

2011 IL App (2d) 100992-U
No. 2-10-0992
Order filed September 9, 2011

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
SECOND DISTRICT

ROBERT D. KERANS,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 09-AR-2374
)	
PETER R. WHITNEY, a/k/a)	
Paige Whitney,)	Honorable
)	Bruce R. Kelsey,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

ORDER

Held: The trial court erred in dismissing plaintiff's complaint on *res judicata* grounds: although the complaint had been dismissed twice for want of prosecution, the first dismissal was vacated and the vacatur did not constitute the one permitted refile, which instead was plaintiff's present complaint, which he timely filed within one year after the only extant dismissal.

¶ 1 Plaintiff, Robert D. Kerans, appeals from the dismissal of his complaint against defendant, Peter R. Whitney, a/k/a Paige Whitney, under section 2-619(a)(4) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(4) (West 2010)). Plaintiff argues that the court erred in granting defendant's motion to dismiss the complaint as barred by a prior judgment because plaintiff had the

right to refile his complaint within one year of its prior dismissal for want of prosecution pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 2010)). We agree and reverse and remand.

¶ 2

I. BACKGROUND

¶ 3 On August 13, 2009, plaintiff filed a complaint for conversion against defendant. The complaint alleged, *inter alia*, that the “case was previously brought as Case No. 07L466 and dismissed for want of prosecution on August 28, 2009 [*sic*]. This matter is timely refiled.”¹

¶ 4 On September 21, 2009, the present case was dismissed for want of prosecution.² On October 7, 2009, plaintiff filed a motion to vacate the dismissal. The trial court granted plaintiff’s motion.

¶ 5 On June 14, 2010, defendant moved to dismiss the complaint under section 2-619(a)(4) of the Code (735 ILCS 5/2-619(a)(4) (West 2010)) as barred by a prior judgment. In support of his motion, defendant attached an affidavit from his attorney. In the affidavit, the attorney averred, in relevant part, as follows:

“4. On January 3, 2008 [the 2007] case was dismissed for want of prosecution.

5. On March 13, 2008 the Court granted Plaintiff’s Motion to Vacate the DWP and allowed him to refile his complaint.

¹As noted by plaintiff in his complaint, this was the second cause of action filed by plaintiff against defendant. The first cause of action was filed in 2007 as Case No. 07-L-466 (the 2007 case). While the present complaint states that the 2007 case was dismissed on August 28, 2009, it was actually dismissed on August 28, 2008.

²The record does not contain a copy of the dismissal order; however, plaintiff’s motion to vacate the dismissal sets forth the date of dismissal as September 21, 2009.

6. On August 28, 2008 [the 2007 case] was again dismissed for want of prosecution.

7. Plaintiff filed a Motion to Vacate DWP, the parties briefed Plaintiff's Motion, and set a hearing date of November 24, 2008.

8. On November 24, 2008 Plaintiff Robert Keran's [sic] failed to appear and the Court denied his Motion to Vacate DWP."

Defendant argued that the present complaint was "almost identical" to the complaint filed in the 2007 case and that, because the 2007 case had been dismissed for want of prosecution "on three occasions," plaintiff could not now refile. In addition, defendant argued that the trial court's November 24, 2008, denial in the 2007 case of plaintiff's motion to vacate the dismissal for want of prosecution was a final order. According to defendant, because plaintiff did not appeal from that order, the present complaint was barred by *res judicata*.

¶ 6 Plaintiff did not file a response to the motion to dismiss; however, he argued at the June 23, 2010, hearing that the present case was timely refiled within one year of the August 28, 2008, dismissal of the 2007 case. Defendant countered in reply with the same arguments advanced in his motion: (1) that plaintiff had the right to refile his complaint only one time and that he had exhausted that right in the 2007 case; and (2) that the trial court's November 24, 2008, denial in the 2007 case of plaintiff's motion to vacate the dismissal for want of prosecution was a final order and, because plaintiff did not appeal from that order, the present complaint was barred by *res judicata*.

¶ 7 The trial court ruled in favor of defendant, stating:

"The Court has reviewed the petition, the Court files in both of these cases, and the history of the cases with the dismissal for want of prosecution in terms of the *res judicata* issue.

I believe the defendant is correct in this case. The November 28—24th of ‘08 is a final and appealable order.

The motion to dismiss is granted.”

¶ 8 Plaintiff moved for reconsideration. Plaintiff argued that the 2007 case was dismissed for want of prosecution on August 28, 2008, and that he had the absolute right to refile the action within one year. According to plaintiff, although the August dismissal was the second dismissal for want of prosecution entered in the 2007 case, the first had been vacated on March 13, 2008, on plaintiff’s motion. Plaintiff also argued that defendant mischaracterized the nature of the March 13, 2008, order, by stating that it “granted Plaintiff [his] first, and only, right to refile his case.” In support, plaintiff attached to his motion the March order, which states: “Plaintiff’s motion to vacate DWP is granted.” Plaintiff argued that the March order reinstated his 2007 complaint; it did not constitute a refiling. Thus, according to plaintiff, he had the absolute right to refile his complaint, which he did on August 13, 2009.

¶ 9 The trial court denied plaintiff’s motion for reconsideration, stating, “I don’t find anything that’s new about the argument or new in terms of facts or law.”

¶ 10 Plaintiff timely appealed.

¶ 11 II. ANALYSIS

¶ 12 Plaintiff argues that the court erred in granting defendant’s motion to dismiss the complaint under section 2-619(a)(4) of the Code (735 ILCS 5/2-619(a)(4) (West 2010)) as barred by a prior judgment, because plaintiff had the right to refile his complaint within one year of the dismissal for want of prosecution pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 2010)). We agree.

¶ 13 Defendant moved to dismiss on the ground that plaintiff's claim was barred by the doctrine of *res judicata*. “ ‘The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action.’ ” *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008) (quoting *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996)). Three requirements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits has been reached by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *Hudson*, 228 Ill. 2d at 467. This court's standard of review for a dismissal based upon the doctrine of *res judicata* is *de novo*. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 565 (2000).

¶ 14 Our supreme court has recognized that, if a plaintiff's action is dismissed for want of prosecution (DWP), the plaintiff has the option, under section 13-217 of the Code, to refile the action within one year of the entry of the DWP order or within the remaining period of limitations, whichever is greater. 735 ILCS 5/13-217 (West 2010); *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497 (1998). A DWP becomes a final order only when the period for refiling the action expires. *S.C. Vaughan Oil Co.*, 181 Ill. 2d at 502; *Flores v. Dugan*, 91 Ill. 2d 108, 114 (1982). Until then, a DWP remains an unappealable interlocutory order. *S.C. Vaughan Oil Co.*, 181 Ill. 2d at 507.

¶ 15 Defendant relies on the principle that a second dismissal for want of prosecution is a final order and constitutes an adjudication on the merits for purposes of *res judicata*. See *Bernstein v. Gottlieb Memorial Hospital*, 185 Ill. App. 3d 709 (1989). On his motion to dismiss, defendant asserted that the 2007 case was dismissed for want of prosecution “on two separate occasions. And

you're only allowed a refiling one time." He argued again at the hearing on the motion for reconsideration that there were "[t]wo DWP's in the first case, in the '07 case." What defendant seems to have overlooked, however, is the fact that the first DWP in the 2007 case was vacated on March 13, 2008. Defendant seems to think that when the DWP was vacated the action began anew and that therefore the August 28, 2008, DWP was the second DWP. But that is not the law. Indeed, as noted by plaintiff, a vacatur of a DWP does not initiate a new action but merely continues the original action; accordingly, a vacated dismissal does not trigger section 13-217, and its one-time application remains available. *O'Connor v. Ohio Centennial Corp.*, 124 Ill. App. 3d 281, 283 (1984). Thus, plaintiff had one year from the August 28, 2008, dismissal to refile under section 13-217.

¶ 16

III. CONCLUSION

¶ 17 For the reasons stated, we reverse the order of the circuit court of Du Page County dismissing plaintiff's complaint, and we remand the cause.

¶ 18 Reversed and remanded.