2019 IL App (4th) 180096-U

NO. 4-18-0096

FILED
October 8, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| *In re* MARRIAGE OF | ) | Appeal from the |
| DONALD S. MAPES, | ) | Circuit Court of |
| Petitioner-Appellee, | ) | Sangamon County |
| and | ) | No. 13D513 |
| DONNA J. MAPES, | ) | |
| Respondent-Appellant. | ) | Honorable |
| | ) | Esteban F. Sanchez, |
| | ) | Judge Presiding. |

JUSTICE HARRIS delivered the judgment of the court.
Justices DeArmond and Turner concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The trial court committed no error by dismissing petitioner's section 2-1401 pleading where it was insufficient for failing to state a cause of action.

(2) The trial court erred by denying petitioner's motion for leave to amend her section 2-1401 pleading.

¶ 2 Pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)), respondent, Donna J. Mapes, sought to vacate or modify a default judgment entered against her and in favor of respondent, Donald S. Mapes, in the parties' divorce case. The trial court denied Donna's request for relief and she appeals. We affirm in part, reverse in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 The parties were married in July 1981. In August 2013, Donald filed a petition for

dissolution of marriage. During the dissolution proceedings, Donna was initially represented by legal counsel. However, in April 2014, her attorney filed a motion to withdraw from the case, which the trial court granted.

¶ 5 Following the withdrawal of her attorney, Donna neither hired new counsel nor appeared in the matter on her own behalf. Specifically, she failed to appear for a hearing on May 12, 2014, following which the trial court determined grounds existed for dissolving the parties' marriage and reserved all other issues. She also failed to appear for a status hearing on May 28, 2014, and for trial on June 16, 2014. At trial, Donald presented evidence, including 19 exhibits. The court found Donna was in default and took the matter under advisement. On July 1, 2014, the court entered its judgment for dissolution of marriage. As part of the judgment, the court ordered an equal division of the parties' marital assets. A pension Donna had with St. John's Hospital was identified as a marital asset with a value of $130,331.

¶ 6 Two years later, on July 1, 2016, Donna filed a "VERIFIED SECTION 2-1401 MOTION TO VACATE OR MODIFY DEFAULT JUDGMENT FOR DISSOLUTION OF MARRIAGE." She alleged that while the parties' divorce case was pending, she was suffering from "mental problems" and prescribed the medications of Thorazine and Xanax by her doctor. Donna asserted that both her "mental problems" and her medications caused her to "not act in her right mind." Additionally, her medications caused confusion. Donna maintained that as a result of her confusion and "mental problems" she agreed to the withdrawal of her attorney in April 2014, failed to hire new counsel, failed to appear in the dissolution proceedings, and failed to file a motion to vacate the default judgment for dissolution of marriage within 30 days after it was entered. Donna also alleged that the dissolution judgment was "unconscionable" because it did "not grant [her] an equitable division of her marital property." Specifically, she asserted that the judgment overstated

the value of her pension, which had an actual value of only $63,867.35 at the time the dissolution judgment was entered.

¶ 7 Donna attached her own affidavit to her motion, stating she had read the motion and that to the best of her knowledge, the information contained therein was true and correct. She also attached an email from Hospital Sisters Health System, dated June 30, 2016, which transmitted letters to her legal counsel. With the email, was a letter to Donna from the same entity, dated September 25, 2013, which stated as follows:

> "At your request, we are providing information regarding your pension benefit from St. John's Hospital, Springfield, IL. The present value of your monthly pension benefit of $1,566.21, payable at your age 65 is $63,867.35. This benefit includes the dates of your hire (June 2, 1979) through your termination date from St. John's (May 26, 2012)."

¶ 8 On August 10, 2016, Donald filed a motion to dismiss Donna's section 2-1401 motion pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2014)). He argued Donna's motion had to be filed no later than two years after the entry of the order or judgment being challenged and that, in this case, her motion was untimely "as 727 days ha[d] elapsed" since the dissolution judgment was entered. Donald also argued that a section 2-1401 filing must be "supported by affidavit or other appropriate showing as to matters not of record" and the affidavit filed by Donna was "deficient in that regard."

¶ 9 On February 23, 2017, the parties appeared in court for a status hearing and were directed to attend mediation. On July 17, 2017, Donna filed a response to Donald's motion to dismiss. She argued her section 2-1401 motion was timely filed as it was filed no more than two years after the dissolution judgment.

¶ 10 On August 15, 2017, Donald filed a notice of hearing for his motion to dismiss and, on August 23, 2017, the trial court conducted a hearing in the matter. At the outset of the hearing, the court noted that the parties appeared in connection with Donald's motion to dismiss Donna's section 2-1401 motion, as well as another pending case involving the parties. The court stated as follows:

> "Now I understand that if *** the motion filed by [Donald] seeking to dismiss the motion to vacate is granted, it would render moot [Donna's] motion to vacate the [dissolution] judgment ***. If not, then we would have to have a hearing on the motion to vacate."

The parties then presented arguments to the court.

¶ 11 Donald reiterated the claims he made in his motion to dismiss, asserting that Donna's section 2-1401 motion was untimely "as 727 days ha[d] elapsed and the motion [was] beyond the [statutory] two-year period." Alternatively, he argued that Donna failed to properly support her motion with an "affidavit or other appropriate showing as to matters not of record." Specifically, he asserted "that there was no affidavit" and "if there was an affidavit, it was deficient in that regard ***."

¶ 12 Donna argued her motion was timely because it was filed on July 1, 2016, exactly two years after the dissolution judgment was entered on July 1, 2014. She cited case authority for the proposition that the two-year statutory period was calculated by excluding the first day on which the judgment was entered and including the last day when the section 2-1401 motion was filed. See *Parker v. Murdock,* 2011 IL App (1st) 101645, ¶ 23, 959 N.E.2d 1219. She also argued that the affidavit attached to her motion was a proper affidavit because it was certified pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2014)).

¶ 13 The trial court then questioned Donna's counsel regarding her basis for seeking modification of the dissolution judgment after two years. Donna's counsel argued that Donna had alleged confusion based on prescription drugs she was taking and her mental-health condition and that she was "not acting in her right mind," which resulted in the withdrawal of her legal counsel and the entry of the default judgment against her. Her counsel also argued due diligence standards could be relaxed to prevent the unjust entry of a default judgment and that the judgment in the case at issue was unconscionable because it did not equitably divide the parties' marital property. Donna's counsel further made an oral motion to file an amended section 2-1401 petition to allege fraud based on allegations that Donald knew Donna's pension was worth much less than it was valued in the dissolution judgment. Counsel asked the court to deny Donald's motion to dismiss or grant the motion based on an allegation other than untimeliness and allow Donna leave to file an amended section 2-1401 motion. Donald's counsel responded by arguing that Donna had not shown that she acted diligently in the dissolution proceedings or alleged diligence in seeking to modify or vacate the dissolution judgment.

¶ 14 Ultimately, the trial court "denied" Donna's section 2-1401 motion. It stated "that section 2-1401 does not afford a litigant a remedy whereby she may be relieved of the consequences of her own mistake or negligence ***." The court explained that although it found Donna's section 2-1401 motion was timely, such a motion should not "be used as a way to correct or avoid the consequences of [Donna's] own mistakes and negligence." It further stated as follows:

> "There has been no explanation offered to the [c]ourt as to knowing what the basis of the judgment of dissolution of marriage was, what the distribution of the—set forth in the judgment [*sic*], what the values that were given to pension [*sic*], etcetera, that [she] waited two years to do that. There's no explanation—no

reasonable explanation being offered for that purpose. And therefore, Mr. Cahnman [(Donna's counsel)], your motion to dismiss [*sic*] the motion to vacate the judgment of dissolution of marriage is denied."

¶ 15 Following the trial court's oral ruling, Donna's counsel asked that the court's order be made without prejudice and with leave to file an amended section 2-1401 petition. The court denied that request without further comment. In its docket entry, the court stated as follows: "Donna Mapes[']s] Motion to Vacate or Modify Judgment of Dissolution of Marriage is denied for the reasons set forth on the record."

¶ 16 On September 22, 2017, Donna filed a posttrial motion to reconsider the trial court's rulings. She argued the trial court erred by (1) ruling on her section 2-1401 motion, which had not been set for hearing, rather than Donald's motion to dismiss; (2) denying her section 2-1401 motion on a basis not asserted in Donald's motion to dismiss; (3) denying her section 2-1401 motion without an evidentiary hearing; (4) denying her section 2-1401 motion based upon a lack of due diligence; and (5) failing to allow her leave to amend her section 2-1401 motion.

¶ 17 Donna attached a proposed amended section 2-1401 motion to her motion to reconsider. In her amended motion, Donna reiterated the claims she made in her original pleading that her mental-health condition and prescription medication use caused her to be confused and resulted in the withdrawal of her legal counsel, her failure to appear in the dissolution proceedings, and her failure to challenge the judgment within 30 days. However, she described her alleged mental-health conditions and prescription medication use in greater detail, stating that she was taking trazodone and citalopram for depression and hydroxyzine for anxiety. She listed side effects of the drugs as confusion, unusual tiredness, loss of memory, and decreased concentration.

¶ 18 Donna also added allegations to her amended petition. She asserted that she "drank

heavily due to her depression" before and after the entry of the dissolution judgment, which contributed to the circumstances surrounding the default judgment against her. Donna further claimed that she did not receive all of the notices in her case after her attorney withdrew and that she did not recall ever receiving a copy of the dissolution judgment. She maintained that Donald "went through her mail before she got it, and on information and belief, he either on purpose or by accident intercepted the [documents] she did not receive."

¶ 19 Donna further claimed an exercise of due diligence in challenging the default judgment. She alleged she first saw the dissolution judgment in late 2015 or in 2016, when her attorney in another case gave her a copy. According to Donna, she first realized the value of her pension was overstated in the dissolution judgment in 2016 and directed her attorney to obtain a copy of a letter valuing her pension from St. John's Hospital. Donna alleged her attorney received correspondence regarding her pension "on June 30, 2017 [*sic*]," that showed it "had about half the value stated in the judgment." Her original section 2-1401 motion was then filed the next day.

¶ 20 Finally, Donna argued that Donald "obtained the dissolution judgment through fraud and fundamental unfairness." She alleged that in January 2014, Donald's attorney received an interrogatory answer from her, valuing her pension at $62,897.35. Donna asserted on information and belief that prior to the entry of the dissolution judgment, Donald "obtained a copy of the 9/25/13 letter valuing [her] pension at $62,867.35," but "deceived the court by representing" an overstated value of $130,331. She alleged that Donald further deceived her in connection with the dissolution proceedings by telling her that the term "maintenance" as used in the petition for dissolution "meant the maintenance of the parties' property." Attached to Donna's proposed amended motion was the correspondence from Hospital Sisters Health System, valuing her pension at $63,867.35; her January 2014 answers to interrogatories regarding the value of her pension;

her own affidavit; and her Wal-Mart pharmacy records for 2014.

¶ 21 On January 16, 2018, the trial court conducted a hearing on Donna's motion to reconsider. The court denied the motion "for the reasons previously stated on the record." It further stated as follows:

> "[The] [c]ourt does not believe that [Donna's] motion is well taken. *** Any opportunity that could have existed by [Donna] challenging the statements by [Donald] relating to whatever value of the pension plan could have been done at the time that this—the dissolution of marriage was being litigated. [The assertion by Donna's counsel] that the issue is an issue of fraud and not valuation of marital property, it's not persuasive. The issue here, regardless of how he phrased it, is the valuation of the marital property. [Donna] had a chance to challenge and present her own valuation, but she did not do so. And therefore, almost two years—as [Donald's counsel] says, short of one day of the two-year statutory period of which to challenge a judgment under [section] 2-1401, *** she now seeks to vacate that judgment. *** I don't believe that she has demonstrated that she actively sought to present to the court *** information concerning her pension, and that she actively sought to litigate that issue."

The court also stated it denied Donna's request for leave to file an amended section 2-1401 motion "for the reasons [the court] previously stated."

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Section 2-1401

¶ 25 Section 2-1401 of the Code "authoriz[es] a trial court to vacate or modify a final

order or judgment in civil and criminal proceedings." *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31, 32 N.E.3d 1099. Proceedings under section 2-1401 must be brought no later than two years after the entry of the challenged order or judgment. 735 ILCS 5/2-1401(c) (West 2014). Additionally, section 2-1401 petitions must be "supported by affidavit or other appropriate showing as to matters not of record." *Id.* § 2-1401(b).

¶ 26 "[A] section 2-1401 petition can present either a factual or legal challenge to a final judgment or order." *Warren County*, 2015 IL 117783, ¶ 31. A fact-dependent challenge is "resolved by considering the particular facts, circumstances, and equities of the underlying case." *Id.* ¶ 50. In such cases, the moving or petitioning party "must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense; (2) due diligence in presenting this defense; and (3) due diligence in filing the section 2-1401 petition for relief." (Emphasis omitted.) *Id.* ¶ 51 (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21, 499 N.E.2d 1381, 1386 (1986)). "The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence ***." *Id.* Additionally, "when the facts supporting the section 2-1401 petition are challenged by the respondent, a full and fair evidentiary hearing should be held." *Id.* "[T]he trial court may also consider equitable considerations to relax the applicable due diligence standards under the appropriate limited circumstances." *Id.*

¶ 27 The supreme court has held that "the nature of the challenge presented in a section 2-1401 petition is critical because it dictates the proper standard of review on appeal." *Id.* ¶ 31. When a section 2-1401 petition presents a fact-dependent challenge to a final judgment rather than a purely legal challenge, the trial court's "ultimate decision on the petition is reviewed for an abuse of discretion." *Id.* ¶ 51; see also *Airoom*, 114 Ill. 2d at 221 ("Whether a section 2-1401 petition should be granted lies within the sound discretion of the circuit court, depending upon the facts

and equities presented.").

¶ 28 B. The Section 2-1401 Procedure Employed by the Trial Court

¶ 29 On appeal, Donna raises several issues in connection with the trial court's denial of her section 2-1401 motion to vacate or modify the dissolution judgment. Initially, we address her contentions that the court erred in the manner in which it addressed the parties' pleadings. Specifically, Donna argues that the court erred by denying her section 2-1401 motion without first (1) ruling on Donald's motion to dismiss her motion and (2) conducting an evidentiary hearing.

¶ 30 Donald responds by asserting that "[t]he trial court did rule on [his] [m]otion to [d]ismiss by denying after argument [Donna's] verified [s]ection 2-1401 [m]otion ***." He contends the court "impl[ied] in [its] ruling that it was in essence granting [Donald's] motion to dismiss." Donald also argues that court committed no error in denying Donna's section 2-1401 motion without an evidentiary hearing because Donna did not show diligence in presenting her claim regarding her pension or her section 2-1401 motion.

¶ 31 "[P]roceedings under section 2-1401 are subject to the usual rules of civil practice." *People v. Vincent*, 226 Ill. 2d 1, 8, 871 N.E.2d 17, 23 (2007). "Section 2-1401 petitions are essentially complaints inviting responsive pleadings," although "responsive pleadings are no more required in section 2-1401 proceedings than they are in any other civil action." *Id.* at 8-9. Petitions are "subject to dismissal for want of legal or factual sufficiency." *Id.* at 8. "Thus, the petition may be dismissed upon a challenge that, even taking as true its allegations, it does not state a meritorious defense or diligence under section 2-1401 case law." *Id.* "Like a complaint, the petition may be challenged by a motion to dismiss for its failure to state a cause of action or if, on its face, it shows that the petitioner is not entitled to relief." (Internal quotation marks omitted.) *Id.*

¶ 32 "[W]hen the opposing party elects to forgo filing a motion attacking the sufficiency

of the petition and answers on the merits, the respondent is deemed to have waived any question as to the petition's sufficiency, and the petition will be treated as properly stating a cause of action." *Id.* "[I]f the respondent does not answer the petition, this constitutes an admission of all well-pleaded facts [citation], and the trial court may decide the case on the pleadings, affidavits, exhibits and supporting material before it, including the record of the prior proceedings." *Id.* at 9. When a section 2-1401 petition survives a motion to dismiss, summary judgment considerations apply. *Id.* Also, "[w]here a material issue of fact exists, summary judgment is inappropriate and an evidentiary hearing *** is required ***." *Id.*

¶ 33 Here, the record reflects no explicit grant or denial of Donald's motion to dismiss. Rather, the court "denied" Donna's section 2-1401 motion on the basis that she failed to demonstrate due diligence. For the reasons that follow, we find the record supports the dismissal of Donna's section 2-1401 for failing to state a cause of action and we view the court's action in the instant case as the functional equivalent of such a ruling.

¶ 34 In *Vincent*, 226 Ill. 2d at 12, the supreme court stated that "a trial court may, on its own motion, dispose of a matter when it is clear on its face that the requesting party is not entitled to relief as a matter of law." See also *Government Employees Insurance Co. v. Buford*, 338 Ill. App. 3d 448, 457, 788 N.E.2d 90, 98 (2003) (stating that the "failure of a complaint to state a cause of action is a fundamental defect which may be raised at any time by any means," including "by the court *sua sponte*"). There, the defendant filed a section 2-1401 petition alleging the trial court violated certain sections of the Unified Code of Corrections when imposing his sentence. *Vincent*, 226 Ill. 2d at 5. The State did not file any responsive pleading and the trial court "denied" the defendant's petition. *Id.*

¶ 35 On review, the supreme court characterized the trial court as having "entered

judgment *sua sponte* by denying relief on the [section 2-1401] petition" and stated its action was "the functional equivalent of a dismissal for failure to state a cause of action." *Id.* at 11, 14. The court explained as follows:

> "In this case, the State's failure to answer the petition constituted an admission of all well-pleaded facts [citation] and rendered [the defendant's] petition ripe for adjudication. The State's failure to answer made the issue for the court a question of whether the allegations in [the defendant's] petition entitled him to relief as a matter of law. [Citations.] Case law has long recognized that a [*sic*] such a judgment, whether it be characterized as a judgment on the pleadings or a dismissal, can be entered by the court notwithstanding the absence of a responsive pleading. [Citations.]" *Id.*at 9-10.

¶ 36 Here, we find the trial court's "denial" of Donna's section 2-1401 motion proper under *Vincent*. The record shows Donna's motion was insufficient as a matter of law because she failed to set forth specific factual allegations with respect to each element of her claim. As stated, Donna was required to allege facts showing the existence of a meritorious claim or defense and due diligence both in presenting her claim and in presenting her section 2-1401 motion. *Warren County*, 2015 IL 117783, ¶ 51. In this instance, her section 2-1401 motion failed to allege any facts showing that she acted diligently in pursuing relief under section 2-1401. See *In re Marriage of Delk*, 281 Ill. App. 3d 303, 309, 666 N.E.2d 683, 686-87 (1996) (finding the trial court did not abuse its discretion in dismissing a request for relief under section 2-1401 where the "petition was deficient on its face in failing to establish diligence in its filing").

¶ 37 Donna points out on appeal that equitable considerations permit the trial court "to relax the applicable due diligence standards under the appropriate limited circumstances." *Warren*

*County*, 2015 IL 117783, ¶ 51. However, her section 2-1401 motion was similarly deficient with respect to any claim of equitable relief. Taking the allegations in Donna's motion as true, she, at most, set forth a meritorious claim regarding the actual value of her pension at the time of the dissolution judgment. However, "[t]he mere assertion of a meritorious defense, without more, does not warrant relaxation of the due diligence requirement" and such a "position would strip the due diligence requirement of any meaning because a meritorious defense is a requirement of a section 2-1401 petition." *Illinois Neurospine Institute, P.C. v. Carson*, 2017 IL App (1st) 163386, ¶ 31, 86 N.E.3d 1219; see also *Vincent*, 226 Ill. 2d at 8 ("[T]he [section 2-1401] petition may be dismissed upon a challenge that, even taking as true its allegations, it does not state a meritorious defense or diligence under section 2-1401 case law."). Accordingly, Donna's assertion of a meritorious claim in the instant case was, without more, insufficient to relax section 2-1401's due diligence requirements.

¶ 38 We note that, on appeal, Donna cites *Castle v. Sterling Savings & Loan Ass'n*, 2 Ill. App. 3d 1074, 278 N.E.2d 185 (1971), to support her argument that the trial court's denial of her section 2-1401 motion should be reversed. In that case, the plaintiff filed a petition under Section 72 of the Civil Practice Act, the predecessor to section 2-1401 of the Code, seeking to vacate a dismissal order. *Id.* at 1075. The defendants filed a motion to dismiss the petition; however, the court ultimately entered an order granting the plaintiff's section 72 petition without ruling on the defendants' motion to dismiss. *Id.* at 1076. On review, the First District reversed, stating as follows: "[T]the court should first have ruled on defendants' motions to dismiss. If these were denied, then defendants should have been afforded the opportunity of filing an answer." *Id.* at 1077.

¶ 39 Our research reveals two cases from this court which held similarly to the First District in *Castle*. See *Manning v. Meier*, 114 Ill. App. 3d 835, 840, 449 N.E.2d 560, 564 (1983)

(holding that rather than granting the plaintiff's section 2-1401 petition following the denial of the defendant's motion to dismiss, the trial court should have given the defendant an opportunity to respond to the plaintiff's petition); *Trusler v. Sears, Roebuck & Co.*, 125 Ill. App. 3d 325, 329, 465 N.E.2d 1047, 1049 (1984) ("[T]he trial court erred in entering judgment on the section 2-1401 petition prior to allowing [the] defendant an opportunity to file an answer."). However, we find all of these cases are distinguishable from the facts presented here as each involved the grant of a section 2-1401 petition without the opportunity to answer the petition by the opposing party. In such circumstances, the party opposing the section 2-1401 petition is deprived of the chance to deny factual allegations in the petition, which would result in the opportunity for an evidentiary hearing to contest the petitioning party's claims.

¶ 40 Conversely, in circumstances like the one in this case, denial of a section 2-1401 petition occurs after all well-pleaded facts in the petition are deemed admitted. Because the facts alleged by the petitioning party are unchallenged, no evidentiary hearing is required. Moreover, the denial or dismissal of a petition in such circumstances necessarily means that the facts as alleged by the section 2-1401 petitioner are insufficient and fail to state a cause of action even when undisputed and taken as true.

¶ 41 Clearly, a section 2-1401 petition is subject to dismissal pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)) for failing to state a cause of action. See *Vincent*, 226 Ill. 2d at 8 (stating "proceedings under section 2-1401 are subject to the usual rules of civil practice"); *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11, 93 N.E.3d 493 (stating that "[a] motion to dismiss under section 2-615 challenges the legal sufficiency of a complaint" and raises the question of "whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief

may be granted"). Although in this case Donald's motion to dismiss was not brought pursuant to section 2-615 of the Code and the trial court did not identify the deficiencies in Donna's section 2-1401 motion with specificity, "we review judgments, not the reasons therefor." *People v. Ryburn*, 378 Ill. App. 3d 972, 978, 884 N.E.2d 1178, 1183 (2008). Here, the record supports a finding that Donna's section 2-1401 motion failed to state a cause of action because she did not allege due diligence in seeking section 2-1401 relief or facts that would support relaxation of the due diligence requirement based upon equitable considerations. Accordingly, we find it was appropriate for the court to *sua sponte* enter judgment on the pleadings, *i.e.*, a judgment that, per *Vincent*, was the functional equivalent of a dismissal for failure to state a cause of action.

¶ 42 C. Denial of Leave to File an Amended Pleading

¶ 43 On appeal, Donna also argues the trial court erred by denying her motion for leave to file an amended section 2-1401 pleading. She alleges the court should have granted her leave on the basis that her pleading would yield a meritorious claim.

¶ 44 In *Vincent*, 226 Ill. 2d at 13, n. 3, the supreme court noted that "the trial court should allow a litigant the opportunity to amend [a section 2-1401] petition in those circumstances when doing so would yield a meritorious claim." Additionally, the Code provides that "amendments may be allowed on just and reasonable terms" any time before the final judgment. 735 ILCS 5/2-616(a) (West 2014). On review, "the circuit court's ruling to allow or deny an amendment is a matter of discretion and will not be reversed absent an abuse of discretion." *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group*, 186 Ill. 2d 419, 432, 712 N.E.2d 330, 337 (1999). To determine whether the circuit court abused its discretion in denying a party's motion to amend, reviewing courts consider four factors: "(1) whether the proposed amendment will cure the defective pleading; (2) whether the proposed amendment would surprise or prejudice the opposing

party; (3) whether the proposed amendment was timely filed; and (4) whether the moving party had previous opportunities to amend." *Id.*

¶ 45 On appeal, neither party addresses the four factors that this court is to consider when reviewing the denial of a motion to amend. We note, however, that unlike her original pleading, Donna's proposed amended section 2-1401 motion alleged due diligence in seeking section 2-1401 relief. Further, she raised allegations of fraud by Donald, which could support a claim of relief based on equitable considerations in the absence of due diligence. See *Physicians Insurance Exchange v. Jennings*, 316 Ill. App. 3d 443, 458, 736 N.E.2d 179, 191 (2000) ("[T]he due diligence requirement may be relaxed if actual fraud or unconscionable conduct played a part in the trial court's judgment.").

¶ 46 Additionally, there has been no claim by Donald that he would be surprised or prejudiced by the filing of an amended pleading and the proposed amended section 2-1401 motion would be Donna's first attempt at amending her pleading. Finally, we note that although Donna did not move for leave to amend until the hearing on Donald's motion to dismiss, which occurred one year after she filed her original section 2-1401 motion and Donald moved to dismiss the proceeding, her original section 2-1401 motion was not attacked by Donald based on its failure to state a cause of action. Rather, Donald's motion to dismiss was brought pursuant to section 2-619, which admits the legal sufficiency of a complaint and raises an affirmative matter that defeats the claim. *American Family Mutual Insurance Co. v. Krop*, 2018 IL 122556, ¶ 13, 120 N.E.3d 982 (2018) ("A section 2-619 motion admits the legal sufficiency of the complaint but asserts another affirmative matter that defeats the claim.").

¶ 47 Here, the trial court did not set forth any rationale for denying Donna's motion for leave to amend her section 2-1401 pleading. Given the circumstances presented, we find that the

court abused its discretion in denying her motion. We reverse the court's denial of that motion and remand with directions that Donna be allowed to file an amended section 2-1401 petition. In closing, we note that Donna labeled both her original and proposed amended section 2-1401 pleadings as "motions"; however, because Donna's section 2-1401 filing was the equivalent of a complaint in a new proceeding rather than a request for relief in pending litigation, her filing would be more appropriately characterized as a "petition."

¶ 48 III. CONCLUSION

¶ 49 For the reasons stated, we affirm the trial court's dismissal of Donna's section 2-1401 motion, reverse the court's denial of Donna's request to file an amended pleading, and remand with directions that the court grant Donna leave to file an amended section 2-1401 petition.

¶ 50 Affirmed in part and reversed in part; cause remanded with directions.