

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).

NO. 4-10-0339

Order Filed 5/27/11

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

WALKER PLACE,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Vermilion County
BILL WATTS,	)	No. 06SC266
Defendant-Appellee.	)	
	)	Honorable
	)	Joseph P.
	)	Skowronski,
	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court. Justices Appleton and Pope concurred in the judgment.

**ORDER**

*Held:* Appeal dismissed for lack of jurisdiction where the trial court's order dismissing the case for want of prosecution was not final and appealable.

Plaintiff, Walker Place, appeals the trial court's dismissal of its small claims complaint against defendant, Bill Watts, for want of prosecution. We dismiss plaintiff's appeal for lack of jurisdiction.

On February 22, 2006, plaintiff filed a small claims complaint against defendant. It alleged defendant was indebted to it in the amount of \$2,512.50, plus court costs, for trespassing on plaintiff's cornfield and negligently causing fire damage to the cornfield. On June 2, 2009, following years of apparent inaction in the case, defendant filed a motion to dismiss for want of prosecution (DWP). He alleged the last activity in the

case was in May 2006, and he had not received anything from plaintiff in the matter since that time. On June 23, 2009, plaintiff filed a notice of hearing, scheduling the case for trial on August 13, 2009. On June 26, 2009, defendant moved to quash plaintiff's notice of hearing.

On August 13, 2009, the trial court conducted a hearing in the matter and addressed defendant's DWP motion. After listening to the parties' arguments, the court noted the case had been on file for three and a half years with nothing happening in the last three years. It then granted defendant's motion based upon that three-year lack of activity. In its oral ruling, the court stated it was dismissing plaintiff's action with prejudice. Its corresponding docket entry states as follows: "motion to dismiss for want of prosecution is allowed. Case dismissed." The record contains no written order.

On August 24, 2009, plaintiff filed a motion to reconsider and vacate the trial court's DWP order. It alleged dismissal of the case was a drastic action that deprived plaintiff of a fair trial on the merits; there had been no harm or prejudice to defendant; there were no prior orders or motions regarding a delay by plaintiff; and there was no showing of a deliberate, contumacious, or unwarranted disregard of the court's authority by plaintiff. On April 13, 2010, the court denied plaintiff's motion to reconsider.

This appeal followed.

The facts of this case present a question of appellate jurisdiction not addressed by either party in their briefs to this court. Because the trial court's DWP order was not final and appealable, jurisdiction is lacking and dismissal of plaintiff's appeal is warranted.

When a plaintiff's action is dismissed for want of prosecution, section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 1994)) permits the plaintiff to refile the action within one year or within the remaining period of limitations, whichever is greater. *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497, 693 N.E.2d 338, 342 (1998). That section states as follows:

"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 \*\*\* the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution \*\*\* 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 voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution[.]" (Emphasis added.) 735 ILCS 5/13-217 (West 1994).

("This version of section 13-217 preceded the amendments of Public Act 89-7, § 15, eff. March 9, 1995. [The supreme court] found Public Act 89-7 unconstitutional in its entirety in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, \*\*\* 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. See *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 71 n.1, \*\*\* 783 N.E.2d 1024 (2002)."  
*Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n.1, 889 N.E.2d 210, 214, n.1 (2008).)

A DWP order remains a nonappealable interlocutory order until the section 13-217 period for refiling expires. *S.C. Vaughan*, 181 Ill. 2d at 507, 693 N.E.2d at 346. Upon that relevant expiration of time, the dismissal becomes final and appealable. *S.C. Vaughan*, 181 Ill. 2d at 502, 693 N.E.2d at 344. Once a DWP order is final for purposes of appeal, "[t]he only vehicle for reinstating the case before the original trial

court \*\*\* is the filing of a petition pursuant to section 2-1401." *S.C. Vaughan*, 181 Ill. 2d at 507, 693 N.E.2d at 346

Section 13-217's one-year refiling period begins to run once the trial court has ruled on the first, timely motion to reconsider and vacate a dismissal for want of prosecution. *People ex rel. Ryan v. Rude Way Enterprises, Inc.*, 326 Ill. App. 3d 959, 962-63, 763 N.E.2d 338, 342 (2001). Also, actions to recover damages for an injury to property must be commenced within five years after the cause of action accrues. 735 ILCS 5/13-205 (West 2004)).

Here, plaintiff sought damages from defendant for fire damage to its cornfield, occurring on September 22, 2005. On February 22, 2006, plaintiff filed its complaint against defendant. On April 13, 2010, the trial court denied plaintiff's motion to reconsider and vacate the court's DWP order. Pursuant to section 13-217 and according to this record, plaintiff had until at least April 13, 2011, to refile its complaint against defendant. The court's DWP order did not become final and appealable until that time. Plaintiff's notice of appeal, filed on April 28, 2010, sought review of a nonfinal order and, as a result, this court lacks jurisdiction over the merits of the appeal.

We note that, in its oral ruling from the bench, the trial court stated it was dismissing plaintiff's complaint with

prejudice. However, given the requirements of section 13-217, a trial court has no authority to enter a DWP order with prejudice where the periods for refiling have not expired. See *Sunderland ex rel. Poell v. Portes*, 324 Ill. App. 3d 105, 113, 753 N.E.2d 1251, 1258 (2001); *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 512, 748 N.E.2d 222, 226 (2001); *Walton v. Throgmorton*, 273 Ill. App. 3d 353, 357-58, 652 N.E.2d 803, 805-06 (1995); *Farrar v. Jacobazzi*, 245 Ill. App. 3d 26, 32, 614 N.E.2d 259, 263 (1993). The court's dismissal with prejudice may not override plaintiff's right to refile its case as provided in section 13-217, and did not render the court's DWP order final and appealable.

For the reasons stated, we dismiss plaintiff's appeal.

Appeal dismissed.