

No. 1-10-3109

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

YVONNE AVERHART,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	
)	
COOK COUNTY SHERIFF'S DEPARTMENT,)	
MICHAEL SHEAHAN, SHERIFF OF COOK COUNTY,)	No. 03 CH 11854
JAMES P. NALLY, ROBERT F. HOGAN, MICHAEL D.)	
CAREY, ARTHUR R. WADDY, MARYNELL O'GREER,)	
DONALD J. STORINO, BRYON BRAZIER, BRIAN J.)	
RIORDAN, DANIEL J. LYNCH, JEROME F. MARCONI,)	
GEORGE P. CAHILL, COOK COUNTY SHERIFF'S)	
MERIT BOARD, AND COUNTY OF COOK,)	Honorable
)	Mary K. Rochford,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court did not abuse its discretion in denying motion to vacate a prior circuit court order disposing of appellant's administrative review claim, where appellant had previously appealed the order as a final judgment and this court affirmed the judgment of the administrative board in that appeal.

¶ 2 Yvonne Averhart appeals from the circuit court's order denying her motion to vacate a

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March 8, 2007 circuit court order that affirmed a decision by the Cook County Sheriff's Merit Board. The circuit court found that Averhart did not present a convincing argument that the March 8, 2007 order "can or should be vacated," where Averhart had previously appealed the order as a final judgment, and this court affirmed the Merit Board's decision. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 As the circuit court aptly described, the claims in this case have a "protracted history" before several state and federal courts. We will review only the factual and procedural history of the Chancery Division proceedings relevant to the present appeal, while briefly summarizing Averhart's related litigation.

¶ 5 *Initial Proceedings in the Chancery Division*

¶ 6 Yvonne Averhart was employed by the Cook County Department of Corrections as a correctional officer. Following an investigation by the Department of Corrections Internal Affairs Division, the Sheriff of Cook County filed a complaint against Averhart with the Cook County Sheriff's Merit Board on May 30, 2001. The complaint alleged that Averhart had made a false official report to the Internal Affairs Division and had inappropriate contact with inmates. On June 11, 2003, the Merit Board issued an order discharging Averhart from her employment.

¶ 7 On July 16, 2003, Averhart sought reversal of the Merit Board's discharge order in a "Complaint for Administrative Review" filed in the circuit court. After hearings on Averhart's complaint, the circuit court twice remanded the matter to the Merit Board, first to consider the testimony of several witnesses, and second to set forth the underlying facts on which the Merit

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Board based its decision. After the second remand, the Merit Board issued a new decision on April 26, 2006.

¶ 8 *Related Federal Court Proceedings*

¶ 9 Meanwhile, as she was pursuing her administrative review claim in the Chancery Division, Averhart filed two complaints (nos. 01 C 5569 and 02 C 3981) in federal district court against Cook County and the Sheriff of Cook County, alleging that her employer had retaliated against her for exercising her First Amendment rights, in violation of Title VII and § 1983. The two cases were consolidated, and the district court granted summary judgment to defendants on September 10, 2004. In an unpublished November 29, 2005 order, the Seventh Circuit affirmed the district court's finding that defendants had not retaliated against Averhart in violation of her constitutional rights. The Seventh Circuit stated that it was not taking a position on the result of the proceedings before the Merit Board.

¶ 10 On September 2, 2005, Averhart filed another lawsuit in the United States District Court for the Northern District of Illinois, Case No. 05 C 5082, against the Sheriff of Cook County, Cook County, the Merit Board, and its individual members. Averhart brought claims under Title VII, based on race and sex discrimination and retaliation based on the Merit Board's termination of her employment. On March 30, 2006, the district court granted Averhart's motion to voluntarily dismiss the case.

¶ 11 *Conclusion of Chancery Proceedings and Appeal 1-07-1222*

¶ 12 On May 30, 2006,¹ Averhart filed an "Amended Complaint for Administrative Review," adding counts II-VII to her administrative review claim. In these additional counts, Averhart alleged multiple violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and violations of 42 U.S.C. § 1983. Under Title VII, Averhart alleged that she was terminated on account of her race and her sex and in retaliation for filing charges of sexual harassment. The basis for her § 1983 claim is unclear, as there are no factual allegations supporting it. The final count in the amended complaint is for common law retaliation against both the Sheriff of Cook County and the Merit Board.

¶ 13 Averhart was not given leave to file the amended complaint. Averhart filed the amended complaint along with a "Motion for Special Process Server" because Averhart believed that "[s]ervice by the Sheriff of Cook County on [defendants] would be prejudiced." In a circuit court order dated June 23, 2006, the motion to appoint a special process server was withdrawn and Averhart was granted 28 days to file her brief in support of administrative review. After extensions of time for Averhart to file briefs, briefing on the administrative review of the Merit Board's decision was completed on December 4, 2006. Sometime on or before January 18, 2007, the circuit court entered a Memorandum and Order affirming the Merit Board's April 26, 2006 decision. The copy of the Memorandum and Order referenced by the parties in this appeal does

¹ On May 30, 2006, Averhart also filed Case No. 06 L 5608 in the Law Division of the Circuit Court of Cook County against Cook County, the Merit Board, and the individual members of the Merit Board. Averhart's complaint in the Law Division raised the same claims alleged in counts II-VII of the amended complaint filed in this case. The Law Division action was dismissed for want of prosecution on June 18, 2008 and never re-filed.

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not list a date, though a January 18, 2007 order, which sets a hearing schedule for briefing on Averhart's motion to reconsider, references the "Court's ruling affirming the decision of the Sheriff's Merit Board."

¶ 14 Averhart then filed an untimely motion to reconsider on February 16, 2007, simply requesting that the trial court "reconsider its decision." While Averhart never mentioned the amended complaint in her motion to reconsider, she asked the circuit court to clarify that it was not making any finding as to "gender animus" and a "policy of retaliation" because "these issues are the subject of a pending Law Division suit." Averhart's counsel failed to appear on two separate hearing dates for the motion. On March 8, 2007, the trial court denied the motion to reconsider, stating "judgment is entered on the Court's ruling set forth in its Memorandum Opinion."

¶ 15 On April 6, 2007, Averhart simultaneously filed a notice to appeal and a motion to vacate the trial court's order denying the motion to reconsider. The notice of appeal was filed "pursuant to Illinois Supreme Court Rule 303" as to "the Order entered on March 8, 2007, and all prior orders in favor of Defendants." In the thirteen-page motion to vacate, Averhart argued at length that the Merit Board lacked jurisdiction for various "newly discovered" procedural faults, such as the board's membership and the failure to attach a "seal of certification" to the board's order. In the midst of these arguments, Averhart also stated,

"The order of March 8 is unclear, as it purports to resolve all claims as to all parties, but only resolves one count, the Administrative Review count. Thus there is an ambiguity as to whether the order is appealable. The order does not contain

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304(a) language but there is case law that suggests it might be appealable anyway.

Because the order is silent as to Counts II-VII of the Amended Complaint, it is arguably not final and appealable."

The trial court "declined to consider Averhart's motion based on the fact that she filed a Notice of Appeal from the March 8, 2007 order and declined to enter any order with regard to that motion."

¶ 16 In the first appeal, Averhart primarily argued that the Merit Board's findings were against the manifest weight of the evidence. One of the issues presented for review was "[w]hether a remand is required due to lack of jurisdiction of the Merit Board and failure of the trial court to enter a final order that disposed of all claims against all parties." As to this issue, Averhart stated that "the Circuit Court of Cook County dismissed Count I of plaintiff's complaint, which alleges a claim for administrative review. The order was silent as to Counts II-VII of the complaint."

Averhart also filed a motion in the appellate court to vacate the March 8, 2007 circuit court order. The appellate court denied this motion on August 14, 2008. On March 20, 2009, the appellate court entered an order affirming the Merit Board's April 6, 2006 decision. *Averhart v. Cook County Sheriff's Department*, No. 1-07-1222 (2009) (unpublished order under Supreme Court Rule 23). On September 30, 2009, the Illinois Supreme Court denied Averhart's petition for leave to appeal.

¶ 17 *Circuit Court's Denial of Averhart's "Re-Notice of Motion to Vacate"*

¶ 18 On April, 15, 2010, Averhart filed a "Re-Notice of Motion to Vacate Order of March 8, 2007." In substance, this motion is the same as the one filed on April 6, 2007, with multiple pages copied verbatim from the original motion. Averhart again attacked the jurisdiction of the

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Merit Board and claimed that its findings were therefore void. She also questioned whether the March 8, 2007 order was a final appealable order where it did not dispose of counts II-VII of the amended complaint. The circuit court denied Averhart's motion to vacate the March 8, 2007 order. In the present appeal, Averhart again asks this Court to vacate the March 8, 2007 order.

¶ 19 ANALYSIS

¶ 20 Averhart's first, and principal, contention on appeal is that she should now be allowed to litigate counts II-VII of an amended complaint. She argues that the March 8, 2007 order never addressed these counts and was therefore not a final judgment. Defendants counter that Averhart sought review of the March 8, 2007 order in the appellate court as a final judgment, the appellate court exercised jurisdiction over the appeal, and the appellate court's decision affirming the Merit Board's decision ended the litigation. Averhart does not offer a coherent argument as to the effect of the first appeal. It appears that her position is that the appellate court was without jurisdiction because the March 8, 2007 order was not a final judgment, but she also refers to the first appeal as "interlocutory."

¶ 21 Illinois Supreme Court Rule 301 provides that "[e]very final judgment of a circuit court in a civil case is appealable as a matter of right." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). "A final judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties in the lawsuit." *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 232-33 (2005). "A judgment is final if it determines the litigation on the merits so that, if affirmed, nothing remains for the trial court to do but proceed with its execution." *Id.*

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¶ 22 At the outset, we see no indication in the record that Averhart's amended complaint was ever an operative complaint. Section 2-616 of the Code of Civil Procedure provides that at any time before final judgment, amendments to pleadings, including those adding parties or causes of action, "may be allowed on just and reasonable terms." 735 ILCS 5/2-616 (West 2002). "[A] party's right to amend a pleading is not absolute or unlimited [citations], and it has been generally held that a party is required to obtain the court's permission to file an amendment [citations]." *Johnson v. Ingalls Memorial Hospital*, 402 Ill. App. 3d 830, 839 (2010). While this court has held that failure to obtain leave to file an amended complaint does not deprive the trial court of jurisdiction over the amended complaint, "the failure to obtain leave of court to amend a complaint is a procedural deficiency." *Id.*

¶ 23 Averhart concedes that she did not seek leave to file the amended complaint. (Although Averhart provides a record citation to a trial court order that purportedly indicated that leave to file her amended complaint was not necessary, the order says nothing to that effect.) While Averhart's failure to seek leave to file the amended complaint is without question a procedural deficiency, Averhart exacerbated this procedural failure when she did not seek a ruling allowing her to file an amended complaint or otherwise clarify the status of the amended complaint prior to filing her appeal. This court has held that a party abandons a motion for leave to amend her complaint by filing a notice of appeal without first ensuring that the trial court ruled on the motion to amend. See *Jackson v. Alvarez*, 358 Ill. App. 3d 555, 563-64 (2005) (finding that appellate court need not address motion where party abandoned it); see also *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 432-33 (2007) ("Plaintiff's failure to obtain a ruling

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from the trial court on his motion for a default judgment prior to filing his notice of appeal resulted in his abandonment of the motion and created a procedural default of any issue related to that motion for the purpose of appeal. We thus need not address this issue on appeal."). Here, Averhart never sought leave to file the amended complaint, and she did nothing to address the amended complaint before filing an appeal addressing the court's resolution of her original complaint. Averhart therefore abandoned the amended complaint, treating the March 8, 2007 order as a final judgment ending the litigation.

¶ 24 We also note that we cannot determine from the record whether the amended complaint was ever properly served on defendants. Setting aside the issue of service, defendants never answered or filed a responsive pleading to the amended complaint. The circuit court's memorandum order affirming the Merit Board's decision refers to "Averhart's Complaint for Administrative Review" but does not mention the amended complaint. The actions of the parties and the court indicate that the complaint was never operative.

¶ 25 Beyond her actions in the circuit court, none of Averhart's filings in her first appeal reveals a sincere attempt to raise a challenge to the finality of the March 8, 2007 order. Averhart filed the first appeal "pursuant to Illinois Supreme Court Rule 303," which sets out the rules for appeals from final judgments of the circuit court in civil cases. See Ill. S. Ct. R. 303 (eff. June 4, 2008); see also Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). She specifically requested "that the reviewing court reverse said order and remand with directions to reverse and vacate the decision of the Sheriff's Merit Board and award full back pay."

¶ 26 There is no question that Averhart sought review of the merits of the March 8, 2007

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order, presenting nearly fifty pages of argument to the appellate court as to why the circuit court was wrong to affirm the Merit Board's decision. But a review of the briefs in that appeal (which Averhart did not provide to the court as part of this appeal) reveals that Averhart failed to present any coherent argument that the circuit court's decision was not a final order. We acknowledge that one of the issues Averhart purportedly presented for review was "[w]hether a remand is required due to lack of jurisdiction of the Merit Board and failure of the trial court to enter a final order that disposed of all claims against all parties." As to the trial court's alleged failure to enter a final order, however, Averhart only stated that "the Circuit Court of Cook County dismissed Count I of plaintiff's complaint, which alleges a claim for administrative review. The order was silent as to Counts II-VII of the complaint." Averhart did not include any citations to the record regarding the amended complaint, provide any detail about the nature of counts II-VII of the amended complaint, or explain why the amended complaint was the operative pleading. Supreme Court Rule 341(h)(6) and (7) require appropriate reference to the pages of the record relied upon. Ill. S. Ct. R. 341 (eff. July 1, 2008); see also *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001) ("It is well established that this court is not required to search the record to determine what legal issues are involved in an appeal."). Averhart also failed to cite any relevant court rules or authority regarding the appeals of final judgments. See Ill. S. Ct. R. 341(h)(7) (requiring "citation of the authorities" relied upon and providing that "[p]oints not argued are waived"); see also *People v. Ward*, 215 Ill. 2d 317, 332 (2005) (declining to consider point raised in brief but not supported by citation to relevant authority). We note that in the first appeal, this court was troubled by several "deficiencies in the

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appellant's brief," including the absence of a factual background or "any attempt to provide this court with even a rudimentary understanding of the case." *Averhart v. Cook County Sheriff's Department*, No. 1-07-1222 (2009), at 2 (unpublished order under Supreme Court Rule 23). This court also noted that the appellant's brief "lacks many citations where required or needed," with "a great number of the citations to the record *** incorrect and point[ing] to completely unrelated material." *Id.* at 3. Where Averhart represented to this court in the notice of appeal that she was appealing from a final judgment, it was essential for Averhart to coherently argue and provide support for her claim that the March 8, 2007 order was not final.

¶ 27 Averhart also claims that, beyond her briefs on appeal, she challenged the finality of the circuit court's March 8, 2007 order in a separate motion to vacate filed with the appellate court. Averhart did not include this motion in the appendix, she did not provide a record citation, and her motion to vacate filed with the appellate court is apparently not part of the record in this appeal. In addition to the Illinois Supreme Court Rules mentioned above, Averhart has not complied with Illinois Supreme Court Rule 342(a), which requires that the appellant include in the appendix "any pleadings or other materials from the record which are the basis of the appeal or pertinent to it." Ill. S. Ct. R. 342(a) (eff. January 1, 2005). As an appellant, Averhart also has the burden to present a sufficiently complete record of the proceedings to support a claim of error, and, in the absence of such a record on appeal, this court will presume the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). While Averhart's failure to comply with the rules and provide any support for her claim is enough for us to reject her argument, there are additional

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reasons to reject Averhart's claim regarding the substance of the motion. We have located in the record defendants' response to Averhart's motion to vacate as well as the appellate court's order denying the motion. Defendants' response addresses only the jurisdiction of the Merit Board, not the finality of the March 8, 2007 order. Moreover, the appellate court's order denying Averhart's motion describes her motion as one seeking to "vacate the order of March 8, 2007 and the merit board's order of April 26, 2006 *** as void for lack of jurisdiction."

¶ 28 We conclude that in the previous appeal, Averhart did not pursue the issue of whether the March 8, 2007 order was a final judgment. She therefore forfeited review of this issue in the first appeal. See *Ward*, 215 Ill. 2d at 332; *Madden v. Paschen*, 395 Ill. App. 3d 362, 389 (2009). We acknowledge the appellate court was free to dismiss the appeal for lack of jurisdiction without any party raising the issue. See, e.g., *Lamar Whiteco Outdoor Corp. v. City of West Chicago*, 395 Ill. App. 3d 501, 504-05 (2009). But where Averhart abandoned the new counts raised in the amended complaint by failing to pursue them the trial court before filing the notice of appeal, the appellate court did have jurisdiction over the appeal. The March 8, 2007 order was thus a final judgment that "fixed absolutely and finally the rights of the parties in the lawsuit." *Big Sky Excavating*, 217 Ill. 2d at 232. Averhart is trying to "have her cake and eat it too": she invoked the jurisdiction of the appellate court by treating the March 8, 2007 order as a final judgment, but after an unsuccessful appeal, she now claims either that the appellate court did not have jurisdiction over the appeal or that her appeal was actually an interlocutory appeal. After the appellate court affirmed the March 8, 2007 order, "nothing remain[ed] for the trial court to do but proceed with its execution." *Id.*

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¶ 29 We also find no merit in Averhart's next claim that her first appeal was filed "pursuant to the collateral order doctrine." The collateral order doctrine is a federal doctrine that allows parties to appeal prejudgment orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, [where the prejudgment orders are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *In re Estate of French*, 166 Ill. 2d 95, 103-04 (1995) (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). Averhart describes the appeal as a "precautionary measure given such case law such as *Cunningham v. Brown*, 22 Ill. 2d 23 [1961], which suggests certain sufficiently discrete matters may be appealable under the collateral order doctrine."

¶ 30 There are several problems with Averhart's reliance on the collateral order doctrine. First, contrary to the single case cited by Averhart, Illinois courts have repeatedly refused to expand their jurisdiction through recognition of the collateral order doctrine, in light of the Illinois Supreme Court's clear command that "jurisdiction is limited to appeals from final judgments except in limited situations created by a supreme court rule, statute, or constitution." *In re Olivia C.*, 371 Ill. App. 3d 473, 476 (2007) (citing *People v. Miller*, 35 Ill.2d 62, 67 (2007)); see also *Stein v. Krislov*, 405 Ill. App. 3d 538, 544 (2010) ("It is beyond our authority to adopt the federal collateral order doctrine where no such doctrine exists under Illinois law and no Illinois courts have done so in the 60 years since the doctrine was pronounced."); *In re Estate of French*, 166 Ill. 2d 95, 103 (1995) ("[W]e need not and do not reach the question of whether this court should adopt the Federal collateral order doctrine under Illinois civil practice rules."). Third, to come

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within the collateral order doctrine, the prejudgment order must be "effectively unreviewable on appeal from a final judgment." *In re Estate of French*, 166 Ill. 2d at 103 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Assuming that the trial court's March 8, 2007 order affirming the administrative decision was not a final judgment itself, the decision affirming the Merit Board's decision was reviewable on a later appeal from a final judgment. Finally, Averhart never claimed to invoke jurisdiction under the "collateral order doctrine" in any of the filings in the previous appeal. As explained above, Averhart filed the appeal pursuant to Illinois Supreme Court Rule 303, asking for review of a final order.

¶ 31 Averhart finally argues that the circuit court's March 8, 2007 order must be vacated because the Merit Board lacked jurisdiction over her complaint. The appellate court rejected this argument in denying a motion by Averhart filed in the first appeal. Averhart is therefore prohibited from litigating this issue again, based on the law of the case doctrine. See *Maniez v. Citibank, F.S.B.*, 404 Ill. App. 3d 941, 958 (2010) ("Under the law of the case doctrine, parties may not relitigate issues previously decided in the same case" unless "a higher court makes a contrary ruling on the same issue subsequent to the lower court's decision" or "a reviewing court finds that its prior decision was palpably erroneous.").

¶ 32 We agree with the circuit court that Averhart could not seek to vacate the March 8, 2007 order because that order was a final judgment and this court has already affirmed the decision of the Merit Board. We therefore need not address defendants' arguments that, in light of the decisions in Averhart's federal cases, the claims raised in Counts II-VII are barred by *res judicata*, nor do we address defendants' other arguments as to why Counts II-VII are otherwise

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not viable. We deny defendants' request to impose sanctions on Averhart or her counsel for filing a frivolous appeal in violation of Illinois Supreme Court Rule 375(b) (Ill. S. Ct. R. 375 (eff. Feb. 1, 1994)).

¶ 33 CONCLUSION

¶ 34 For the reasons set forth above, we conclude that the circuit court did not abuse its discretion in denying the motion to vacate the March 8, 2007 order.

¶ 35 Affirmed.