2021 IL App (1st) 200850

SIXTH DIVISION
Filing Date September 30, 2021

No. 1-20-0850

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LETICIA HERRERA,	)	
	)	Appeal from the
Petitioner-Appellee,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. 06 D 3755
RAFAEL HERRERA,	)	
	)	The Honorable
Respondent-Appellant.	)	Lori Rosen,
	)	Judge, Presiding.

JUSTICE ODEN JOHNSON delivered the judgment of the court, with opinion.
Presiding Justice Pierce and Justice Harris concurred in the judgment and opinion.

OPINION

¶ 1 Following an evidentiary hearing, the circuit court denied motions filed by respondent Rafael Herrera (respondent or Rafael) to modify a judgment of dissolution of marriage, quash an affidavit of service by publication and to vacate a default judgment, all in connection to his dissolution of marriage judgment entered on June 7, 2006. On appeal, Rafael contends that the circuit court erred in: (1) applying *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986), to deny his motion to quash the affidavit for service by publication filed on April 11, 2006, and (2) denying

his motion to reconsider the March 2020 denial of his 2-1401 (735 ILCS 5/2-1401 (West 2018)) petition to modify the dissolution judgment based on promissory estoppel and waiver. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 A. Procedural Background

¶ 4 Petitioner Leticia Herrera (petitioner or Leticia) and Rafael were married in Cook County on October 9, 1993. On January 25, 2006, Leticia filed a petition for order of protection, in which she alleged, among other things, that she resided in Chicago and Rafael resided in Mexico. The circuit court granted Leticia leave to serve Rafael by publication pursuant to sections 2-206 and 2-207 of the Code of Civil Procedure (Code) (735 ILCS 5/2-206, 2-207 (West 2006)). The court subsequently certified the service by publication for the order of protection on February 2, 2006.

¶ 5 The record indicates that Leticia filed for dissolution of marriage in Cook County on April 4, 2006, and was granted leave to serve Rafael by publication on April 10, 2006. The circuit court certified the service by publication for the dissolution of marriage action on April 17, 2006. Rafael did not respond, and Leticia sought a default judgment against him on May 26, 2006, which was granted on June 7, 2006. Pursuant to the dissolution judgment, Leticia was awarded the marital home located in Chicago, and she filed a motion for a judge's deed on July 27, 2006. The hearing on Leticia's motion was continued to August 28, 2006, and Rafael was granted additional time to enter his appearance. On August 28, 2006, Rafael's counsel filed his appearance *instanter*, and he was granted 21 days to respond to Leticia's motion for immediate

sale of the marital home.[1] On April 3, 2007, the parties entered an agreed order that Leticia's motions for a judge's deed and for immediate sale of the marital home were withdrawn, as the property was listed for sale, and the matter was taken off the court's call.

¶ 6 On June 17, 2019, Rafael filed a section 2-1401(f) (735 ILCS 5/2-1401 (West 2018)) petition to modify the judgment for dissolution of marriage that was entered on June 7, 2006. In his petition, Rafael contended that: (1) he was not personally served with process and that service was obtained by publication; (2) he and Leticia lived together as husband and wife prior to January 2006 and again sometime after November 2006 until April 1, 2019; (3) he took temporary employment in Arizona between January and August 2006, and was unaware of the divorce proceedings; (4) at the time the agreed order was entered on April 3, 2007, Leticia failed to inform the court that she and Rafael were living had resumed living together in the marital home; (5) the award of the marital home to Leticia was void; and (6) the award of the marital home to Leticia was waived because she never took any action to enforce the award against him.

¶ 7 Additionally, Rafael argued that the default judgment was void because: (1) he had a meritorious defense, namely that the award left him a pauper as the home was his only asset which he purchased and owned separate from Leticia and he made all of the mortgage payments; (2) his "perceived" lack of due diligence at the time the judgment was entered should be relaxed because he was under a "disability" as Leticia controlled all of the information about the divorce; (3) he did not know his house was awarded to Leticia or that it was listed for sale and thought that he still owned it; (4) it would be unconscionable to allow

[1] The motion for immediate sale of the marital home is not contained in the record.

Leticia to have the house while he had continued to make all mortgage and utility payments until the present time; (5) Leticia could have obtained proper service by asking Rafael for his address in Arizona; (6) Leticia did not tell him about the divorce until two months after the default judgment was entered, even though he returned from Arizona in August 2006; (7) he did not recall speaking to the attorney who filed an appearance in the original action; and (8) alternately, because the court reserved jurisdiction to enforce the award or modify judgment, it should be modified to grant Rafael possession of the marital home that was already titled in his name and was awarded to Leticia based on her misrepresentation and manipulation. Rafael attached an affidavit to support his claims.

¶ 8 Leticia filed a response to Rafael's 2-1401(f) petition on September 18, 2019, denying the allegations of the petition. On September 24, 2019, a hearing was held on Rafael's petition. No report of proceedings or bystander's report was filed with the record on appeal from that hearing. However, the record reflects that an order was entered granting Rafael's motion to modify the June 7, 2006, dissolution judgment and revoking the award of the martial home to Leticia. The order also reserved for the court's consideration the division of all property, including the marital home, and any other financial issues that were stated in the original judgment, and took the case off of the call.

¶ 9 On October 18, 2019, Leticia, by new counsel, filed a motion to reconsider, vacate, and reinstate original judgment. Leticia argued that: (1) Rafael was physically present in court and was represented by counsel at the various court dates related to her motion for judge's deed; (2) his attorney's appearance gave the court *in rem* jurisdiction over the matter and the property as well as personal jurisdiction over Rafael; (3) Rafael did not attack the judgment at any time while the matter was previously pending in 2006 or 2007, nor did he allege fraud, disability or

duress; (4) any knowledge that Rafael now claims regarding her purported fraud was available to him on August 23, 2006; (5) his contentions are untimely as they were not filed within the two-year period required by section 2-1401 (735 ILCS 5/2-1401 (West 2018)); (6) the court lacked jurisdiction beyond the two-year period of 2-1401; (7) she was present at the September 24, 2019, court date but was not allowed to testify and she was not adequately represented by her previous counsel; (8) an evidentiary hearing must be held to grant relief under 2-1401 pursuant to *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986), and (9) no relief under 2-1401 could be granted because more than two years had passed since the entry of judgment.

¶ 10 The circuit court set Leticia's motion to reconsider for hearing on December 3, 2019. Rafael's response was filed on November 21, 2019, and he additionally argued that Leticia did not meet the test of valid service by publication.

¶ 11 On December 2, 2019, Rafael filed a second section 2-1401(f) (735 ILCS 5/2-1401(f) (West Supp. 2019))[2] petition, seeking to quash the affidavit for service by publication and vacate the default dissolution judgment entered in 2006. In his motion, Rafael restated his arguments that he was improperly served by Leticia; that Leticia's affidavit of service failed to strictly comply with section 2-206(a) (735 ILCS 5/2-206(a) (West 2006)), which required a showing of due diligence to locate Rafael; and that his contentions were supported by the parties' daughter's affidavit.

[2] Section 2-1401 was amended, effective June 25, 2019, by P.A. 101-27, § 900-42 and again, effective August 16, 2019, by P.A. 101-411, § 10. The August 16, 2019, amendment was in effect when Rafael filed his second 2-1401(f) petition on December 2, 2019. We note that the amendment did not change the text of subsection (f). We further note that section 2-1401 has since been amended again, by P.A. 102-558 on August 20, 2021.

¶ 12 On December 3, 2019, the circuit court scheduled Leticia's motion to reconsider and Rafael's new section 2-1401(f) petition for hearing on January 16, 2020. Leticia filed a supplemental reply to Rafael's response, arguing that section 2-1401 (735 ILCS 5/2-1401 (West 2018)) did not provide a remedy from the consequences of a litigant's own mistake or negligence. Leticia also filed a motion to strike and dismiss Rafael's motion to quash on December 31, 2019, noting that Rafael's motion acknowledged that an attorney previously filed an appearance on his behalf in the original cause on August 28, 2006. Additionally, Leticia argued that: (1) Rafael's motion sought similar, if not identical relief in the previously filed 2-1401 petition, which was previously granted by the court; (2) Rafael filed an application and affidavit to sue or defend as an indigent person on August 7, 2006, which was granted on August 28, 2006, the same day Rafael's appearance was filed; (3) per his affidavit, Rafael knew of the matter; (4) Rafael waived any right to challenge the court's jurisdiction pursuant to 735 ILCS 5/2-301 (West 2018)); and (5) he was statutorily barred from the relief sought in the motion pursuant to various sections of 2-619 (735 ILS 5/2-619 (1), (4), (5), (9) (West 2018)).

¶ 13 Rafael subsequently filed a reply on January 15, 2020, raising the new argument that Leticia failed to respond to his argument that her failure to strictly comply with section 2-206(a) (735 ILCS 5/2-206(a) (West 2006)), was void *ab initio*.

¶ 14 On January 16, 2020, the circuit court granted Leticia's motion to reconsider and set the matter for an evidentiary hearing on March 10, 2020, on both of Rafael's underlying petitions to modify the dissolution judgment and to quash service. The court's order also barred the parties from changing title to the marital home and indicated that a pretrial conference was

held at the parties' request. The record does not contain a report of proceedings or certified bystander's report for this court date.

¶ 15 B. Evidentiary Hearing

¶ 16 The evidentiary hearing was held on March 10, 2020, and both parties testified in their cases-in-chief through interpreters.

¶ 17 Rafael testified that he was deported to Mexico in 2005. Prior to his deportation, he resided in a house that Leticia purchased in 2000 with money that he gave her. Leticia listed this address as Rafael's last known residence in the affidavit filed with her petition for an order of protection in 2006. He also testified that Leticia visited Mexico in August 2005. On January 14, 2006, Rafael returned to the United States. He did not immediately return to Chicago because Leticia threatened to have him arrested if he returned to the marital home. Rafael did not communicate his address directly to Leticia; however, Leticia knew he was staying with mutual friends in Phoenix, Arizona. He stated that he lived in Arizona for eight months at two different addresses but nevertheless maintained contact with his children. Rafael learned of the divorce in August 2006 from one of his sons after being informed that Leticia was trying to put the house in her name. He filed an appearance and was present in court on August 17, 2006, but did not remember hiring an attorney to represent him. After court, Leticia left the courthouse without speaking to him, explaining what was going on, or providing him with any documentation concerning the divorce. Rafael stated that he was unaware that his appearance in court was part of the divorce proceeding. He also testified that following his appearance on August 17, 2006, he did not sign any papers or meet with any attorneys; any documents bearing his signature from August 17, 2006, until June 17, 2019, when he filed the motion at issue here were not written by him.

¶ 18 Rafael further testified that he resumed living in the marital home in 2007, a little over one and a half years after the divorce was finalized. He was still unaware that he was divorced. At all times between August 17, 2007, and the date of his testimony, he made all payments for the home's mortgage and taxes, including a foreclosure redemption. He and Leticia continued to cohabitate until April 2019, when Leticia had him arrested and removed from the house. That was the first time he saw the divorce papers, which Leticia said showed that she owned the house.

¶ 19 Leticia testified that prior to the divorce in 2006, they were married and lived together in Chicago where the marriage was registered. Rafael was deported to Mexico in 2005. Leticia stated that she went to Mexico in June 2005 for her father's funeral. During that visit, Rafael physically assaulted her, and she stated that she told him that she was divorcing him. She returned to Chicago after obtaining an address in Mexico where Rafael could receive mail. Communication between the parties resumed through the children after Leticia filed an order of protection against Rafael. Leticia testified that during his calls to the children, Rafael threatened her multiple times; during one such call he told Leticia directly, "I'm going to kill you." In April 2006, the week prior to filing for divorce, Leticia learned that Rafael was in Phoenix and was planning to return to Chicago. She stated that she did not talk to Rafael about the divorce because she was afraid for her life at that point. Leticia had an attorney for both the order of protection and the petition for dissolution of marriage, which was granted in June 2006. She further stated that Rafael appeared in court with an attorney in August 2006 to settle the issue of the house. At that time, he lived in Joliet with some of the children. Three years later, at the request of the children, Rafael returned to the marital residence and lived with Leticia and the five children until 2019.

¶ 20 The following documents were admitted into evidence: (1) the parties' marriage certificate; (2) Leticia's affidavit in support of her 2006 petition for an order of protection; (3) Leticia's affidavit of service by publication; (4) Rafael's initial petition to modify the judgment of dissolution of marriage; and (5) correspondence between the parties' attorneys.

¶ 21 At the conclusion of all testimony and closing arguments, the circuit court indicated that it had reviewed both parties' pleadings, read all the cases cited, and conducted its own research into the matter. The court found that the witnesses not only contradicted one another but also contradicted their own testimony. Thus, the circuit court stated that it did not give the parties' testimony much weight and looked primarily at the orders and documents previously filed. The court found that its decision was dependent on the affidavit for service by publication filed on April 11, 2006; namely whether the affidavit was improper on its face or whether Leticia obtained leave to serve by publication based on fraudulent means. The court noted that if the affidavit was facially improper, it would find the affidavit void and unenforceable; on the other hand, if the affidavit was the product of fraudulent behaviors or circumstances, it would find the affidavit voidable.

¶ 22 In reviewing the affidavit, the circuit court noted that it listed Rafael's last known location as Phoenix, Arizona, which the parties agreed was accurate at that time. The court found the parties' agreement sufficient to establish that the affidavit was facially sound. Nevertheless, the court added that Leticia's statement that she was not in contact with Rafael was dubious and opined that Leticia could have done more to obtain Rafael's address in Phoenix and notify him of the dissolution. The court went on to state that, while the affidavit was facially accurate, the situation surrounding its creation could suggest fraud. Nonetheless, the court found that Leticia's actions did not result in undue harm; Rafael still owned the house as title was still in

his name, and Leticia did not gain any property from her actions. As such, the circuit court concluded that the affidavit was voidable.

¶ 23 Based on the aforementioned conclusion, the circuit court found that pursuant to section 2-1401 (735 ILCS 5/2-1401 (West 2018)), Rafael only had two years following the entry of the judgment to challenge it, or to show due diligence for an extension beyond that time to make his challenge. The court found that Rafael's testimony that he was not involved in the divorce proceedings after August 17, 2006, and was unaware of the divorce was not credible. Further, the court noted that Rafael had an attorney of record, and he should have followed up with the attorney to get a better understanding of what was occurring. The court determined that Rafael did not show due diligence in order to extend the time to challenge the judgment, and accordingly the two-year limitations period applied.

¶ 24 The circuit court accordingly denied both of Rafael's petitions, finding that because the affidavit was voidable the judgment could not be challenged using section 2-1401(f) because that section only applied to void judgments. 735 ILCS 5/2-1401(f) (West 2018). The circuit court also found that Rafael's argument, that the award of the marital home to Leticia was waived because she never took any action to enforce the award against him, was irrelevant at that time and was better suited for a situation such as if Leticia were to file a new motion for a judge's deed. Persuaded by the court in *Smith*, the trial court in our case ruled that Rafael's petition and motion were brought outside of the two-year statute of limitations period for bringing a section 2-1401 challenge to a judgment. 114 Ill. 2d 209 (1986). Further, Rafael did not present a meritorious defense or show due diligence in filing the petitions, therefore the late filings could not be excused. *Id.*

¶ 25 On April 9, 2020, Rafael filed a motion to reconsider in which he argued that Leticia was not entitled to relief due to promissory estoppel. In support of his new argument, Rafael cited to the then recent unpublished disposition of this court in *Illinois Dept. of Healthcare and Family Services ex. rel. Green v. Jones*, 2019 IL App (1st) 182352-U, arguing that the case made clear that the equitable doctrine of promissory estoppel would bar a plaintiff from raising a statute of limitations defense to an otherwise time-barred attempt to vacate or quash a previous adjudication. He maintained that the circuit court erred in not applying waiver to Leticia's delay in enforcement of her award, and that the court's discretion allowed it to bar Leticia from raising the two-year statute of limitations under promissory estoppel or laches.

¶ 26 Leticia moved to strike and dismiss Rafael's motion to reconsider on June 4, 2020, arguing that Rafael relied on a non-precedential case and did not support his motion with any new evidence. The circuit court denied Rafael's motion to reconsider on July 20, 2020, after a virtual hearing with both parties represented by counsel.[3] The record does not contain a report of proceedings or certified bystander's report from this hearing. Rafael requested and was granted leave to supplement the record with the transcript of the March 10, 2020, evidentiary hearing by agreed order for purposes of his appeal. Rafael timely filed a notice of appeal on August 5, 2020, seeking review of the circuit court's March 10, 2020, and July 20, 2020, orders.

¶ 27 ANALYSIS

¶ 28 On appeal, Rafael contends that the circuit court erred in: (1) applying *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986), to deny his motion to quash the affidavit for service by publication

[3] A virtual hearing was conducted via Zoom due to the COVID-19 Pandemic.

filed on April 11, 2006, and (2) denying his motion to reconsider the March 2020 denial of his 2-1401 (735 ILCS 5/2-1401 (West 2018)) petition to modify the dissolution judgment based on promissory estoppel and waiver.

¶ 29 A. Denial of Rafael's Motion to Quash Affidavit for Service

¶ 30 Rafael first contends that it was legal error for the circuit court to apply a section 2-1401(c) (735 ILCS 5/2-1401(c) (West 2018)) analysis under *Smith* to his section 2-1401(f) (735 ILCS 5/2-1401(f) (West 2018)) petition because his petition alleged that the default judgment based on constructive service was void *ab initio* pursuant to section 2-206(a) of the Code (735 ILCS 5/2-206(a) (West 2006)). He maintains that our supreme court clarified in *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002) that *Smith* does not apply to a section 2-1401(f) petition which alleges that a judgment or order was void because the allegation of voidness substitutes for and negates the need to allege a meritorious defense and due diligence. Rafael additionally argues that Leticia failed to strictly comply with due inquiry to determine his address in Arizona as required by section 2-206(a) of the Code (735 ILCS 5/2-206(a) (West 2006)), because she failed to provide any evidence that she tried to ascertain his Arizona address. He also asserts that the circuit court's findings support this argument; the court found that Leticia could have been more diligent in attempting to locate Rafael. He concludes that the circuit court's finding that the affidavit was valid and only voidable was an abuse of discretion.

¶ 31 In response, Leticia argues that in order for Rafael to prevail on either of his section 2-1401 motions, he must have filed his petitions no more than two years after the entry of the order or judgment or show that he was under a legal disability or duress or that the ground for relief was fraudulently concealed to excuse the two-year limitations period under section 2-1401(c)

(735 ILCS 5/2-1401 (West 2018)). She contends that the circuit court properly found that Rafael did not file within the two-year period and was not under a legal disability or duress, and the matter was not fraudulently concealed. Leticia further contends that the August 28, 2006, appearance by Rafael's attorney gave the court *in rem* jurisdiction over the dissolution case and the real estate but also personal jurisdiction over Rafael. Leticia notes that at no time while the case was pending in 2006 and 2007 did Rafael attack the judgment, jurisdiction or the service by publication; nor did he allege fraud, disability, or duress. Further, Leticia argues that any knowledge that Rafael now has pertaining to her alleged fraud as alleged in his two petitions he would have had on August 28, 2006, as such alleged fraud occurred prior to that date. Leticia concludes that the circuit court lacked jurisdiction to entertain Rafael's motions, filed more than 13 years after the entry of the dissolution of marriage judgment.

¶ 32 1. Void versus Voidable

¶ 33 Rafael first contends that the default judgment was void, as opposed to voidable, and could be attacked at any time.

¶ 34 Generally, although Rafael had the right to challenge the default judgment on voidness grounds for improper service in the circuit court, he had to file within two years of the judgment, allege a meritorious defense to the original action, and show that the petition was brought with due diligence. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002); *Smith*, 114 Ill. 2d at 221-22. It is well-settled that a judgment entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks 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. A petition seeking post-judgment

relief from a void order can be filed pursuant to section 2-1401 and could also validly be brought outside of the two-year limitations period. *Id.*

¶ 35 Here, Rafael's motion simply represents a collateral request for the court to expunge a void order. Section 2-1401(f) of the Code provides that "nothing contained in [section 2-1401] affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief." 735 ILCS 5/2-1401(f) (West 2018). Contrary to Rafael's claim, paragraph (f) does not itself provide a statutory vehicle for seeking relief from a void order or judgment, but instead simply states the well established rule at common law that a void decree is subject to collateral attack at any time. *JoJan Corp. v. Brent*, 307 Ill. App. 3d 496, 502 (1999). Paragraph (f) further preserves a party's right to seek relief from a void order or judgment by means other than under section 2-1401. *Id.* Instead of originating under any specific provision of the Code, a motion for relief from a void order or judgment arises from the inherent powers of the court to expunge void acts from its record. *Id.*

¶ 36 We must therefore determine whether the original default order was void or voidable. Whether a judgment is void or voidable presents a question of jurisdiction. *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 27. If there is no jurisdiction, any subsequent judgment of the court is rendered void and may be attacked collaterally. *Id.* A void order is a complete nullity from its inception and has no legal effect. *Cushing v. Greyhound Lines, Inc.*, 2012 IL App (1st) 100768, ¶ 103. A voidable judgment, on the other hand, is an erroneous judgment entered by a court that possesses jurisdiction and is not subject to collateral attack. *In re Marriage of Mitchell*, 181 Ill. 2d 169, 174 (1998).

¶ 37 Under Illinois law, a party may challenge a judgment as being void at any time, either directly or collaterally, and the challenge is not subject to forfeiture or other procedural

restraints. *LVNV Funding,* 2015 IL 116129, ¶ 38. However, only the most fundamental defects, i.e., a lack of personal jurisdiction or lack of subject matter jurisdiction warrant declaring a judgment void. *Id.* Once a court has acquired jurisdiction, an order will not be rendered void merely because of an error or impropriety in the issuing court's determination of the law. *Marriage of Mitchell,* 181 Ill. 2d at 174.

¶ 38 Thus, we must determine whether the circuit court had jurisdiction over the matter and Rafael when the default judgment was entered in 2006.

¶ 39 "Subject matter jurisdiction" refers to the power of a court to hear and determine cases of the general class to which the proceeding in question belongs. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002). A circuit court's subject matter jurisdiction is conferred entirely by our state constitution except for its power to review administrative actions, which is conferred by statute. *Id.*; Ill. Const.1970, art. VI, § 9. That jurisdiction extends to all "justiciable matters," (Ill. Const.1970 art. VI, § 9), which has been defined as controversies appropriate for review by the court, in that they are definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests. *Belleville Toyota*, 199 Ill. 2d at 335. There is no dispute that the circuit court had subject matter jurisdiction over the parties' divorce proceedings in 2006. Therefore, we turn to the issue of personal jurisdiction.

¶ 40 Where the trial court held an evidentiary hearing on the issue of personal jurisdiction and made factual findings, we will review any of its relevant factual findings under the manifest weight of the evidence standard. *Madison Miracle Productions, LLC v. MGM Distribution Co.*, 2012 IL App (1st) 112334, ¶ 39. However, the circuit court's legal conclusions- including

its conclusions regarding the legal effect of its own factual findings and its ultimate resolution of the issue of personal jurisdiction – will be reviewed *de novo*. *Id.*

¶ 41 In this case, personal jurisdiction over Rafael was obtained through service by publication, the petition for which was certified by affidavit. The object of service of process is to notify a party of pending litigation and thus secure his presence. *In re Marriage of Wilson,* 150 Ill. App. 3d 885, 887 (1986). Although the usual method is by personal service, the legislature provides for substitute service, such as service by publication, especially for nonresident defendants. *Id.* at 887-88. The use of constructive service demands strict compliance with the statutory requirements. *Id.* at 888. In construing the sufficiency of the notice, courts focus not on " 'whether the notice is formally and technically correct, but whether the object and intent of the law were substantially attained thereby.' " *Id.* (quoting *Fienhold v Babcock*, 275 Ill. 282, 289-90 (1916)).

¶ 42 The requirements for service by publication are set out in section 2-206 of the Code (735 ILCS 5/2-206 (West 2006)). Section 2-206 requires that the party seeking service by publication file an affidavit stating that the person to be served is a nonresident of this State, or has concealed himself within the State, or after due diligence cannot be found. *Id.* Publication shall then be made in a newspaper published in the county in which the action is pending. *Id.* The publication must contain notice of the pendency of the action, the title of the court and of the case, including the names of the first-named plaintiff and defendant, the number of the case, identities of the parties sought to be served and the date after which default may be entered against those parties. *Id.* The clerk shall then mail a copy of the notice to each defendant whose place of residence is stated in such affidavit. *Id.*

¶ 43 Leticia's affidavit for service by publication was filed on April 11, 2006, in which she averred that Rafael was out of state and believed to be temporarily residing in Phoenix, Arizona; and that his true place of residence could not be ascertained on diligent inquiry and his last known place of residence was the marital home. Service in this case was premised on a notice published in the Chicago Daily Law Bulletin on April 13, 20, and 27, 2006.

¶ 44 Here, Rafael contends that the circuit court did not have personal jurisdiction over him when the default dissolution judgment was entered in June 2006 because Leticia's affidavit of service was fraudulent. Leticia, however, contends that the affidavit was not fraudulent and additionally that the circuit court gained personal jurisdiction over defendant when he personally appeared in court and was also represented by counsel in August 2006, a laches argument. As noted above, after the evidentiary hearing, the circuit court found that the affidavit of service by publication was facially sound as both parties agreed that Rafael resided in Arizona at the time the affidavit was filed. The court did, however, note that Leticia could have done more to ascertain Rafael's actual address in Arizona.

¶ 45 Based on our review of the record, we find that Leticia's affidavit of service by publication was not facially invalid. In it, she averred that Rafael was temporarily residing in Arizona at the time, which both parties testified to at the evidentiary hearing, and that she did not know his exact address. Rafael did not testify that Leticia knew his exact whereabouts, only that she could have ascertained them. Whether Leticia could have looked harder for Rafael is not our inquiry; our inquiry is whether the affidavit is correct on its face. We conclude that the affidavit complied with section 2-206 and thus conferred personal jurisdiction over Rafael to the circuit court. Because we have concluded that Leticia's affidavit of service is facially valid and

conferred the court with personal jurisdiction over Rafael, it follows then that the default dissolution judgment was voidable rather than void.

¶ 46 2. Compliance with Section 2-1401

¶ 47 Our conclusion that the affidavit of service was voidable, rather than void, means that the dissolution judgment could not be attacked at any time. Rather, Rafael was required to comply with the requirements of section 2-1401 (735 ILCS 5/2-1401 (West 2018)).

¶ 48 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. It provides a statutory mechanism by which a final judgment may be vacated or modified more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2018). Proceedings under section 2-1401 must be brought no later than two years after the entry of the challenged order or judgment. *Id.* § 2-1401(c). Additionally, section 2-1401 petitions must be "supported by affidavit or other appropriate showing as to matters not of record." *Id.* §2-1401(b).

¶ 49 To be entitled to relief under section 2-1401, the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting that claim or defense in the original action; and (3) due diligence in presenting the section 2-1401 petition. *Cavitt v. Repel*, 2015 IL App (1st) 133382, ¶ 46. Time during which the ground for relief is fraudulently concealed is excluded from the two-year filing requirement. *Id.* To prove fraudulent concealment in a section 2-1401 petition, the petitioner must prove by clear and convincing evidence that the other party intentionally misstated or concealed a material fact which he or

she had a duty to disclose and that the petitioner detrimentally relied on that statement or conduct. *Id*.; *In re Marriage of Himmel*, 285 Ill. App. 3d 145, 148 (1996).

¶ 50 In this case, it is undisputed that Rafael filed his section 2-1401 motion more than 13 years after entry of the default judgment for dissolution of marriage was entered against him. However, he contends that the dissolution judgment was procured by fraudulent means thus excusing his compliance with section 2-1401. We disagree.

¶ 51 Because the ground for relief alleged in Rafael's section 2-1401 petition was fraudulent concealment, the time for filing the petition would have been tolled for more than two years after entry of the June 2006 judgment. *Cavitt*, 2015 IL App (1st) 133382, ¶ 49. However, such tolling period is not without end; it would only be extended until such time as the party had knowledge of a possible basis for vacating the judgment. *Id.*; see also *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 7.

¶ 52 In this case, while acknowledging Rafael's claim that Leticia obtained the dissolution judgment by fraud, the record reveals that he appeared and participated in a proceeding related to the parties' marital home in August 2006, just two months after the dissolution judgment was entered. He was represented by counsel during the proceedings related to the marital home in August 2006, and the record indicates that a subsequent agreed order was entered by the parties in April 2007 related to the marital home. Rafael also testified that he learned of the divorce in August 2006 after one of his children informed him. Additionally, the trial court found that Rafael's contradictory testimony that he was not involved in the divorce proceedings after August 17, 2006, and unaware of the divorce was not credible. The circuit court noted that Rafael had an attorney of record and should have followed up.

¶ 53 Based on the record, we find that the period for filing a section 2-1401 petition was tolled until August 2009, two years after Rafael first became aware of the dissolution judgment. However, Rafael did not file his first section 2-1401 petition until June 2019. We find that Rafael's acts of participating in the case personally and through counsel in both 2006 and 2007, as well as his own testimony that he was aware of the divorce in August 2006 constitute judicial admissions, which dispensed with proof of a fact claimed to be true; accordingly, the issue of whether Rafael knew of the possibility of fraudulent concealment by Leticia was removed from contention. *Cavitt*, 2015 IL App (1st) 133382, ¶ 50. Judicial admissions are formal acts of a party or its attorney in court, "dispensing with proof of a fact claimed to be true and are used as a substitute for legal evidence at trial"; judicial admissions "include admissions in pleadings, as well as admissions in open court, stipulations, and admissions made pursuant to requests to admit." *Dremco, Inc. v. Hartz Construction Co.*, 261 Ill. App. 3d 531, 535-36 (1994). Here because Rafael judicially admitted that he had knowledge of the divorce in August 2006 and thus his claim for fraud, the filing of his section 2-1401 petition more than two years later, on June 17, 2019, was dilatory and time-barred. Thus, his petition was properly denied.

¶ 54 B. Motion to Reconsider

¶ 55 As we have determined that Rafael's section 2-1401 petition was time-barred and properly dismissed, we find it unnecessary to determine whether the circuit court properly denied Rafael's motion to reconsider.

¶ 56 CONCLUSION

¶ 57 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 58 Affirmed.