

NOTICE
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2013 IL App (5th) 120549-U

NO. 5-12-0549

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

MADISON COUNTY MASS TRANSIT DISTRICT, an Illinois Municipal Corporation,)	Appeal from the
Plaintiff-Appellant,)	Circuit Court of
)	Madison County.
v.)	
POLETTI FAMILY LIMITED PARTNERSHIP, <i>et al.</i> ,)	Nos. 10-ED-19 & 10-ED-20
Defendants-Appellees,)	
and)	
MADISON COUNTY MASS TRANSIT DISTRICT, an Illinois Municipal Corporation,)	
Plaintiff-Appellant,)	
v.)	
STEVEN J. POLETTI, <i>et al.</i> ,)	Honorable
Defendants-Appellees.)	Barbara L. Crowder, Judge, Presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Spomer and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's award of attorney fees to the defendants following the dismissal of the plaintiff's commendation petitions is reversed where the defendants' request for attorney fees was filed more than 30 days after the final dismissal order was entered and the trial court abused its discretion by granting the defendants' section 2-1401 petition because the defendants failed to demonstrate due diligence in pursuing their claim for attorney fees in the original condemnation actions.

¶ 2 The plaintiff, Madison County Mass Transit District, appeals from the order of the circuit court of Madison County awarding the defendants, Poletti Family Limited Partnership, *et al.*, and Steven J. Poletti, *et al.*, attorney fees in the amount of \$12,699.70, following the court's dismissal of the plaintiff's complaints for condemnation that was filed against the defendants. For the reasons which follow, we reverse the decision of the circuit court.

¶ 3 On December 27, 2010, the plaintiff filed a complaint for condemnation of certain private parcels of land owned or controlled by the defendants, Poletti Family Limited Partnership, *et al.* (Madison County case number 10-ED-19) for the purpose of the construction, operation, and maintenance of a bikeway trail. That same day, the plaintiff also filed a similar complaint for condemnation against defendants, Steven J. Poletti, *et al.* (Madison County case number 10-ED-20). In response, on January 27, 2011, the defendants filed a traverse and motion to dismiss the plaintiff's complaints for condemnation (the defendants were represented by the same attorney and a motion to dismiss was filed in both cases).

¶ 4 On November 10, 2011, the trial court entered a consolidated order dismissing the condemnation complaints filed in both cases. Specifically, the court concluded that the resolution authorizing the plaintiff's use of eminent domain to acquire the tracts of land inadequately described the property to be taken, *i.e.*, the resolution described the relevant properties in their entirety and did not specify those parts of the properties sought to be taken. The court concluded that the error was fatal and that the plaintiff had failed to establish the necessary elements required by section 10-5-10 of the Eminent Domain Act (the Act) (735 ILCS 30/10-5-10 (West 2010)) to sustain an eminent-domain action and complaint for condemnation.

¶ 5 On July 2, 2012, the defendants filed a combined petition for relief from judgment

pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2010)) and a motion for attorney fees pursuant to section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)). Specifically, the combined motion stated that a consolidated order was entered by the trial court dismissing the plaintiff's complaints for condemnation on November 10, 2011. It further stated that because of a clerical error on the part of the Madison County circuit clerk, the parties had no knowledge of the court's decision until June 2012. The motion alleged that the defendants had a meritorious claim, *i.e.*, that they were entitled to reimbursement of attorney fees and costs, and a petition for fees would have been filed within 30 days of the dismissal order had the defendants been aware that an order had been entered. Attached to the combined motion was an affidavit of M. Joseph Hill, the defendants' attorney, which itemized his attorney fees. The only explanation offered for counsel's failure to request attorney fees in the underlying condemnation actions was the clerical error.

¶ 6 Thereafter, the plaintiff filed a response to the defendants' combined petition for relief from judgment and motion for attorney fees, arguing that the trial court did not have jurisdiction to consider the attorney-fees issue because the motion was filed more than 30 days after entry of the final judgment. The plaintiff noted that the final order of dismissal was entered on November 10, 2011, and the 30-day period expired on December 10, 2011. In support of this argument, the plaintiff cited section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)), the statute providing for the award of attorney fees in condemnation actions. The plaintiff argued that section 10-5-70(a) of the Act provided that any request for fees must be filed in the underlying condemnation action, which was no longer pending once the 30-day deadline expired. Further, the plaintiff argued that the defendants' request for attorney fees was barred by *res judicata* because it could have been raised in the underlying condemnation actions. In the alternative, the plaintiff argued that

the trial court should deny the defendants' petition for relief from judgment because the defendants failed to offer any evidence establishing the existence of a meritorious defense and no evidence of their diligence in pursuing attorney fees within the underlying condemnation actions.

¶ 7 On August 2, 2012, the trial court entered an order granting the defendants' motion for attorney fees, finding that the motion was not untimely under section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)). As support for its conclusion, the court cited *Town of Libertyville v. Bank of Waukegan*, 152 Ill. App. 3d 1066, 1072-73 (1987), which held that a trial court had jurisdiction to consider a fee application made within 30 days of the entry of the final order where a notice of appeal was previously filed from the dismissal order. In the alternative, the court granted the defendants' petition for relief from judgment. Specifically, the court stated as follows: "That motion seeks relief from a final order that does not address attorney fees even though they are specifically mentioned in 735 ILCS 30/10-5-70. In the event a court of review would find that the entry of the traverse order triggered a deadline that the application should have been filed within 30 days thereafter, then this court grants defendants' motion."

¶ 8 On August 30, 2012, the plaintiff filed a motion to reconsider the trial court's August 2, 2012, order, arguing that the court did not have jurisdiction to consider the defendants' request for attorney fees after expiration of the 30-day deadline. The plaintiff again argued that the statutory language of section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)), which stated that "the court shall, upon the application of the defendants ***, enter an order in the action for the payment *** of all costs, expenses, and reasonable attorney fees," makes clear that a motion for fees in an eminent-domain proceeding must be filed while the court has jurisdiction over the underlying condemnation action.

¶ 9 On November 2, 2012, the trial court entered an order denying the plaintiff's motion

to reconsider and awarded the defendants \$12,699.70 for attorney fees and costs. Specifically, the court concluded that a motion for attorney fees pursuant to eminent-domain proceedings was not an attack on the trial court's judgment and therefore not a posttrial motion. Relying on *Town of Libertyville*, the court concluded that section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)) did not set forth an express deadline for filing a motion for fees and therefore it had discretion to determine whether a fee request was filed within a "reasonable time period." The plaintiff appeals.

¶ 10 First, the plaintiff argues that the trial court lacked jurisdiction to grant the defendants' motion for attorney fees because it was filed more than seven months after the entry of the final judgment dismissing the condemnation complaints. The plaintiff argues that the plain language of section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)) requires that an application for fees be brought before the trial court in the original condemnation action, while the court maintained jurisdiction. The plaintiff argues that because the trial court retains jurisdiction for 30 days following entry of a final order or judgment, the court only has jurisdiction to entertain an application for fees filed within that 30-day deadline. We agree with the plaintiff.

¶ 11 Statutory construction is a matter of law and therefore subject to *de novo* review. *Detrana v. Such*, 368 Ill. App. 3d 861, 867 (2006). The primary rule of statutory construction is to ascertain and give effect to the legislative intent. *Augustus v. Estate of Somers*, 278 Ill. App. 3d 90, 97 (1996). The most reliable indicator of the legislature's intent is the language of the statute. *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill. 2d 103, 117 (2007). The statutory language must be given its plain and ordinary meaning. *Detrana*, 368 Ill. App. 3d at 867. Eminent-domain statutes are required to be strictly construed. *Town of Libertyville*, 152 Ill. App. 3d at 1070.

¶ 12 Section 10-5-70(a) of the Act provides the following with regard to requests for

attorney fees in eminent-domain proceedings:

"If the plaintiff dismisses the complaint before the entry of the order by the court first mentioned in this subsection (a) or fails to make payment of full compensation within the time named in that order or if the final judgment is that the plaintiff cannot acquire the property by condemnation, the court shall, upon the application of the defendants or any of them, enter an order in the action for the payment by the plaintiff of all costs, expenses, and reasonable attorney fees paid or incurred by the defendant or defendants in defense of the complaint, as upon the hearing of the application shall be right and just, and also for the payment of the taxable costs." 735 ILCS 30/10-5-70(a) (West 2010).

¶ 13 In the present case, the defendants filed a petition requesting attorney fees pursuant to section 10-5-70(a) of the Act approximately seven months after the trial court dismissed the plaintiff's condemnation petitions. The trial court granted the defendants' request for attorney fees, concluding that it had jurisdiction to consider the matter. The court relied on *Town of Libertyville v. Bank of Waukegan*, 152 Ill. App. 3d 1066 (1987), in reaching this decision.

¶ 14 *Town of Libertyville*, 152 Ill. App. 3d at 1072, involved the issue of whether the circuit court had jurisdiction to consider the defendants' application for fees in an eminent-domain proceeding because the plaintiff had previously filed a notice of appeal from the dismissal of its condemnation petition. The defendants had requested attorney fees based on section 7-123(a) of the Code (Ill. Rev. Stat. 1985, ch. 110, ¶ 7-123(a)), now section 10-5-70 of the Act (735 ILCS 30/10-5-70 (West 2010)). *Id.* The fee request was made within 30 days of the final judgment dismissing the condemnation petition. *Id.* The Second District concluded that the filing of the notice of appeal did not deprive the circuit court of jurisdiction to consider the fee request, reasoning that the circuit court retained jurisdiction

to determine matters collateral or incidental to the final judgment or order, which included those matters lying outside the issues in the appeal or arising subsequent to the judgment appealed from. *Id.* at 1072-73. The court further reasoned that an application for attorney fees and costs could not be made until final judgment was entered in a condemnation suit. *Id.* at 1073. The court concluded that an application for attorney fees and costs made pursuant to section 7-123(a) of the Code "lies outside the issues in the underlying judgment" and that section 7-123(a) of the Code did not set forth a time limit for seeking these expenses. *Id.* The court noted that a "litigant may wish either to wait until the appeal process ends before filing an application or to proceed at a time after the judgment is entered." *Id.* Accordingly, the court concluded that the filing of a notice of appeal from the final judgment in the condemnation action did not deprive the circuit court of jurisdiction to entertain "the collateral or supplemental matter of fees and costs pursuant to section 7-123(a)." *Id.*

¶ 15 Unlike *Town of Libertyville*, the application for fees filed in the present case was not filed within 30 days of the dismissal of the underlying condemnation actions, while the circuit court had jurisdiction over these cases. The issue in the present case is whether the court has jurisdiction to entertain a motion for attorney fees pursuant to section 10-5-70 of the Act where the motion was filed outside the 30-day window, after the circuit court lost jurisdiction in the underlying condemnation actions. The plaintiff cites *Illinois Department of Financial & Professional Regulation v. Rodriquez*, 2012 IL 113706, a case that distinguished *Town of Libertyville*, in support of its position that the circuit court did not have jurisdiction to entertain the defendants' fee request. In that case, the circuit court granted summary judgment in favor of Rodriquez, concluding that an administrative rule of the Illinois Department of Financial and Professional Regulation was invalid. *Rodriquez*, 2012 IL 113706, ¶ 4. More than one year after the rule was invalidated, Rodriquez filed a petition for litigation expenses pursuant to section 10-55(c) of the Illinois Administrative Procedure

Act (the Administrative Act) (5 ILCS 100/10-55(c) (West 2010)), which allowed a plaintiff to bring an independent action to recover litigation expenses where he successfully had an administrative rule invalidated. *Id.* ¶ 4-6. The circuit court found that Rodriguez's claim for litigation expenses was barred by *res judicata* because it could have been brought with the previous litigation seeking to invalidate the administrative rule. *Id.* ¶ 6. The appellate court reversed, finding that section 10-55(c) of the Administrative Act allowed for the plaintiff to bring an independent action for attorney fees and that *res judicata* was not applicable because the "operative facts giving rise to the claim for litigation expenses did not arise until the rule was invalidated." *Id.*

¶ 16 On appeal, the Department argued that section 10-55(c) of the Administrative Act did not create an independent cause of action for the recovery of litigation expenses and therefore a request for those expenses must be brought while the court had jurisdiction over the underlying action. *Id.* ¶ 8. Rodriguez countered that section 10-55(c) created a separate cause of action and the court retained indefinite jurisdiction to hear a petition for fees filed pursuant to section 10-55(c) of the Administrative Act. *Id.* ¶ 9. He also argued that *res judicata* did not apply because the claim for litigation expenses was not available to him until the rule was invalidated. *Id.*

¶ 17 The supreme court looked at the language of the statute, which stated as follows:

"In any case in which a party has any administrative rule invalidated by a court for any reason, including but not limited to the agency's exceeding its statutory authority or the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees." *Id.* ¶ 12 (quoting 5 ILCS 100/10-55(c) (West 2010)).

In construing this statute, the supreme court reasoned that the phrase "the court" may not be

read in isolation and concluded that when read together with the rest of section 10-55(c) of the Administrative Act, it was "clear that the fees are to be awarded by the court that invalidated the rule." *Id.* ¶ 15. The court further concluded that section 10-55(c) established a time limitation on the filing of a petition for fees because it required that a fee request be brought in the case in which the rule was invalidated. *Id.* ¶ 17.

¶ 18 The supreme court reasoned that *Libertyville* was inapplicable because the fee request in *Libertyville* was made within 30 days of the final judgment, while the court maintained jurisdiction, and the issue in that case was whether the circuit court had lost jurisdiction to rule on a fee request filed after the plaintiff had filed a notice of appeal. *Id.* ¶ 20. Additionally, the court rejected the argument that a fee request was a collateral matter, which would allow the circuit court to retain indefinite jurisdiction to consider the request. *Id.* ¶ 29. The court concluded that the plain language of section 10-55(c) of the Administrative Act did not create a separate cause of action and an application for attorney fees must be brought while the court that invalidated the rule had jurisdiction. *Id.* ¶ 37.

¶ 19 In the present case, the defendants did not file their application for attorney fees within 30 days of the final judgment, while the circuit court had jurisdiction over the condemnation actions. Relying on *Libertyville*, the circuit court concluded that it had discretion to determine whether a fee petition pursuant to section 10-5-70 of the Act was filed within a reasonable time period because the statute did not establish a time limit for filing fee requests in eminent-domain proceedings. We disagree. As previously stated, section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)) provides as follows with regard to fee applications: "the court shall, upon the application of the defendants or any of them, enter an order *in the action* for the payment by the plaintiff of all costs, expenses, and reasonable attorney fees paid or incurred by the defendant." (Emphasis added.) Like *Rodriguez*, the statutory language "in the action" indicates that the application for attorney

fees must be brought in the same action as the underlying condemnation proceeding and therefore must be made while the circuit court in the original condemnation action has jurisdiction. Therefore, the request for attorney fees is not a collateral matter, which would allow the court to retain jurisdiction to consider the request. Additionally, like *Rodriquez*, we find *Libertyville* to be inapplicable to the issue at hand because the fee application in *Libertyville* was filed within 30 days of the final judgment, while the circuit court maintained jurisdiction over the underlying action. Therefore, we conclude that the circuit court had jurisdiction to entertain a motion for attorney fees filed under section 10-5-70(a) of the Act within 30 days of the entry of final judgment. Because the defendants failed to file their request for attorney fees within that time limitation, the circuit court did not have jurisdiction to consider their request. Accordingly, we conclude that the circuit court erred in granting the defendants' motion for attorney fees.

¶ 20 The plaintiff also argues that the circuit court abused its discretion by granting the defendants' petition for relief filed pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). Specifically, the plaintiff argues that the defendants' petition failed to meet the requirements of section 2-1401 in that defendants failed to demonstrate due diligence in pursuing attorney fees in the original condemnation actions and that the petition was not supported by sworn allegations of a party having personal knowledge of the relevant facts. Additionally, the plaintiff argues that the issue involving attorney fees is barred by *res judicata* because the defendants could have previously raised this issue in the underlying condemnation action.

¶ 21 Section 2-1401 sets forth a statutory procedure which allows final judgments to be vacated. *Prenam No. 2, Inc. v. Village of Schiller Park*, 367 Ill. App. 3d 62, 64-65 (2006). "The purpose of a section 2-1401 petition is to make the circuit court aware of facts not appearing in the record which, if known to the court at the time of judgment, would have

prevented the court's entry of judgment." *Id.* at 65. Although the section 2-1401 petition must be filed in the original proceeding, it is not a continuation of the original proceeding, and is instead the commencement of a new cause of action. *Storcz v. O'Donnell*, 256 Ill. App. 3d 1064, 1069 (1993). However, section 2-1401 is not to be used as a procedure where a litigant may relitigate issues already resolved or to raise matters which could have been previously adjudicated. *Johnson v. Valspar Corp.*, 251 Ill. App. 3d 564, 569 (1993).

¶ 22 In order to be legally sufficient, the petition must be supported by the sworn allegations of a party having personal knowledge of the relevant facts not of record, set forth by either verified petition or attached affidavit. *Storcz*, 256 Ill. App. 3d at 1069. To obtain relief under section 2-1401, the petitioner must allege and prove (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 seeking relief. *In re Marriage of Baumgartner*, 226 Ill. App. 3d 790, 793 (1992). To demonstrate due diligence, a litigant must establish that his failure to appear or defend against the underlying action was the result of an excusable mistake and that he had acted reasonably under the circumstances, as opposed to negligently, when he failed to initially resist the judgment. *Prenam No. 2*, 367 Ill. App. 3d at 65. "Section 2-1401 does not afford a remedy to relieve a litigant of the consequences of his own mistakes or his counsel's negligence." *Storcz*, 256 Ill. App. 3d at 1069. The petitioner is required to affirmatively set forth specific factual allegations supporting the claim of due diligence. *Id.* at 1069-70. A reviewing court may disturb the circuit court's ruling on a section 2-1401 petition only if it finds that the circuit court abused its discretion. *Id.* at 1070.

¶ 23 In the present case, after concluding that it had jurisdiction to consider the defendants' application for attorney fees, the trial court stated as follows with regard to the defendants' 2-1401 petition:

"[I]n an abundance of caution in the event the court viewed that the application of fees must be filed within 30 days of the granting of the traverse, the defendants have filed a motion under 735 ILCS 5/2-1401. That motion seeks relief from a final order that does not address attorney fees even though they are specifically mentioned in 735 ILCS 30/10-5-70. In the event a court of review would find that the entry of the traverse order triggered a deadline that the application should have been filed within 30 days thereafter, then this court grants defendants' motion."

¶ 24 After carefully reviewing the record in this case, we conclude that the defendants' factual allegations in the section 2-1401 petition and attached affidavit were insufficient to entitle them to relief. The defendants' section 2-1401 petition alleged that the Madison County circuit clerk failed to forward a copy of the trial court's final dismissal order entered on November 10, 2011, to the parties and that neither the plaintiff nor the defendants had knowledge of the decision until June 2012. The petition also alleged that the defendants have a meritorious claim for attorney fees and a petition for fees would have been filed within 30 days of the final judgment had the defendants been aware that a final decision had been entered. Attached to the petition is an affidavit of the defendants' attorney, M. Joseph Hill, itemizing the attorney fees incurred in the original condemnation actions.

¶ 25 The defendants failed to make a request for attorney fees in the motions to dismiss, after the trial court took the motions under advisement, or within 30 days of the dismissal order. Neither the section 2-1401 petition nor the affidavit of the defendants' attorney contains factual allegations which establish that the defendants acted with due diligence in pursuing their claims regarding the attorney fees in the original condemnation actions. The defendants did not assert that their failure to timely raise the attorney-fee issue was the result of an excusable mistake and that they had acted reasonably, not negligently, in failing to follow the progress of the case. The defendants offered only "clerical error" as explanation

for their failure to pursue this claim after the condemnation petitions were dismissed and while the circuit court had jurisdiction over the original proceedings. The consolidated dismissal order had been filed for approximately seven months before counsel learned of its existence. We note that a copy of the consolidated order was contained in the common law record for Madison County case numbers 10-ED-19 and 10-ED-20 (the cases at issue in this appeal), which indicates that the attorneys could have found the order in the circuit court files had they looked for it. A moving party has the obligation to follow the progress of his case and the failure to do so is generally not a ground for relief under section 2-1401. *Genesis & Sons, Ltd. v. Theodosopoulos*, 223 Ill. App. 3d 276, 280 (1991). Moreover, the defendants should have raised this issue in the underlying condemnation action as section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)) does not create a separate cause of action for attorney fees. As stated above, issues which could have been raised in the earlier proceeding in a motion for rehearing or direct appeal are *res judicata* and may not be relitigated in the section 2-1401 proceeding, which is a separate action and not a continuation of the earlier action. Accordingly, we conclude that the trial court abused its discretion in granting the defendants' section 2-1401 petition for relief from judgment.

¶ 26 For the foregoing reasons, the judgment of the circuit court of Madison County is hereby reversed.

¶ 27 Reversed.