additionally, petitioner asserts Judge Gramlich told him to get a court date for those pleadings, and he had 30 days to do so. In her motion to dismiss, respondent asserted the February 2007 order disposed of all matters before the court, including petitioner's two petitions to modify child support. She further contended the trial court told petitioner he had a right to seek reconsideration of the court's order, but he would need to take action and should consult an attorney.

¶ 30 We find implicit in the trial court's February 2007 order was a finding petitioner abandoned his petitions for modification of child support, and thus the February 2007 order did dispose of the two petitions to modify child support. First, in paragraph eight of respondent's motion to set arrearage, she alleged petitioner had abandoned his motions to modify child support by not setting his motions for a hearing, and the trial court granted her motion. The facts leading up to the February 2007 hearing also support a finding the trial court concluded petitioner had abandoned his child-support motion. The December 2005 trial did not take place and nothing had happened for more than a year thereafter. Moreover, petitioner's September 2005 request for modification was even labeled a request for *temporary* relief. Further, petitioner did not notice his petitions when respondent requested the arrearage be set. "[*P*]*ro se* litigants are presumed to have full knowledge of applicable court rules and procedures and must comply with the same rules and procedures as would be required of litigants represented by attorneys." *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1067, 916 N.E.2d 45, 57 (2009). Additionally, it would be illogical to set a child-support arrearage for a period of time during which a petition to modify child support was pending without also disposing of the petition to modify child support.

¶ 31 Accordingly, we find the trial court did not err by finding the February 7, 2007, order disposed of petitioner's two child-support petitions.

¶ 32 Petitioner further contends the February 7, 2007, order was not a final order because it did not address all of his claims in his January 2004 and September 2005 petitions to modify child support and respondent's claims for attorney fees, costs, and interest prayed for in respondent's January 2007 motion. We have already found the February 7, 2007, judgment disposed of petitioner's two petitions to modify child support, and thus no claims from those

petitions were left pending after the February 2007 judgment.

¶ 33 As to respondent's prayer for relief, "[a] court may grant less relief than demanded." *Cannell v. Medical & Surgical Clinic, S.C.*, 21 Ill. App. 3d 383, 386, 315 N.E.2d 278, 280 (1974). In its written order drafted by respondent's counsel, respondent was only awarded $86,290 plus interest. While the order did not specifically deny respondent's other requests for relief, the order also did not reserve those issues. As respondent notes, the record contains no evidence she provided the trial court with an affidavit of attorney fees and asserts she abandoned her request, which supports the conclusion the court implicitly denied the requested relief. Moreover, we must construe the lack of a report of proceedings for the February 1, 2007, hearing against the appellant. See *People v. Hunt*, 234 Ill. 2d 49, 58, 914 N.E.2d 477, 481 (2009). Accordingly, we find the trial court's February 7, 2007, order implicitly denied respondent's claims for relief not expressly awarded in the written order.

¶ 34 As to interest, the written judgment did not specify the amount of interest awarded respondent. Petitioner asserts that the amount of interest is a claim that rendered the February 7, 2007, judgment nonfinal. Respondent claims it is an ancillary issue that did not render the judgment nonfinal.

¶ 35 "[A]n order is final where matters left for future determination are merely incidental to the ultimate rights which have been adjudicated by the order." *In re Petition to Incorporate Village of Greenwood*, 275 Ill. App. 3d 465, 470, 655 N.E.2d 1196, 1199 (1995). In *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 175, 950 N.E.2d 1136, 1143 (2011), our supreme court held "[an] award of judgment interest was not part of the judgment itself, but incidental thereto, and imposed on a specific sum contained in the underlying orders with a rate of interest set forth in the Code of Civil Procedure." Under section 505(b) of the Illinois

Marriage and Dissolution of Marriage Act (750 ILCS 5/505(b) (West 2006)), "[a] support obligation, or any portion of a support obligation, which becomes due and remains unpaid as of the end of each month, *** shall accrue simple interest as set forth in Section 12-109 of the Code of Civil Procedure." Section 12-109(b) of the Procedure Code (735 ILCS 5/12-109(b) (West 2006)) expressly states the interest on child-support judgments arises as a matter of law and dictates how interest on unpaid child support is calculated. Accordingly, we find a determination of judgment interest on a child-support judgment in a dissolution case is also not part of the judgment and does not render the judgment nonfinal.

¶ 36 Accordingly, the trial court did not err by finding the February 7, 2007, order was a final order.

¶ 37 Petitioner next asserts that, by deciding respondent's motion to set the child-support arrearage before his earlier filed petitions to modify child support, the trial court violated the rule that motions should be heard and disposed of in the order in which they were filed. It is not clear what judgment or order petitioner is challenging. He did claim, in his July 2008 motion to vacate, the petitions to modify child support were not rendered moot by the February 2007 order because his petitions to modify should have been heard before respondent's motion to set the arrearage was heard. If petitioner is challenging the June 2013 order, we note that, in respondent's motion to set the arrearage, she asserted petitioner had abandoned his petitions to modify child support. Thus, respondent provided a proper reason as to why her motion should be heard despite two other pending petitions on the matter. Accordingly, petitioner cannot establish any error in the trial court's June 2013 judgment based on the motion to set the arrearage being heard before petitioner's petitions. To the extent petitioner is challenging the court's February 2007 judgment, we do not have jurisdiction over that order because the period

for filing a notice or late notice of appeal from that order expired years before petitioner's 2013 notice of appeals. See Ill. S. Ct. Rs. 303(a)(1), (d) (eff. May 30, 2008) (requiring, when no postjudgment motion has been filed, a notice of appeal be filed within 30 days of the final judgment and a petition for leave to file a late notice of appeal be filed within 30 days of the expiration of the initial 30-day period).

¶ 38 2. *Section 2-1401 Claim (Count II)*

¶ 39 Last, petitioner claims the trial court erred by failing to rule on his section 2-1401 claim. Respondent contends the court properly dismissed petitioner's section 2-1401 claim. Respondent moved to dismiss this claim under section 2-615 of the Procedure Code (735 ILCS 5/2-615 (West 2008)).

¶ 40 "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face." *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473, 905 N.E.2d 781, 788 (2009). A trial court should grant a section 2-615 motion only when "it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Pooh-Bah Enterprises, Inc.*, 232 Ill. 2d at 473, 905 N.E.2d at 788. In ruling on a section 2-615 motion to dismiss, "only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *Pooh-Bah Enterprises, Inc.*, 232 Ill. 2d at 473, 905 N.E.2d at 789. Additionally, this court may affirm a section 2-615 dismissal on any basis supported by the record. *Stoll v. United Way of Champaign County, Illinois, Inc.*, 378 Ill. App. 3d 1048, 1051, 883 N.E.2d 575, 578 (2008).

¶ 41 To obtain relief under section 2-1401 of the Procedure Code (735 ILCS 5/2-1401 (West 2008)), the petitioner must affirmatively set forth specific factual allegations in support of

the following: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the trial court in the original action; and (3) due diligence in filing the section 2-1401 claim for relief. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21, 499 N.E.2d 1381, 1386 (1986). A litigant is not entitled to relief under section 2-1401 " 'unless he shows that through no fault or negligence of his own, the error of fact or the existence of a valid defense was not made to appear to the trial court.' " *Smith*, 114 Ill. 2d at 222, 499 N.E.2d at 1387 (quoting *Brockmeyer v. Duncan*, 18 Ill. 2d 502, 505, 165 N.E.2d 294, 296 (1960)).

¶ 42 In his section 2-1401 claim, petitioner asserts respondent's counsel committed fraud by unilaterally canceling petitioner's March 1, 2007, hearing date. He asserts no facts showing he acted with due diligence in both presenting his claim to the trial court in the original action and in filing his section 2-1401 claim. To the contrary, his factual allegations show petitioner knew he had no child-support motions pending before the trial court on September 17, 2007, about 10 months before he filed his July 2008 motion to vacate. Additionally, respondent's motion to set the child-support arrearage expressly asserted petitioner had abandoned his child-support petitions, and thus he had notice the status of those petitions was at issue at the hearing on respondent's motion. Moreover, petitioner claims a defense of fraud as to why a hearing was not held within 30 days after the February 7, 2007, judgment. However, he does not allege he filed a postjudgment motion challenging the February 7, 2007, judgment, and the record does not reflect one was filed. With no motion or petitions pending after the February 2007 judgment, the trial court would have had nothing to hear on March 1, 2007, and any fraud purportedly committed by respondent's counsel as to that hearing date had no impact on petitioner. Thus, we find petitioner also did not allege facts showing the existence of a meritorious defense. Since petitioner failed to plead any facts establishing the three elements

necessary for relief under section 2-1401 and it is clearly apparent no set of facts exists based on respondent's counsel's alleged fraud that would entitle him to section 2-1401 relief, we find the trial court properly dismissed petitioner's section 2-1401 claim.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the judgment of the Sangamon County circuit court.

¶ 45 Affirmed.