2012 IL App (1st) 101789-U

FIFTH DIVISION
March 30, 2012

No. 1-10-1789

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAW OFFICE OF JOHN S. XYDAKIS, P.C.,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellant,	)	of Cook County
	)	
v.	)	09 L 07913
	)	
CYNTHIA RILEY n/k/a CYNTHIA HUDSON,	)	Honorable Lee Preston,
	)	Judge Presiding
Defendant.	)	

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

HELD: *Res judicata* barred the plaintiff from repeatedly litigating the same facts and circumstances with the same party in hopes of obtaining different results; the trial court's dismissal of the plaintiff's duplicative action was affirmed.

¶ 1 Chicago attorney John S. Xydakis, who does business as the Law Office of John S. Xydakis, P.C. (hereinafter Xydakis), appeals from a trial court order dismissing his action on grounds of *res judicata* because Xydakis had previously sued the same client in 2004 for the same unpaid attorney fees. Xydakis contends *res judicata* is inapplicable because the 2004 case ended with an appellate order deeming the lawsuit void *ab initio* for lack of service, and so, in

effect, there was no previous lawsuit to trigger *res judicata*. The client, Cynthia Riley, counters that the appellate court deemed the judgment – not the lawsuit itself – to be void; it did not disturb the trial court's dismissal of the 2004 action with prejudice, and so, *res judicata* bars the current, duplicative action.

¶ 2 The doctrine of *res judicata* is based on the principle that once a cause of action has been adjudicated by a court of competent jurisdiction, the dispute between the parties is conclusively settled, unless there is a direct proceeding to review or set aside the adjudication. *Drabik v. Lawn Manor Savings & Loan Ass'n*, 65 Ill. App. 3d 272, 276, 382 N.E.2d 333, 336 (1978). "[T]he law affords every [person] his [or her] day in court" (*Pedigo v. Johnson*, 130 Ill. App. 3d 392, 394, 474 NE.2d 430, 433 (1985)), but once a party has litigated or had an opportunity to litigate, *res judicata* will protect litigants and judicial resources from the burdens of retrying an identical cause of action with the same party. *In re Marriage of Kohl*, 334 Ill. App. 3d 867, 880, 778 N.E.2d 1169, 1180 (2002). The first action is deemed conclusive not only as to all matters that were litigated and determined, but to all matters which might have been presented to support or defeat a claim. *Drabik*, 65 Ill. App. 3d at 277, 382 N.E.2d at 336.

¶ 3 The record on appeal indicates Xydakis became Riley's attorney in 1999 and represented her interests in a series of legal matters including a class action lawsuit against State Farm Insurance about its use of vehicle salvage certificates. In 2004, while representing her in the class action, Xydakis filed a contract action against Riley seeking attorney fees she allegedly owed for his work on the previous matters. He was still representing her in the class action in 2005 when he was given leave to use substitute service in the attorney fee case and was granted

an *ex parte* default judgment for $30,800 in attorney fees on April 27, 2005.

¶ 4 On June 27, 2005, however, Riley filed a *pro se* section 2-1401 petition for relief from judgment/motion to quash service, contending Xydakis' use of substitute service violated her right to due process. 735 ILCS 5/2-1401 (West 2004). Instead of filing a response to Riley's petition for relief/motion to quash, Xydakis filed a motion to dismiss it. After that, he withdrew as her attorney in the class action. The trial court heard oral arguments in mid 2006 and then ruled that substitute service of process by regular mail delivery comported with due process. The trial court denied Riley's motion to quash service and granted Xydakis' motion to dismiss Riley's 2-1401 petition. This was one of three rulings that would be appealed.

¶ 5 Before that appeal was taken, Riley obtained legal counsel from Chicago Volunteer Legal Services and her new attorney filed an amended section 2-1401 petition. Counsel also filed a motion to dismiss Xydakis' complaint for fees with prejudice pursuant to sections 2-619(a)(2) and (a)(9) of the Code (735 ILCS 5/2-619(a)(2), (a) (9) (West 2006)), pointing out that Xydakis had a conflict of interest when he simultaneously sued Riley for attorney fees and represented her interests against State Farm Insurance. Section 2-619 motions are a means of summarily disposing of cases that are barred by easily proved defenses or defects. *SDS Partners, Inc. v. Cramer*, 305 Ill. App. 3d 893, 895, 713 N.E.2d 239, 240 (1999). Riley's 2-619 motion relied on Rule 1.7 of the Illinois Rules of Professional Conduct which prohibits an attorney from bringing an action against a current client (Ill. S. Ct. R. Prof'l Conduct R. 1.7 (eff. May 3, 2005)) and further asserted that Xydakis' complaint was contrary to Illinois public policy. The trial court heard oral arguments in late 2006 and then granted Riley's amended 2-1401 petition and 2-619

motion. The court's written order was expressly based solely on the public policy argument. This was the second of the three orders that were appealed.

¶ 6 Although the trial court had been persuaded by Riley's public policy argument, the court, nonetheless, denied her subsequent motion to sanction Xydakis by requiring him to pay $300 per hour for the 128 hours of legal work expended on her behalf by Chicago Volunteer Legal Services. See Ill. S. Ct. R. 137 (eff. Feb 1, 1994) (regarding the imposition of sanctions for presenting a pleading, motion or other paper that is not well grounded in fact and law and that is motivated by an improper purpose, such as to harass or cause unnecessary delay or needless cost). The trial court found that Xydakis' complaint seeking attorney fees was neither frivolous nor sanctionable, and, in an exercise of discretion, the court denied Riley's request for $38,475. This is the third order which would be considered by the appellate court.

¶ 7 Thus, at this juncture, Riley had been relieved of the *ex parte* judgment, but she appealed the denial of her motion to quash service of process and filed a separate appeal regarding the denial of her request for sanctions (No. 1-06-1920 and No. 1-07-1005). Xydakis filed his own appeal from the order that vacated the *ex parte* default judgment (No. 1-06-3722). The three appeals were consolidated.

¶ 8 The appellate court first ruled that substitute service by regular mail without further attempt at personal service of either Riley or her then-attorney did not comply with standards of due process. *Law Office of John S. Xydakis, P.C. v. Riley*, No. 1-06-1920, slip op. at 11 (1st Dist. July 11, 2008). The appellate court, therefore, concluded the denial of Riley's motion to quash service was in error. Then, because effective service is how the circuit court would have gained

personal jurisdiction over Riley, the appellate court ruled, "The May 6, 2005, *ex parte* default judgment awarding Xydakis $30,800 plus $654 in court costs was void *ab initio* for lack of personal jurisdiction over Riley." *Law Office of John S. Xydakis, P.C. v. Riley*, No. 1-06-1920, slip op. at 11 (1st Dist. July 11, 2008). The appellate court continued, "Therefore, the circuit court's act of vacating the judgment against Riley [pursuant to her amended section 2-1401 petition] is affirmed." *Law Office of John S. Xydakis, P.C. v. Riley*, No. 1-06-1920, slip op. at 11 (1st Dist. July 11, 2008). The appellate court did not expressly analyze the circuit court's dismissal of Xydakis' complaint with prejudice. Instead, it stated, "Because we have concluded that the judgment against Riley was void from the outset, [Xydakis' appeal] in which he challenges the circuit court's determination that his lawsuit violated public policy, is of no practical effect." *Law Office of John S. Xydakis, P.C. v. Riley*, No. 1-06-1920, slip op. at 11 (1st Dist. July 11, 2008). Finally, the appellate court analyzed the circuit court's discretionary denial of Riley's request for sanctions and found no abuse of discretion. *Law Office of John S. Xydakis, P.C. v. Riley*, No. 1-06-1920, slip op. at 11 (1st Dist. July 11, 2008).

¶ 9 Thus, the appellate affirmed the circuit court's rulings. In a petition for rehearing, Xyadkis argued the appellate court's conclusions about personal jurisdiction over Riley were incorrect because service by mail had been effective or because Riley submitted to jurisdiction by participating in the proceedings. Xydakis did not, however, argue that the appellate court should have considered his public policy argument or that the dismissal of his complaint *with prejudice* was unwarranted. After the appellate court denied the petition for rehearing, Xydakis sought further review in the supreme court, but in late 2008, that court denied his petition for leave to

appeal. Pursuant to Supreme Court Rule 368, in early 2009, the clerk of the appellate court transmitted the reviewing court's mandate to the trial court. See Ill. S. Ct. Rule 368 (eff. July 1, 2006).

¶ 10 Nonetheless, in December 2008, Xydakis returned to the trial court and attempted to serve Riley with a copy of his 2004 pleading and, by his own account, in July 2009, he "re-filed the original lawsuit as a new case." Riley then filed a section 2-619 motion arguing the refiled suit was barred by *res judicata*. 735 ILCS 5/2-619 (West 2008). Paragraph (a)(4) of section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619(a)(4) (West 2008)) incorporates the doctrine of *res judicata* and permits a trial court to dismiss a cause of action on the grounds that it "is barred by a prior judgment." *Marvel of Illinois, Inc. v. Marvel Contaminant Control Industries, Inc.*, 318 Ill. App. 3d 856, 863, 744 N.E.2d 312, 318 (2001) (citing 735 ILCS 5/2-619(a)(4) (West 2000)). After briefing and oral argument, the trial court granted Riley's motion. This appeal followed.

¶ 11 Our review of a trial court's application of the doctrine of *res judicata* under section 2-619(a)(4) is *de novo*. *Marvel of Illinois*, 318 Ill. App. 3d at 863, 744 N.E.2d at 318; 735 ILCS 5/2-619(a)(4) (West 2008).

¶ 12 The first necessary element of a *res judicata* ruling is a final judgment on the merits rendered by a court of competent jurisdiction. *Marvel of Illinois*, 318 Ill. App. 3d at 863, 744 N.E.2d at 318. This element is satisfied in this instance. The trial court found in the first action that Xydakis' lawsuit against Riley was contrary to public policy and granted Riley's motion to dismiss with prejudice. The dismissal *with* prejudice was as conclusive of the parties' rights as if

the matter had proceeded to trial and been resolved by a final judgment. *SDS Partners*, 305 Ill. App. 3d at 896, 713 N.E.2d at 241. A dismissal *with* prejudice amounts to an adjudication on the merits. *SDS Partners*, 305 Ill. App. 3d at 896, 713 N.E.2d at 241; *Johnson v. Du Page Airport Authority*, 268 Ill. App. 3d 409, 418, 644 N.E.2d 802, 808 (1994); *Rogaris v. Oliver*, 246 Ill. App. 3d 876, 881, 617 N.E.2d 53, 54 (1993). The ruling bars the plaintiff from maintaining another action on the same claim. *SDS Partners*, 305 Ill. App. 3d at 896, 713 N.E.2d at 241; *Johnson*, 268 Ill. App. 3d at 418, 644 N.E.2d at 808; *Rogaris*, 246 Ill. App. 3d at 881, 617 N.E.2d at 54. When the appellate court affirms the trial court, the trial court's decision becomes final and satisfies the first element of the doctrine of *res judicata*. *222 East Chestnut St. Corp. v. 199 Lakeshore Drive, Inc.*, 24 Ill. App. 2d 545, 549-50, 165 N.E.2d 71, 73 (1960). It is the trial court's adjudication, not the opinion of the court of review, that we consider for purposes of *res judicata*. *222 East Chestnut St.*, 24 Ill. App. 2d at 550, 165 N.E.2d at 73 ("It has consistently been held that a former adjudication does not rest on the opinion of the court of review, but on the judgment of the trial court which become[s] final through affirmance.").

¶ 13 Xydakis took an unsuccessful appeal from that ruling. He emphasizes that the first appellate court decision did not specifically address his public policy argument about the dismissal of his complaint. He argues that because the dismissal was argued but "not decided," he was free to return to the trial court for further proceedings. This is incorrect. The cases Xydakis relies upon, such as *Filipetto* and *Foster*, were instances in which the appellate court addressed issues of law and then remanded the matters for further proceedings on the merits of the plaintiff's allegations. *Filipetto v. Village of Wilmette*, 254 Ill. App. 3d 461, 627 N.E.2d 60

(1993); *Foster v. Kanuri*, 288 Ill. App. 3d 796, 681 N.E.2d 111 (1997). Under those circumstances, the trial court and litigants may proceed consistent with the appellate decision. *Foster*, 288 Ill. App. 3d at 799, 681 N.E.2d at 113-14. These cases are not applicable here.

¶ 14 Although the appellate court chose not to directly address Xydakis' argument about public policy, it disposed of his appeal on other grounds. See *City of Chicago v. Holland*, 206 Ill. 2d 480, 492, 795 N.E.2d 240, 247-48 (2003) (an appellate court determines whether the circuit court reached the proper result; the circuit court's reasoning is not material if the judgment is correct; also, a reviewing court may sustain a judgment on any grounds disclosed by the record regardless of whether the circuit court relied on those grounds, and regardless of whether the circuit court's reasoning was sound). Significantly, the appellate court did not reverse the dismissal with prejudice, it did not remand the action for any further proceedings, and it affirmed the trial court's judgment. Thus, the final judgment of the trial court dismissing Xydakis' 2004 pleading *with* prejudice still stands. If Xydakis believed the appellate court misapprehended or overlooked issues, he could have argued as much in his petition for rehearing. See *Ad-Ex, Inc. v. City of Chicago*, 207 Ill. App. 3d 163, 180, 565 N.E.2d 669, 680 (1991) (rehearing may be granted where the reviewing court has inadvertently erred). We have reviewed the petition for rehearing that Xydakis filed in the first appeal. Xydakis did not argue that the appellate court should have considered his public policy argument or that the dismissal of his complaint *with* prejudice was unwarranted. Xydakis' subsequent petition to the supreme court was denied and in early 2009, the clerk of the appellate court transmitted the mandate to the trial court. The procedural rules provide that when a reviewing court affirms a judgment and "the mandate is

filed in the circuit court, enforcement of the judgment may be had and other proceedings may be conducted as if no appeal had been taken." Ill. S. Ct. Rule 369(b) (eff. July 1, 1982). In other words, due to the affirmance, Xydakis then stood exactly where he had when the circuit court entered the dismissal with prejudice.

Xydakis contends the appellate court ruled that his entire lawsuit was void *ab initio*, and that since his lawsuit was deemed a nullity, he was permitted to later refile his action to cure any jurisdictional defect that crept into the 2004 proceedings. He contends *res judicata* cannot be applied to a suit that has been deemed a nullity. However, Xydakis' lawsuit has never been deemed a nullity by any court. As Riley points out, the appellate court's actual statement was that the "*ex parte* default judgment awarding Xydakis $30,800 plus $654 in court costs was void *ab initio* for lack of personal jurisdiction over Riley." This is not the same as saying that the 2004 lawsuit, the subsequent motion practice, or any trial court order was rendered a nullity. Furthermore, we have disregarded Xydakis' reliance on *Weirzbicki v. Gleason*, 388 Ill. App. 3d 921, 906 N.E.2d 7 (2009), for the proposition that when a lawsuit is a nullity, all orders and judgments are expunged from the record. What actually occurred in *Weirzbicki*, is that the trial court entered an order while an appeal was pending, the order was thus void *ab initio* for lack of subject matter jurisdiction, and the appellate court *sua sponte* pointed out this defect in the order and remarked on its own authority " 'to expunge from its records void acts." *Weirzbicki*, 388 Ill. App. 3d at 931, 906 N.E.2d at 18 (quoting *People v. Magnus*, 262 Ill. App. 3d 362, 365, 633 N.E.2d 869, 872 (1994)). Xydakis' contention that "*res judicata* doesn't apply to [a] suit deemed [a] nullity" is premised on his mischaracterizations of the previous lawsuit, previous appeal, and

the authority he relies upon. The record before us establishes that the first element of *res judicata* has been satisfied by a final judgment on the merits rendered by a court of competent jurisdiction. *Marvel of Illinois*, 318 Ill. App. 3d at 863, 744 N.E.2d at 318 (setting out the three essential elements of *res judicata*).

¶ 15 Moving to the second element of a *res judicata*, we find that Xydakis' 2009 pleading concerns the same cause of action that was resolved in his 2004 action. Illinois uses the transactional test for determining whether *res judicata* bars a claim. *Marvel of Illinois*, 318 Ill. App. 3d at 863-64, 744 N.E.2d at 319 (citing *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 307-10, 703 N.E.2d 883, 891-93 (1998)). If the same facts are essential to maintaining both proceedings then there is an "identity" or sameness between the two causes of action asserted and *res judicata* bars the later proceeding. *In re Marriage of Wardell*, 149 Ill. App. 3d 537, 543, 500 N.E.2d 960, 964 (1986). Xydakis' 2004 and 2009 pleadings are based on the same facts of his relationship with Riley and her purported non-payment of attorney fees incurred between 1999 and 2003 and purportedly still due and owing. We find no material difference between the facts alleged in Xydakis' 2004 and 2009 complaints, and by his own account, he simply refiled the pleading under a different case number.

¶ 16 The last element of *res judicata* is identity of the parties, and here we indisputably have the same plaintiff and defendant as in the 2004 litigation. *Marvel of Illinois*, 318 Ill. App. 3d at 863, 744 N.E.2d at 318 (setting out the three essential elements of *res judicata*).

¶ 17 We are unpersuaded by Xydakis' citation to section 5/13-217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 1994)), for the proposition that he was subject to a one

year statute of limitations in which to refile his action after (he lost) the first appeal. That statute concerns actions in which judgment was entered for the plaintiff but reversed on appeal, actions in which the plaintiff voluntarily nonsuited, or actions which were dismissed by the court for procedural reasons which are not relevant here. Xydakis' 2004 action was dismissed on Riley's motion pursuant to section 2-619 of the Code of Civil Procedure, which concerns, "Involuntary dismissal based upon certain defects or defenses." 735 ILCS 5/2-619 (West 2008). Xydakis cannot rely on an irrelevant provision in the civil practice act. Similarly, Xydakis' reliance on *Brown v. Tinder*, 48 Ill. App. 3d 489, 491, 359 N.E.2d 494, 496 (1977), is misplaced, because the court was addressing a case which had been dismissed for want of prosecution. And, in *Roth v. Northern Assurance Company, Ltd.*, 32 Ill. 2d 40, 41, 203 N.E.2d 415, 416 (1965), the plaintiff's claim was dismissed because it did not meet the court's requisite jurisdictional amount, that is, the court did not have subject matter jurisdiction, which has never been an issue here.

¶ 18 Xydakis' final argument is that his fee collection action was not contrary to public policy as the first trial judge ruled, and that, a minimum he is entitled to proceed against Riley under the equitable theory of *quantum meruit*. In effect, Xydakis is asking us to redetermine the merits of his 2004 action, to adjudicate whether it was proper for the circuit court to dismiss the 2004 action on public policy grounds, and to decide whether the previous panel of this appellate court correctly ruled against Xydakis. We cannot and will not do this. The rule is that no question that was raised or could have been raised in a previous appeal on the merits can be raised on a subsequent appeal. *Kazubowski v. Kazubowski*, 45 Ill. 2d 405, 413, 259 N.E.2d 282, 288 (1970); *People* ex rel. *White v. Busenhart*, 29 Ill. 2d 156, 159, 193 N.E.2d 850, 853 (1963).

The appellate brief that Xydakis filed in the first appeal was his opportunity to argue any errors he perceived in the trial court proceedings and the motion for reconsideration he filed in the first appeal was his opportunity to raise any errors he perceived in the appellate decision. See *Kazubowski*, 45 Ill. 2d at 413, 259 N.E.2d at 288 (arguments raised after an appeal are considered waived).

¶ 19 Having considered the three essential elements of *res judicata* and Xydakis' various arguments for reaching a contrary conclusion, we conclude *res judicata* bars Xydakis from repeatedly litigating the same facts and circumstances with the same party in hopes of obtaining different results. Accordingly, we find that the trial court properly granted Riley's 2-619(a)(4) motion to dismiss the 2009 action (735 ILCS 5/2-619(a)(4) (West 2008)) and we affirm that ruling.

¶ 20 Affirmed.