

No. 1-11-0394

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

DIVERSIFIED TELECOMMUNICATIONS, INC.,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 10CH22201
)	
MARTIN A. LIEBERMAN,)	The Honorable
)	Sophia Hall,
Defendant-Appellee.)	Judge Presiding.

Justice James Fitzgerald Smith delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concur in the judgment.

Held: Judgment affirmed; Appellant had no "absolute right" to refile complaint which was previously dismissed pursuant to Rule 103(b) for lack of diligence.

¶ 1 ORDER

¶ 2 Appellant Diversified Telecommunications, Inc. appeals from a judgment of the circuit court of Cook County dismissing its re-filed complaint for judgment on arbitration award as to appellee Martin A. Lieberman pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2008)). We affirm.

¶ 3

BACKGROUND

¶ 4 Diversified's complaint seeks judgment on an arbitration award that was entered against Lieberman in 2002. Diversified's original complaint was dismissed pursuant to Illinois Supreme Court Rule 103(b) with prejudice by the trial court in January 2009. We affirmed the dismissal and modified it to a dismissal without prejudice. *Diversified Telecommunications, Inc. v. Lieberman*, No. 1-09-0765 (2010) (unpublished order under Supreme Court Rule 23).

Diversified filed the instant re-filed complaint in May 2010, and the trial court again dismissed the complaint in October 2010.

¶ 5 The circumstances leading up to the January 2009 dismissal of the previous complaint for judgment on award are contained in this court's January 2010 decision. We include here only those facts pertinent to this appeal.

¶ 6 An arbitration award in favor of Diversified and against Lieberman was entered in October 2002. In February 2004, Diversified filed a "complaint for judgment on award," alleging that defendant had failed to pay the arbitration award. Also in February 2004, a summons was issued for defendant and returned "not served." Between February 2005 and August 2006, multiple alias summons were issued for defendant.¹

¶ 7 In September 2006, plaintiff's process server allegedly served an alias summons on defendant by leaving a copy of the complaint and summons with a woman named Jill Lieberman. While Ms. Lieberman shares a surname with the appellee here, she apparently is not related to

¹Meanwhile, in June 2003, defendant filed a lawsuit against Crystal Communications, LLC, seeking indemnification for any liability pursuant to the arbitration award. The Crystal lawsuit was dismissed in November 2007.

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the appellee, has never been married to him, and has never lived with him. The appellee has never lived at the address at which the process server served Ms. Lieberman.

¶ 8 In January 2007, the underlying cause was dismissed for want of prosecution. Diversified's motion to vacate the dismissal was denied in June 2008. Three days later, however, this cause was reinstated and the motion to vacate the dismissal was granted. In August 2008, a default judgment was entered against Lieberman. Diversified immediately thereafter sent notice of the default judgment to appellee Lieberman's correct address.

¶ 9 In September 2008, Lieberman filed a motion to quash service, vacate default, and to dismiss himself from the case. The trial court granted the motion to quash service, granted the motion to vacate the default judgment, and granted the motion to dismiss the case with prejudice. The court found that Diversified had not diligently sought service on Lieberman. Diversified's motion to reconsider was denied in February 2009, and Diversified appealed the circuit court's decision.

¶ 10 On appeal, we affirmed the circuit court's decision to dismiss the case for lack of diligence. *Diversified Telecommunications, Inc. v. Lieberman*, No. 1-09-0765 (2010) (unpublished order under Supreme Court Rule 23). However, we modified the decision to a dismissal without prejudice² because, according to Rule 103(b):

"If the plaintiff fails to exercise reasonable diligence to obtain service on a defendant prior to the expiration of the applicable

²We noted in our decision that, from the record on appeal, we were unable to ascertain the trial court's reasoning as to why the dismissal was with prejudice.

statute of limitations, the action as to that defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice as to that defendant only." Supreme Court Rule 103(b).

We found that, as of September 1, 2006, when the process server's affidavit stated that the summons was returned "served" by substitute service, Diversified had a reasonable belief that it had obtained service. Since such service was reasonably believed to have been effected within the five year statute of limitations from the October 2, 2002, arbitration award, pursuant to Rule 103(b), the dismissal should have been without prejudice. *Diversified Telecommunications, Inc. v. Lieberman*, No. 1-09-0765 (2010) (unpublished order under Supreme Court Rule 23).

¶ 11 Then, Diversified re-filed his complaint in May 2010. In response, Lieberman filed a motion to dismiss the complaint, which is the motion at issue here. Lieberman based his motion on sections 2-619(a)(2), (4), and (5), and argued that the complaint was filed after the expiration of the five-year statute of limitations applicable to actions on awards of arbitration.

¶ 12 The trial court granted Lieberman's motion to dismiss. Diversified appeals.

¶ 13 ANALYSIS

¶ 14 Diversified contends that the trial court erred in dismissing his complaint where he had an "absolute right" to refile his complaint under Rule 103(b) and/or pursuant to section 13-217 of

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the Code of Civil Procedure (735 ILCS 5/13-217 (West 2010) (hereinafter the savings statute)). Specifically, Diversified argues that, because we modified the previous dismissal to a dismissal without prejudice, we "implicitly held that Rule 103(b), and/or [the savings statute] gave Diversified the right to re-file this matter;" that the "remedial nature" of the savings statute permits re-filing; and that a dismissal without prejudice is identical to a dismissal for want of prosecution for purposes of re-filing this case. We disagree.

¶ 15 A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's complaint but asserts affirmative defenses or other matter that avoids or defeats the plaintiff's claim. DeLuna v. Burciaga, 223 Ill. 2d 49, 59 (2006). An "[a]ffirmative matter" is something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." Golden v. Mullen, 295 Ill. App. 3d 865, 869 (1997). All properly pleaded facts are accepted as true and a reviewing court is concerned only with the question of law presented by the pleadings. Thornton v. Shah, 333 Ill. App. 3d 1011, 1019 (2002). Rulings on section 2-619 motions are reviewed *de novo*. DeLuna, 223 Ill. 2d at 59.

¶ 16 Section 13-205 of the Code of Civil Procedure requires, in relevant part, that actions on awards of arbitration "shall be commenced within five years next after the cause of action accrued." 735 ILCS 5/13-205 (West 2010).

¶ 17 Rule 103(b) states, in relevant part:

"Dismissal for Lack of Diligence. If the plaintiff fails to exercise reasonable diligence to obtain service on a defendant prior to the

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expiration of the applicable statute of limitations, the action as to that defendant may be dismissed without prejudice."

¶ 18 Pursuant to the savings statute:

"In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is reversed or entered against the plaintiff, or after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District

Court for improper venue." 735 ILCS 5/13-217 (West 2010).

¶ 19 This case can only be "saved" if Diversified can show that a dismissal for lack of diligence fits within the statute. See *DeClerck v. Simpson*, 143 Ill. 2d 489, 495 (1991), quoting *Conner v. Copley Press, Inc.*, 99 Ill. 2d 382, 385 (1984) (" '[The savings statute] thus allows a plaintiff, whose original action has been dismissed on specified grounds, to file an action again though the statute of limitations has run. If the dismissal was on one of the specified grounds, the statute provides, in effect, a new limitations period which will extend at least one year from the date of the dismissal' ").

¶ 20 The savings statute enumerates six specific situations which could allow a plaintiff to refile a dismissed lawsuit where: (1) judgment is entered for the plaintiff but reversed on appeal; (2) there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff; (3) the action is voluntarily dismissed by the plaintiff; (4) the action is dismissed for want of prosecution; (5) the action is dismissed by a United States District Court for lack of jurisdiction; or (6) the action is dismissed by a United States District Court for improper venue. 735 ILCS 5/13-217 (West 2010). None of these situations apply to the case at bar, where Diversified's cause of action was dismissed pursuant to Rule 103(b) for lack of diligence, which is not one of the aforementioned reasons. Accordingly, because dismissal for lack of diligence is not among the enumerated six, the savings statute does not apply to this case.

¶ 21 Diversified argues that the comments to Rule 103 demonstrate that the savings statute applies here to authorize the filing of its complaint after the running of the statute of limitations.

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The comments to Rule 103 state, in relevant part:

"Further, the last sentence of Rule 103(b) addresses situations where the plaintiff has refiled a complaint under section 13-217 of the Code of Civil Procedure within one year of the case either being voluntarily dismissed pursuant to section 2-1009 or being dismissed for want of prosecution. If the statute of limitations has run prior to the plaintiff's refiled complaint, the trial court has the discretion to dismiss the refiled case if the plaintiff failed to exercise reasonable diligence in obtaining service."

The last sentence to Rule 103(b), to which the comment refers, states:

"In considering the exercise of reasonable diligence, the court shall review the totality of the circumstances, including both lack of reasonable diligence in any previous case voluntarily dismissed or dismissed for want of prosecution, and the exercise of reasonable diligence in obtaining service in any case refiled under section 13-217 of the Code of Civil Procedure."

¶ 22 Diversified's attempt to broaden the scope of the savings statute is unpersuasive. The categories of cases where the savings statute applies have been interpreted narrowly. See *DeClerck*, 143 Ill. 2d at 495 (the savings statute is "very specific and clear"). The comments to Rule 103(b) on which Diversified relies address only a case refiled after a voluntary dismissal or a dismissal for want of prosecution. These comments in no way modify the final sentence of

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Rule 103(b) which, in reference to the savings statute, only addresses those dismissals specifically covered by the savings statute: voluntary dismissals or dismissals for want of prosecution. Dismissals pursuant to Rule 103(b), such as the one at issue here, are not addressed by the savings statute.

¶ 23 Lieberman posits that he is put in a position with no solution, as "what would be the point of a dismissal without prejudice if the case could not be re-filed after the statute of limitations?" However, our purpose is not to carve out a solution for him, but to follow the law as it exists. Whether or not it would be good public policy to equate a dismissal for lack of diligence with a dismissal for want of prosecution as an additional savings clause statutory condition is not before this court, but would rather be an issue for the legislature to decide.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.