

No. 1-10-1645

ERIC PARKER AND LYNLEE MUEHRING,)	Appeal from the Circuit Court
)	of Cook County
Plaintiffs-Appellants,)	
)	
v.)	No. 04 MI 115518
)	
MICHAEL MURDOCK,)	The Honorable
)	Pamela Hill Veal,
Defendant-Appellee.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Presiding Justice Cunningham and Justice Connors concurred in the judgment
and opinion.

OPINION

¶ 1 In this case we are called upon to determine whether a petition to vacate brought under section 2-1401 of the Illinois Code of Civil Procedure (Code) was filed outside the two-year time frame allowed for such relief, in violation of section 2-1401© (735 ILCS 5/2-1401© (West 2008)). Plaintiffs, Eric Parker and Lynlee Muehring, obtained a judgment against defendant, Michael Murdock, on October 13, 2004. The circuit court granted defendant's section 2-1401 petition, filed on January 18, 2007, to vacate the October 13, 2004 judgment. We hold that defendant's section 2-1401 petition was not timely filed because it was filed outside the two-year statutory limitation for seeking relief from a judgment. Therefore, the circuit court order granting defendant's section 2-1401 petition is void and must be vacated by this court.

¶ 2

JURISDICTION

¶ 3 On January 25, 2010, plaintiffs filed their motion to vacate the trial court's order granting defendant's request to vacate the judgment entered against defendant, arguing it was void pursuant to section 2-1401(f) of the Code. 735 ILCS 5/2-1401 (West 2008). On May 12, 2010, the circuit court denied plaintiffs' motion. Plaintiffs timely filed their notice of appeal on June 10, 2010. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 304(b)(3), governing appeals from judgments or orders granting or denying relief as requested in a section 2-1401 petition. Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010); see also *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002) ("a circuit court's ruling on [a section 2-1401 petition] is deemed a final order and provision has been made for immediate review of these orders in Supreme Court Rule 304(b)(3)").

¶ 4

BACKGROUND

¶ 5 Plaintiffs entered into a lease for an apartment owned by defendant in 2001. In 2002, plaintiffs filed a complaint against defendant alleging several violations of the Chicago Residential Landlords and Tenants Ordinance. Chicago Municipal Code § 5-12-010 *et seq.* (added Sept. 8, 1986). On October 13, 2004, plaintiffs obtained an *ex parte* default judgment against defendant in the amount of \$14,433.70, which included attorney fees of \$750.

¶ 6 On October 13, 2006, defendant filed a petition pursuant to section 2-1401 of the Code seeking relief from the October 13, 2004, judgment against him. In his petition, defendant alleged that his attorney did not inform him of the judgment, claiming he only learned of it in late October of 2004. Defendant alleged that when he learned of the judgment against him, he

1-10-1645

turned the case over to his attorney with the understanding that his attorney would move to vacate the judgment. Defendant's attorney failed to do so. Defendant claimed that he was seeking redress against his attorney for legal malpractice in a separate action. Defendant attached to his petition his own affidavit attesting to the facts he alleges in his petition, as well as a copy of the judgment entered on October 23, 2004.

¶ 7 The circuit court entered and continued the matter of defendant's section 2-1401 petition until November 29, 2006, in courtroom 1106. On November 29, 2006, the court continued the case until December 20, 2006, to be heard in courtroom 1110. On January 5, 2007, defendant filed a motion to reset his section 2-1401 petition on the court calender. The notice of motion indicated that the motion would be heard before Judge Gorman in courtroom 1110 on January 18, 2007. Defendant, in his motion to reset his petition, alleged that the case had been set for status on December 20, 2006, but that on that date, plaintiff's counsel informed defendant that the matter was not set on the court's December 20, 2006, calender and needed to be "re-spindled." According to defendant's motion, "Plaintiff's counsel agreed to appear to request time to respond on December 20, 2006."

¶ 8 The next two orders in the record were both entered on January 18, 2007. One order transferred the matter to courtroom 1106. The other order, this time entered by Judge Veal, granted defendant's section 2-1401 petition and indicated that only defendant was present in court that day.

¶ 9 On January 24, 2007, plaintiffs moved pursuant to section 2-1301(e) of the Code to vacate the January 18, 2007, order granting defendant's section 2-1401 petition. 735 ILCS 5/2-

1301(e) (West 2008). In their motion, plaintiffs alleged that the parties had agreed that on December 20, 2006, plaintiffs would appear and seek time to respond to defendant's section 2-1401 petition, but that the matter was not on the court's call that day. On January 18, 2007, plaintiffs' counsel appeared in courtroom 1110, but was informed that Judge Gorman recused herself and that the matter had been transferred to courtroom 1106 for reassignment. Plaintiffs' counsel alleged that in courtroom 1106, he spoke to a clerk, who indicated that he had no knowledge of the cause being transferred. Plaintiff's counsel alleged that he did not know that the case had been reassigned to courtroom 1102. Plaintiffs alleged further that they believed that they would be allowed time to respond to defendant's section 2-1401 petition and that they had "valid objections to [d]efendant's 2-1401 petition which should be heard by the [c]ourt."

¶ 10 On February 28, 2007, the circuit court denied plaintiffs' motion to vacate defendant's section 2-1401 petition. In its order, the circuit court also indicated that it was denying plaintiffs' request to file further pleadings to defendant's section 2-1401 petition. The circuit court allowed defendant 21 days to answer plaintiffs' complaint and file a counterclaim. The parties were also given leave to initiate discovery.

¶ 11 On January 25, 2010, plaintiffs filed another motion to vacate the circuit court's order of January 18, 2007, granting defendant's section 2-1401 petition. Unlike their first motion to vacate, which they filed pursuant to section 2-1301(e) of the Code, this time plaintiffs filed their motion pursuant to section 2-1401(f) of the Code alleging that the order of January 18, 2007, granting defendant's section 2-1401 petition was void because defendant failed to file his section 2-1401 petition to vacate within two years of the judgment. Plaintiffs alleged that the judgment

vacated by defendant's section 2-1401 petition was entered on October 13, 2004. Defendant did not file his section 2-1401 petition until October 13, 2006. Plaintiffs relied upon this court's decision in *Irving v. Irving*, 209 Ill. App. 318 (1918), to argue that in computing time by calender year "the calender should be examined and the day numerically corresponding to that day *** is determined and the calender year expires on that day, less one day." According to plaintiffs' computation, in order for defendant's section 2-1401 petition to be timely filed it should have been filed on October 12, 2006, not October 13, 2006, when defendant filed it. Based on the computation, plaintiffs contended defendant's section 2-1401 petition was untimely; and, thus, void. Plaintiffs requested that the court vacate its January 18, 2007, order and reinstate the judgment entered against defendant on October 13, 2004.

¶ 12 The record makes clear defendant was granted time to respond to plaintiffs' second motion to vacate on two separate occasions, but failed to do so.

¶ 13 On May 12, 2010, the circuit court denied plaintiffs' motion to vacate its order of January 18, 2007, which granted defendant's section 2-1401 petition. Plaintiffs timely appealed on June 10, 2010.

¶ 14 ANALYSIS

¶ 15 Before this court, plaintiffs argue the circuit court did not have subject matter jurisdiction to grant defendant's section 2-1401 petition because defendant's petition was not timely and, thus, its order granting defendant's petition on January 18, 2007, is void. Specifically, plaintiffs contend that defendant filed his petition two years and one day after the judgment entered October 13, 2004. Plaintiffs argue section 2-1401© requires parties to file their petitions within

two years of the entry of the order or judgement they seek to vacate. To compute two calendar years, plaintiffs argue that this court should determine the corresponding calendar day, less one day.

¶ 16 We note that defendant did not file a brief in this matter. On July 29, 2011, this court, on its own motion, found that defendant failed to file a brief within the time prescribed by Supreme Court Rule 343(a). Ill. S. Ct. R. 343(a) (eff. July 1, 2008). We ordered that the case be taken for consideration on the record and plaintiffs' brief only.

¶ 17 Section 2-1401 of the Code provides litigants a means of obtaining relief from judgments older than 30 days. 735 ILCS 5/2-1401 (West 2008). Section 2-1401© limits the time in which a litigant may obtain relief stating:

"Except as provided in Section 20b of the Adoption Act and Section 2-32 of the Juvenile Court Act of 1987 or in a petition based upon Section 116-3 of the Code of Criminal Procedure of 1963, *the petition must be filed not later than 2 years after the entry of the order or judgment.* Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years." Emphasis added. 735 ILCS 5/2-1401© (West 2008).

¶ 18 The purpose of section 2-1401 is to establish judgments that are stable and final. *Crowell v. Bilandic*, 81 Ill. 2d 422, 427-28 (1980). A petition under section 2-1401 is not a continuation

of the old proceeding but, rather, a new one. *Sarkissian*, 201 Ill. 2d at 102. The "two-year period of limitations has been *strictly* construed by the courts, and we cannot, even if the circumstances were believed to warrant it, extend this limitation by judicial fiat." (Emphasis added.) *Sidwell v. Sidwell*, 127 Ill. App. 3d 169, 173 (1984); see also *Crowell*, 81 Ill. 2d at 427 ("2-year limitation mandated by [section 2-1401] must be adhered to"); *Cruz v. Columbus-Cuneo-Cabrini Medical Center*, 264 Ill. App. 3d 633, 638 (1994) (the requirements of section 2-1401 are "stringent"). Further, "section 2-1401 does not afford a litigant a remedy whereby he may be relieved of the consequences of his own mistake or negligence." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 222 (1986).

¶ 19 Our supreme court has held that a void order may be challenged at any time because an "order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally." *Sarkissian*, 201 Ill. 2d at 103 (quoting *Barnard v. Michael*, 392 Ill. 130, 135 (1945)); see also *Wierzbicki v. Gleason*, 388 Ill. App. 3d 921, 931 (2009) ("This court has a duty to vacate void judgments ***."). Section 2-1401(f) allows a litigant to challenge a void order or judgment. 735 ILCS 5/2-1401(f) (West 2008); *Sarkissian*, 201 Ill. 2d at 105 ("petitions seeking relief from void judgments are section 2-1401 petitions"). Petitions alleging an order or judgment is void, brought under paragraph (f) of section 2-1401, do not have to be brought within two years of the void order or judgment. *Sarkissian*, 201 Ill. 2d at 104. Unlike typical 2-1401 petitions, petitions brought in this manner do not need to allege a meritorious defense or due diligence. *Id.* Based on the

1-10-1645

procedural posture of this case, our review is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007) ("when a court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, that order will be reviewed, on appeal, *de novo*").

¶ 20 This court has held that "in computing time by the calender year, days are not counted, but the calender is examined and the day numerically corresponding to that day in the following year is ascertained, and the calender year expires on that day, less one." *Irving v. Irving*, 209 Ill. App. 318, 320 (1918). We note that our decision in *Irving* is persuasive authority only, as decisions of the Illinois Appellate Court prior to 1935 are not binding or precedential. *Reichert v. Court of Claims*, 203 Ill. 2d 257, 262 n.1 (2003) ("appellate court decisions issued prior to 1935 are persuasive authority only"). However, in *People ex rel. Sullivan v. Powell*, 35 Ill. 2d 19, 22-23 (1966), our supreme court cited *Irving* approvingly in determining the proper calculation of a six-year term for elected judges. Our supreme court held that "under general principles of statutory construction a six-year term ends on the day preceding the sixth anniversary date of election. If both the original election day and the day of the beginning of the next term were included, the result would be a term of six years and one day." *Id.* at 23.

¶ 21 In this case, defendant has failed to present any good reason or authority for us to deviate from our supreme court's guidance in the correct manner of determining the calculation of a statutory period of years. Defendant sought to vacate the judgment entered against him on October 13, 2004. In order for his petition to be considered timely filed under paragraph © of section 2-1401, defendant needed to file his petition "not later than 2 years after the entry of the *** judgment." 735 ILCS 5/2-1401© (West 2008). We hold that defendant's petition, to be

timely filed, had to have been filed by October 12, 2006, at the latest. This calculation is based on determining the corresponding calendar day two years after the judgment was entered against defendant on October 13, 2004, and subtracting one day according to the method used by this court in *Irving* and by our supreme court in *Powell*. *Irving*, 209 Ill. App. at 320; *Powell*, 35 Ill. 2d at 23. Defendant filed his petition one day late, on October 13, 2006.

¶ 22 The two-year time limitation contained in section 2-1401 is strict and cannot be extended by this court absent a showing of legal disability, duress or that the grounds for relief were fraudulently concealed. *Crowell*, 81 Ill. 2d at 427; 735 ILCS 5/2-1401© (West 2008). None of these were alleged by defendant here. Defendant does not even acknowledge in his petition that it is untimely. He did allege in his petition that the negligence of his attorney caused the original judgment against him. However, this is not a showing of legal disability, duress, or that the grounds for relief were fraudulently concealed such that the two-year time limitation can be extended.¹

¶ 23 We hold that defendant filed his section 2-1401 petition past the two-year time limitation of section 2-1401©. 735 ILCS 5/2-1401© (West 2008). Because the circuit court lacked

¹We note that this court has held that "it is well established that [section 2-1401] does not afford a remedy to a party who has been negligent or whose trial counsel has been negligent." *Illinois Marine Towing Corp. v. Black*, 74 Ill. App. 3d 909, 913 (1979); see also *Smith*, 114 Ill. 2d at 222 ("section 2-1401 does not afford a litigant a remedy whereby he may be relieved of the consequences of his own mistake or negligence"); *People v. Lawton*, 212 Ill. 2d 285, 299-300 (2004) (although addressing a section 2-1401 petition in a criminal case and *dicta*, our supreme court stated, "If this were a conventional civil case in which a litigant sought to collaterally attack a judgment on the grounds that his lawyer was negligent, there would be no question that relief would not lie under section 2-1401").

1-10-1645

jurisdiction to enter an order granting defendant's untimely petition, the order of January 18, 2007, is void. We therefore vacate the circuit court's order entered on January 18, 2007, granting defendant's motion to vacate pursuant to section 2-1401 of the Code. We remand the cause to the circuit court to determine plaintiffs' request for attorney fees in bringing this appeal.

¶ 24

CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Cook County is vacated and the cause remanded.

¶ 26 Order vacated; cause remanded.

REPORTER OF DECISIONS - ILLINOIS APPELLATE COURT

ERIC PARKER AND LYNLEE MUEHRING,

Plaintiffs-Appellants,

v.

MICHAEL MURDOCK,

Defendant-Appellee.

No. 1-10-1645

Appellate Court of Illinois
First District, Second Division

September 13, 2011

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Presiding Justice Cunningham and Justice Connors concurred in the judgment
and opinion.

Appeal from the Circuit Court of Cook County.

The Honorable Pamela Hill Veal, Judge Presiding.

Kendle, Mikuta & Fenstermaker, 221 N. LaSalle Street, Suite 1430, Chicago, IL
60601, (Joan M. Fenstermaker, of counsel), for APPELLANTS.

John P. Quall, 220 S. Halsted Street, 2nd Floor, Chicago, IL 60661, for APPELLEE.
