

No. 1-10-3025

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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STANLEY BRZOZOWSKI,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 10 L 5009
	)	
PIOTR W. ZDRZALKA,	)	
	)	Honorable
Defendant-Appellee.	)	Drella Savage,
	)	Judge Presiding.

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JUSTICE KARNEZIS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

*HELD:* The circuit court properly dismissed plaintiff's complaint for malicious prosecution where plaintiff filed his complaint beyond the statute of limitations for his action and had previously used his right to refile under section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217 (West 2008)).

ORDER

This appeal arises from an order of the circuit court dismissing plaintiff Stanley Brzozowski's malicious prosecution complaint against defendant Piotr Zdrzalka pursuant to sections 2-619 and 2-615 of the Illinois Code of Civil Procedure (735 ILCS

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5/1 *et seq.* (West 2008)) (the Code). Plaintiff argues the court erred in dismissing his complaint because (1) section 13-217 of the Code (735 ILCS 5/13-217 (West 2008)) saved it from being time barred and (2) his complaint stated sufficient facts to support his claim. We affirm.

### Background

On April 29, 2010, plaintiff filed a complaint for malicious prosecution against defendant. Plaintiff alleged defendant had caused him to be wrongfully arrested for aggravated assault and incarcerated in February 2006 by falsely claiming he pointed a gun at defendant and threatened defendant. Plaintiff stated the criminal case against him had been dismissed on June 9, 2007. He claimed he suffered injuries in excess of \$50,000 as a result of his wrongful lengthy incarceration. Plaintiff stated he was filing his action pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 2008)) because his previous complaint had been dismissed for want of prosecution on May 7, 2009. Section 13-217, also known as the saving statute, permits the refiling of certain dismissed actions within one year of dismissal, whether or not the statute of limitations for the actions has expired. 735 ILCS 5/13-217 (West 2008)); *Jain v. Johnson*, 398 Ill. App. 3d 135, 136, 138 (2010).

Plaintiff had first filed a *pro se* malicious prosecution complaint against defendant and defendant's wife in the United States District Court, Northern District of Illinois, on November 2, 2007. On the defendants' motion, the district court dismissed the complaint for lack of jurisdiction on January 3, 2008. Plaintiff had next filed a *pro se*

malicious prosecution complaint against defendant and his wife in the Circuit Court of Cook County on January 18, 2008. On the defendants' motion, the court dismissed that complaint without prejudice on March 28, 2008. On May 23, 2008, plaintiff filed a *pro se* amended complaint, which the court dismissed without prejudice on June 13, 2008. On September 9, 2008, plaintiff filed a *pro se* second amended complaint, which the court dismissed without prejudice on January 7, 2009. On March 5, 2009, plaintiff filed a third amended complaint against defendant only, which the court dismissed for want of prosecution on May 7, 2009.<sup>1</sup> Plaintiff then filed another complaint against defendant on April 29, 2010, the complaint at issue here.<sup>2</sup>

Defendant filed a combined motion to strike and dismiss plaintiff's complaint

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<sup>1</sup> Plaintiff's brief states the court dismissed his case for want of prosecution on March 27, 2009. However, both plaintiff's complaint and defendant's motion to dismiss state the date of dismissal as May 7, 2009, so we will use this date.

<sup>2</sup> This recitation of plaintiff's previous filings and the attendant dispositions is taken from plaintiff's brief on appeal. The record does not contain copies of plaintiff's previous filings nor of the dispositions. Although both parties have included copies of plaintiff's previous complaints and a few of the courts' orders in their respective appendices, the record on appeal cannot be supplemented by attaching documents to a brief or including them in an appendix. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 326 (2008). These submissions, therefore, are not properly before this court and we cannot consider them. *Compton*, 382 Ill. App. 3d at 326. As the appellant, it is plaintiff's burden to present a sufficiently complete record to support his arguments and any inadequacies in the record will be held against him. *Redelmann v. K.A. Steel Chemicals, Inc.*, 377 Ill. App.3d 971, 977 (2007). Here, this means that we have no way of verifying that plaintiff's litany of prior events is accurate. However, since defendant's motion to dismiss and its brief on appeal both recite essentially the same version of events as plaintiff sets forth, we will accept it as sufficient for our purposes.

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pursuant to sections 2-619(a)(9) and 2-615(a) of the Code (735 ILCS 5/2-619(a)(9), 615(a) (West 2008)). He argued the complaint was barred by section 2-619(a)(9) because the statute of limitations for malicious prosecution actions had run and the action could not be saved by the savings statute because plaintiff had already refiled his case once before. He also argued the complaint should be dismissed pursuant to section 2-615(a) for failure to state a claim upon which relief could be granted.

The court granted defendant's 2-619 motion to dismiss and his 2-615 motion to dismiss on September 13, 2010, and dismissed the case with prejudice. Plaintiff filed his notice of appeal with the circuit court on October 8, 2010.

#### Analysis

Plaintiff first argues the court erred in dismissing his malicious prosecution complaint against defendant with prejudice pursuant to section 2-619(a)(9) of the Code. Defendant had argued that plaintiff's April 29, 2010, complaint was time barred because the two-year statute of limitations for plaintiff's malicious prosecution action had expired in June 2009 and the complaint could not be saved by the refiling rule stated in section 13-217 of the Code.

A claim may be dismissed pursuant to section 2-619(a)(9) if it "is barred by other affirmative matter avoiding the legal effect of or defeating it." 735 ILCS 5/2-619(a)(9) (West 2008); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). A statute of limitations defense is an affirmative defense properly pleaded in a motion to dismiss pursuant to section 2-619. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill.

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App. 3d 446, 456, 845 N.E.2d 792, 802 (2006). In reviewing a section 2-619 motion, we accept all properly pleaded facts as true and are concerned only with the question of law presented by the pleadings. *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169, 174 (2004). Accordingly, we review a section 2-619 dismissal *de novo*. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993).

There is no question that plaintiff filed the malicious prosecution complaint at bar after the statute of limitations for the action had expired. An action for malicious prosecution must be commenced within two years after the cause of action accrues. 735 ILCS 5/13-202 (West 2008). A cause of action for malicious prosecution accrues on the date that the criminal proceeding on which it is based has been terminated in the plaintiff's favor. *Ferguson v. City of Chicago*, 213 Ill.2d 94, 99 (2004). Plaintiff's complaint states that the criminal proceeding against him, which was allegedly initiated as a result of defendant's untrue charges, was dismissed in his favor on June 9, 2007. Plaintiff's complaint for malicious prosecution against defendant based on the false charges should, therefore, have been filed by June 9, 2009. It was not. Plaintiff filed the complaint on April 29, 2010, beyond the statute of limitations for the claim. It was, therefore, time barred.

Plaintiff argues, however, that his complaint was not time barred because he filed it pursuant to section 13-217 of the Code. Section 13-217, the savings statute, provides in relevant part:

"In the actions \*\*\* where the time for commencing an action is limited, if \*\*\* the

action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, \*\*\* then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff \*\*\* may commence a new action within one year or within the remaining period of limitation, whichever is greater, after \*\*\* the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction.” 735 ILCS 5/13-217 (West 2008).<sup>3</sup>

Under section 13-217, if an action was timely filed at its inception, it may be refiled within one year after a dismissal on one of the bases enumerated in the statute, even if the statute of limitations for the claim has since expired. *Jain*, 398 Ill. App. 3d at 138. Plaintiff asserts that, because his previous timely complaint was dismissed for want of prosecution by the circuit court on May 7, 2009, he had until May 7, 2010, to refile and his April 2010 complaint was, therefore, timely.

Section 13-217 provides a plaintiff with the absolute right to refile his complaint within one year or within the remaining period of limitations, whichever is greater. *Timberlake v. Illini Hospital*, 175 Ill.2d 159, 163 (1997). And, as plaintiff suggests,

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<sup>3</sup> “This version of section 13-217 preceded the amendments of Public Act 89-7, § 15, eff. March 9, 1995. [Our supreme court] found Public Act 89-7 unconstitutional in its entirety in *Best v. Taylor Machine Works*, 179 Ill.2d 367, 228 Ill.Dec. 636, 689 N.E.2d 1057 (1997). The version of section 13-217 currently in effect is, therefore, the version that preceded the amendments of Public Act 89-7.” *Hudson v. City of Chicago*, 228 Ill.2d 462, 469 (2008).

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dismissal for want of prosecution is indeed one of the bases for refiling enumerated in section 13-217. However, section 13-217 was not intended to permit multiple refilings of the same action. *Timberlake*, 175 Ill.2d at 163. Rather, it permits only one refiling, even where the applicable statute of limitations has not yet expired for an action.

*Timberlake*, 175 Ill.2d at 163 (citing *Flesner v. Youngs Development Co.*, 145 Ill.2d 252, 254 (1991)). Plaintiff had already used his single opportunity to refile his malicious prosecution claim by the time he filed the claim at bar.

Plaintiff's first malicious prosecution complaint against defendant, filed within the statute of limitations, was dismissed for lack of jurisdiction by the United States district court on January 3, 2008. Dismissal for lack of jurisdiction by a federal district court is one of the enumerated dispositions that is covered by section 13-217. Pursuant to section 13-217, therefore, plaintiff could commence a new action on the same basis within one year of the district court's dismissal (thus by January 3, 2009) or within the remaining limitations period (by June 7, 2009), whichever was greater. 735 ILCS 5/13-217 (West 2008). He did timely refile, filing a malicious prosecution complaint on the same basis against defendant in the circuit court on January 18, 2008. When that complaint was dismissed for want of prosecution, he attempted to file the complaint at issue here on April 29, 2010.

But, after the United States district court dismissed plaintiff's suit for lack of jurisdiction, section 13-217 permitted plaintiff 'one, and only one,' refiling of his action, even if the applicable statute of limitations had not expired. *Flesner*, 145 Ill.2d at 254;

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*Hurst v. Capital Cities Media, Inc.*, 323 Ill. App. 3d 812, 822 (2001). Plaintiff used his single opportunity to refile his claim on January 18, 2008, when he refiled his complaint against defendant in the circuit court after the federal court had dismissed it for lack of jurisdiction. He cannot refile the same complaint a second time after the complaint has already been dismissed twice before. The savings statute does not operate to save plaintiff's untimely complaint and the court, therefore, did not err in dismissing plaintiff's complaint as time-barred pursuant to section 2-619(a)(9).

Because we find the court properly dismissed plaintiff's complaint as untimely pursuant to section 2-619, we need not consider plaintiff's argument that the court erred in dismissing his complaint pursuant to section 2-615.

Affirmed.