

No. 1-14-1080

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF JEYALAKSHMI SELWYN,)	Appeal from the
)	Circuit Court of
Petitioner-Appellant,)	Cook County.
)	
v.)	No. 12 D 11558
)	
GEORGE LEBANON,)	Honorable
)	David Haracz,
Respondent-Appellee.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

O R D E R

¶ 1 **Held:** Where the petitioner did not demonstrate due diligence in presenting his defense or claim to the circuit court in the original action or in filing his section 2-1401 petition for relief, and where extraordinary circumstances did not exist to justify relaxing the due diligence requirements, the circuit court's order granting the petition is reversed.

¶ 2 In this action for dissolution of marriage, petitioner Jeyalakshmi Selwyn appeals from the trial court's grant of respondent George Lebanon's "Emergency Motion to Vacate and Modify Judgment for Dissolution of Marriage and for Immediate Preliminary Injunction." On appeal, Selwyn contends that the trial court lacked jurisdiction to consider Lebanon's motion because he filed it more than 30 days after the denial of his first motion to vacate. In the alternative, Selwyn contends that if the trial court did not lack jurisdiction, the motion should nevertheless have been denied because it did not comply with the requirements of section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). Although the appellee has not filed a response brief in this court, we may proceed under the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 3 For the reasons that follow, we reverse.

¶ 4 In the action underlying the instant appeal, Selwyn filed a petition for dissolution of marriage in December 2012. Lebanon was personally served on January 5, 2013, in India. On January 17, 2013, Lebanon filed a *pro se* document titled "Affidavit of George Selwyn Lebanon," which requested that the court appoint an attorney and "adjourn" the proceedings for at least six months so as to permit Lebanon "to file my answer with all documentary evidence through my attorney." Lebanon did not formally file an appearance. On February 14, 2013, Selwyn moved for a default judgment based on Lebanon's failure to file an appearance. The trial court entered an order of default and a judgment for dissolution of marriage on February 26, 2013.

¶ 5 On July 8, 2013, Lebanon filed a "Motion to Vacate the February 26, 2013 Court Order After 30 Days," invoking section 2-1401. In the motion, Lebanon asserted, among other things, that the affidavit he filed earlier was intended to serve as an answer; that he had not received notice of the default but learned about it "sometime in April 2013" after receiving a Qualified Illinois Domestic Relations Order entitling Selwyn to 50 percent of his pension; that he suffered from medical conditions that prevented him from immediately returning to Chicago from India to participate in litigation; that no discovery was conducted prior to the distribution of the parties' property; and that the judgment for dissolution of marriage subjected him to an unfair distribution of property. Among the exhibits attached to the motion was Lebanon's affidavit. On September 23, 2013, the trial court entered an order denying the section 2-1401 petition without prejudice. The order indicated that all parties were present and represented by counsel at a hearing on the petition, and that the court was fully advised.

¶ 6 On January 3, 2014, Lebanon filed an "Emergency Motion to Vacate and Modify Judgment for Dissolution of Marriage and for Immediate Preliminary Injunction." Again invoking section 2-1401, Lebanon made essentially the same allegations as in his first section 2-1401 petition. He also asserted that the matter was an emergency because he was seeking judicial deeds from courts of Illinois and India. Lebanon asked the court to vacate and modify the judgment for dissolution of marriage and issue an immediate preliminary injunction "to prevent unconscionable distribution and dissipation of assets." Selwyn filed a response to Lebanon's petition. Following a hearing on the petition, on March 18, 2014, the trial court entered an order

finding that "the possibility of an unconscionable result exists" and vacating the default judgment. Selwyn appeals.

¶ 7 As an initial matter, we note that appellate jurisdiction exists in this case. Section 2-1401 authorizes a party to seek relief from a final judgment, such as a default judgment, when brought more than 30 days after judgment has been entered. 735 ILCS 5/2-1401(a) (West 2012); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 101 (2002). Because the filing of a section 2-1401 petition is considered a new proceeding, and not a continuation of an old one, a circuit court's ruling on such a petition is deemed a final order. *Sarkissian*, 201 Ill. 2d at 102. Orders disposing of section 2-1401 petitions are immediately reviewable under Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010), which states that appeal may be taken from "a judgment or order granting or denying any of the relief prayed in a petition under section 2-1401 of the Code of Civil Procedure." *Sarkissian*, 201 Ill. 2d at 102.

¶ 8 On appeal, Selwyn contends that the trial court lacked jurisdiction to consider Lebanon's section 2-1401 petition because he filed it more than 30 days after the denial of his first motion to vacate under section 2-1401. In the alternative, Selwyn contends that if the trial court did not lack jurisdiction, the petition should nevertheless have been denied because it did not comply with the requirements of section 2-1401. In particular, Selwyn argues that Lebanon failed to demonstrate the existence of a meritorious claim, failed to use due diligence in presenting his claim in the original action, and failed to use due diligence in presenting his second section 2-1401 petition.

¶ 9 In support of her contention that the trial court lacked jurisdiction to consider Lebanon's second section 2-1401 petition, Selwyn relies on *Village of Glenview v. Buschelman*, 296 Ill. App. 3d 35 (1998). The *Buschelman* court held that successive 2-1401 petitions are not allowed unless they are (1) authorized by an order granting leave to amend an earlier petition, (2) submitted for the purpose of curing defects in the earlier petition or for alleging grounds that have not and could not have been previously adjudicated, and (3) filed within 30 days after the order granting leave to amend. *Buschelman*, 296 Ill. App. 3d at 39-40. However, *Buschelman's* holding that the law permits a party only a single section 2-1401 petition has been strongly rejected in *People v. Walker*, 395 Ill. App. 3d 860, 867 (2009), which held that *Buschelman* was wrongly decided. In *Walker*, we observed that the *Buschelman* court reasoned in a way that implied a section 2-1401 was merely one form of postjudgment motion, rather than an initial pleading. *Walker*, 395 Ill. App. 3d at 868. We also looked beyond the reasoning in *Buschelman* and found "nothing in Illinois law that suggests that a party is limited jurisdictionally to one section 2-1401 petition." *Walker*, 395 Ill. App. 3d at 868. Noting that the language of section 2-1401 does not limit a party to one such petition, we concluded, "We must reject the idea that a trial court lacks jurisdiction to hear more than one section 2-1401 petition." *Walker*, 395 Ill. App. 3d at 868-70.

¶ 10 We agree with the reasoning of the *Walker* court. Accordingly, Selwyn's contention that the trial court lacked jurisdiction to consider Lebanon's petition fails.

¶ 11 In order to be entitled to relief under section 2-1401, a petition must set forth specific factual allegations supporting the following elements: (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 for relief. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986); *In re Marriage of Harnack & Fanady*, 2014 IL App (1st) 121424, ¶ 52. These elements must be established by a preponderance of the evidence. *Babcock v. Wallace*, 2012 IL App (1st) 111090, ¶ 23. The issue of a meritorious defense is a question of law reviewed *de novo*, while question of due diligence is subject to abuse of discretion review. *Marriage of Harnack & Fanady*, 2014 IL App (1st) 121424, ¶ 53.

¶ 12 After a thorough review of the record, we conclude that the trial court abused its discretion in granting Lebanon's section 2-1401 petition. Even assuming Lebanon demonstrated a meritorious defense by alleging that the judgment for dissolution of marriage subjected him to an unconscionable and unfair distribution of marital property due to no discovery being conducted before the default judgment was entered, his petition fails to *allege*, let alone show by a preponderance of the evidence, due diligence in presenting his claims to the circuit court in the original action or in filing the section 2-1401 petition at issue. Lebanon was personally served on January 5, 2013. Instead of filing an appearance or an answer, he filed a *pro se* "Affidavit," requesting that the court appoint him an attorney and stay the proceedings for at least six months. Then, although he admits he had notice of the default judgment in April 2013, he waited three months, until July 8, 2013, to file his first section 2-1401 petition seeking to have the default judgment vacated. After that petition was denied without prejudice on September 23, 2013, Lebanon again waited over three months, until January 3, 2014, to file his second "emergency" section 2-1401 petition. We cannot find that these actions demonstrate due diligence.

¶ 13 It is true that a trial court may invoke its equitable powers to waive the due diligence requirements of section 2-1401 under extraordinary circumstances. *Marriage of Harnack & Fanady*, 2014 IL App (1st) 121424, ¶¶ 59-60. Extraordinary circumstances exist, for example, when a party has " 'procured an unconscionable advantage through the extraordinary use of court processes,' " where fraud or fundamental unfairness has been shown, or where the failure to exercise due diligence was caused by circumstances outside the record and beyond the petitioner's control. *Marriage of Harnack & Fanady*, 2014 IL App (1st) 121424, ¶ 60, quoting *American Consulting Ass'n v. Spencer*, 100 Ill. App. 3d 917, 923 (1981).

¶ 14 Here, Lebanon has not presented any evidence to show that extraordinary circumstances exist to excuse his failure to exercise due diligence. No evidence indicates that Selwyn used court processes to gain an unconscionable advantage, that she engaged in fraud, or that her conduct was fundamentally unfair, and no evidence has been presented to show that as a result of circumstances outside the record and beyond Lebanon's control, the existence of a valid defense was not made known to the trial court. Lebanon has not presented a reasonable excuse for failing to take action in these proceedings in a timely manner. Thus, exceptional circumstances do not exist in this case so as to warrant relaxing the due diligence requirements of section 2-1401.

¶ 15 For the reasons explained above, we reverse the judgment of the circuit court.

¶ 16 Reversed.