2015 IL App (5th) 140129-U

NO. 5-14-0129

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
CARISA N. CERAJEWSKI, n/k/a	)	Hamilton County.
Carisa N. Campbell,	)	
	)	
Petitioner-Appellee,	)	
	)	
and	)	No. 08-D-23
	)	
JOHN V. CERAJEWSKI,	)	Honorable
	)	Barry L. Vaughan,
Respondent-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Cates and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Where John V. Cerajewski's section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)) did not raise any matters that were not raised or could not have been raised on appeal, John's claims were legally insufficient and the trial court's ruling dismissing his petition was correct. We affirm.

¶ 2 This dissolution and custody case between John V. Cerajewski and Carisa N. Campbell has a protracted and tortuous history. The case began in 2008. The final judgment awarding custody of the minor child to Carisa occurred in 2012. John appealed the judgment. John's direct appeal was dismissed as untimely. The supreme court denied

John's petition for leave to appeal. There have been numerous pleadings filed and contested hearings held since the 2012 judgment and John's unsuccessful appeal. John's fifth attorney of record currently represents him. John filed a petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) in January 2014. John's section 2-1401 petition with attachments totaled 840 pages. Carisa filed a motion to dismiss in response. At a hearing held February 10, 2014, the court denied both Carisa's motion to dismiss and John's section 2-1401 petition. John appeals.

¶ 3 John raises the following seven issues on appeal:

"(1) When a legally sufficient 1401 petition has not been answered, is it an abuse of discretion for the circuit judge to summarily deny the unopposed 1401 petition on the merits?

(2) When a legally sufficient 1401 petition has not been answered, is it an abuse of discretion for the circuit judge to deny the unopposed 1401 petition without first considering the exhibits attached in support of the 1401 petition?

(3) When an unanswered 1401 petition asserts a constitutional challenge to the trial court's child custody orders under 750 ILCS 5/602 'as applied' to a fit parent and the minor child of the parties, and requests briefing and oral argument, is it an abuse of discretion for the circuit judge to deny the unopposed 1401 petition without briefing and oral argument?

(4) When an unanswered 1401 petition asserts a constitutional challenge to the trial court's child custody orders under 750 ILCS 5/602 'as applied' to a fit

parent and the minor child of the parties, is it an abuse of discretion for the circuit judge to deny the unopposed 1401 petition without first ordering notification of the Illinois Attorney General as required by Illinois Supreme Court Rule 19?

(5) When an unanswered 1401 petition asserts a constitutional challenge to the trial court's child custody orders under 750 ILCS 5/602 'as applied' to a fit parent and the minor child of the parties, is it an abuse of discretion for the circuit judge to deny the unopposed 1401 petition without appointing a guardian ad litem for the minor child of the parties?

(6) When an unanswered 1401 petition asserts a constitutional challenge to the trial court's child custody orders under 750 ILCS 5/602 'as applied' to a fit parent and the minor child of the parties, is it an abuse of discretion for the circuit judge to deny the unopposed 1401 petition without entering findings of fact and conclusions of law?

(7) When an unanswered 1401 petition asserts a constitutional challenge to the trial court's child custody orders under 750 ILCS 5/602 'as applied' to a fit parent and the minor child of the parties, is it an abuse of discretion for the circuit judge to deny the unopposed 1401 petition without briefing and oral argument, when the constitutional challenge is based on whether or not the trial judge has considered the evidence in light of the correct evidentiary standard?"

¶ 4 The common query in all of these issues is whether a trial court can *sua sponte* deny an unanswered section 2-1401 petition that is legally sufficient. The answer to this

query disposes of all of John's issues. We review a judgment on the pleadings or a dismissal of a section 2-1401 petition on a *de novo* basis. *People v. Vincent*, 226 Ill. 2d 1, 14, 871 N.E.2d 17, 26 (2007); *People v. Bramlett*, 347 Ill. App. 3d 468, 473, 806 N.E.2d 1251, 1255 (2004).

¶ 5 Relief under section 2-1401 is premised on a defense or claim that would have precluded entry of judgment in the original action. *Vincent*, 226 Ill. 2d at 7-8, 871 N.E.2d at 22 (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 499 N.E.2d 1381 (1986)). The petitioner must also prove diligence in discovering the defense or claim and filing the petition. *Id.* The purpose of a section 2-1401 petition "is not to relitigate matters that were or could have been raised on direct appeal ***." *People v. Burrows*, 172 Ill. 2d 169, 187, 665 N.E.2d 1319, 1327 (1996); *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000).

¶ 6 Proceedings brought under section 2-1401 are subject to the usual rules of civil practice. *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23 (citing *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 279, 433 N.E.2d 253, 256 (1982))). A section 2-1401 petition invites a responsive pleading. *Id.* A motion to dismiss attacks the legal sufficiency of the section 2-1401 petition. *Id.* If the opposing party chooses instead to answer the petition, the respondent has waived the question of sufficiency and the petition is treated as stating a cause of action. *Id.* at 9, 871 N.E.2d at 23. Similarly, if a respondent does not answer the 2-1401 petition, all well-pleaded facts are deemed admitted. *Id.*

¶ 7 John argues that once the court denied Carisa's motion to dismiss, the court could not deny the legally sufficient unanswered 2-1401 petition.

¶ 8 However, responsive pleadings are not required in section 2-1401 proceedings. *Vincent*, 226 Ill. 2d at 9-10, 871 N.E.2d at 24. The trial court can dispose of the section 2-1401 petition *sua sponte* without a responsive pleading and render judgment on the pleadings alone, which is the functional equivalent of a dismissal for failure to state a cause of action. *Id.* at 13, 871 N.E.2d at 26.

¶ 9 Having decided that the trial court had the authority to act as it did, we must decide whether it was correct in denying John's petition.

¶ 10 Despite John's contention otherwise, the fact that the court denied Carisa's motion to dismiss and then *sua sponte* ruled on his section 2-1401, without affording her the opportunity to answer, does not affect the outcome in this case. While an unanswered petition constitutes an admission of all well-pleaded facts (*Vincent*, 226 Ill. 2d at 9, 871 N.E.2d at 23 (citing *Robinson v. Commonwealth Edison Co.*, 238 Ill. App. 3d 436, 442, 606 N.E.2d 615, 619 (1992)), a trial court may still, 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. The trial court may decide the case on the pleadings, affidavits, exhibits, and supporting material before it, including the record of the prior proceedings. *Vincent*, 226 Ill. 2d at 9, 871 N.E.2d at 23. "[*S*]*ua sponte* dismissal of a meritless complaint that cannot be salvaged by amendment comports with due process and does not infringe the right of access to the courts." *Id.* at 13, 871 N.E.2d at 26.

¶ 11 The fallacy in John's arguments is the assumption that his petition was sufficient at law. It was not. John 's petition was a meritless complaint that could not be salvaged by amendments. Our review of the record and the hearing transcript indicates that the trial judge properly determined that John's allegations did not provide a legal basis for relief under section 2-1401, because John raised and contested the exact same issues that were raised or could have been raised at trial or on direct appeal–child custody, visitation, and child support. Wrapping these issues in the guise of a constitutional challenge does not change the fact that these issues had already been litigated all the way up to our supreme court. Nor is there any support in the law for John's argument that he is entitled to equitable relief because of his assertion that the representation of his four prior attorneys was deficient in that they "individually and collectively, utterly, totally, and completely failed to perform their duty to represent the Respondent in this case with at least a minimum standard of care and professionalism." John's reliance on *Strickland v. Washington* to support this argument is completely misplaced because *Strickland* sets forth the standard for effective assistance of counsel guaranteed by the sixth amendment in criminal prosecutions, *not in civil cases*. *Strickland v. Washington*, 466 U.S. 668, 688 (1984); see *Ameritech Publishing of Illinois, Inc. v. Hadyeh*, 362 Ill. App. 3d 56, 60, 839 N.E.2d 625, 630 (2005) (*Strickland v. Washington*'s application of the sixth amendment right to the effective assistance of counsel is not applicable in a civil setting). Section 2-1401 does not provide for a second bite at the apple merely because John now claims more competent counsel.

¶ 12 In sum, John's section 2-1401 petition is insufficient at law as it raises matters that were raised or could have been raised at trial or on direct appeal.

¶ 13 Carisa asks this court to sanction John for filing a frivolous appeal pursuant to Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994). We decline the opportunity to consider Carisa's request.

¶ 14 CONCLUSION

¶ 15 For the foregoing reasons, we affirm the judgment of the circuit court of Hamilton County.

¶ 16 Affirmed.