

No. 1-12-0263

**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).

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**IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT**

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STEVE FRIEDLANDER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois
	)	
v.	)	
	)	No. 11 M5 389
ANET INTERNET SOLUTIONS, INC., a	)	
subsidiary of VISINET CONTINENTAL	)	
BROADBAND, INC.,	)	The Honorable
	)	Thomas W. Murphy,
Defendant-Appellee.	)	Judge Presiding

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PRESIDING JUSTICE HARRIS delivered the judgment of the court.  
Justices Connors and Simon concurred in the judgment.

**ORDER**

**Held:** The circuit court properly granted defendant's motion to dismiss because section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217 (West 1994)) only allows a plaintiff to refile a claim one time.

¶ 1 Plaintiff, Steve Friedlander, filed a complaint against defendant, ANET Internet Solutions, Inc., a subsidiary of Visinet Continental Broadband, Inc., for breach of contract and

declaratory relief on March 17, 2011. Defendant, pursuant to section 2-615 of the Illinois Code of Civil Procedure<sup>1</sup> (Code) (735 ILCS 5/2-615 (West 2010)), sought dismissal of plaintiff's complaint asserting that plaintiff had previously filed two similar complaints against it for breach of contract, in 2008 and 2009 respectively, which the circuit court dismissed for want of prosecution. Therefore, defendant argued that section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)) did not allow plaintiff to file his third and current complaint. At issue is whether the circuit court properly granted defendant's motion to dismiss plaintiff's complaint. We hold the circuit court properly granted defendant's motion to dismiss because section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)) only allows a plaintiff to refile a claim one time.

¶ 2 JURISDICTION

¶ 3 On December 20, 2011, the circuit court granted defendant's motion to dismiss plaintiff's complaint pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2010). On January 19, 2012, plaintiff timely appealed. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 4 BACKGROUND

¶ 5 On March 17, 2011, plaintiff filed a two count complaint against defendant, who he named as "ANET INTERNET SOLUTIONS, INC. as a wholly owned subsidiary of

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<sup>1</sup> At oral argument, there was confusion regarding whether defendant brought its motion to dismiss under section 2-619 (735 ILCS 5/2-619 (West 2010)) or section 2-615 (735 ILCS 5/2-615 (West 2010)) of the Code. We have reviewed the record, which shows that defendant brought its motion pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2010).

CONTINENTAL VISINET BROADBAND, INC." In his complaint, plaintiff alleged the parties had reached an agreement whereby defendant would pay him a commission for services rendered.<sup>2</sup> Plaintiff alleged that "[a]s of May 4, 2004, Continental acquired ANET and ANET became a wholly owned subsidiary of Continental." Plaintiff sought a declaratory judgment under count one of his complaint and alleged breach of contract under count two of his complaint. Plaintiff attached to his complaint a copy of an email dated September 19, 2003, between himself and Jeff Liggett, who plaintiff alleged was a former owner of "ANET." The email formed the basis of plaintiff's allegations that the parties had reached an agreement concerning his commission. Plaintiff sought a judgment against defendant for \$33,876; the amount of commissions he alleged he was owed by defendant.

¶ 6 Defendant, pursuant to section 2-615 of the Code, moved to dismiss plaintiff's complaint. 735 ILCS 5/2-615 (West 2010). Defendant argued that plaintiff had already filed two complaints against it, in 2008 and 2009, which were both dismissed for want of prosecution by the circuit court. Therefore, defendant asserted that plaintiff could not, under section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)), refile his complaint for a third time. Plaintiff's 2008 complaint, filed on July 28 of that year, referred to defendant as "ANET, an Illinois Corporation." In the 2008 complaint, plaintiff alleged the parties had a valid and enforceable agreement and attached the same September 19, 2003, email as evidence of the agreement. Plaintiff sought a judgment against defendant for \$33,876; the amount of commissions he alleged he was owed by

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<sup>2</sup> It is not clear from plaintiff's complaint what services he provided to defendant.

defendant. Plaintiff's 2008 complaint contained only a single count. The circuit court dismissed plaintiff's 2008 complaint against defendant for want of prosecution on October 14, 2008.

¶ 7 On October 13, 2009, plaintiff filed another complaint against defendant, again referring to it as "ANET, an [ ] Illinois Corporation." Plaintiff's 2009 complaint contained two counts. The first count sought a judgment for breach of contract and the second count sought a declaratory judgment. Plaintiff alleged defendant owed him \$33,876 in commissions under the purported agreement and attached the same September 19, 2003, email as evidence of an agreement between the parties. On January 14, 2010, the circuit court dismissed plaintiff's 2009 complaint for want of prosecution.

¶ 8 Defendant argued further, in its reply in support of its motion to dismiss,<sup>3</sup> plaintiff did not deny that he filed the same action with the same plea for relief based upon the same set of facts in both plaintiff's 2008 and 2009 complaints. Defendant also referred to plaintiff's contention that plaintiff's 2008 and 2009 complaints were nullities, stating that plaintiff's "purported misidentification of ANET constitutes a misnomer." Defendant attached two affidavits to its reply. In the first affidavit, Jonathan Rosenson, the Vice President of Quality Assurance and Strategic Initiatives for Continental Broadband, attested that plaintiff's attorney contacted him by telephone on November 30, 2009. Rosenson attested that plaintiff's attorney asked him "which company he should serve \*\*\* and I advised him he could serve Continental Broadband."

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<sup>3</sup> The record does not contain plaintiff's response to defendant's motion to dismiss. In order to "support a claim of error, the appellant has the burden to present a sufficiently complete record." *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009).

Plaintiff's attorney later served Rosenson, via email, a copy of plaintiff's 2009 complaint.

Rosenson attested further that he spoke with plaintiff's attorney one more time after their initial conversation. Later, Rosenson was served with plaintiff's current complaint.

¶ 9 On December 20, 2011, the circuit court granted defendant's motion to dismiss, with prejudice. On January 19, 2012, plaintiff timely filed his notice of appeal.

¶ 10 ANALYSIS

¶ 11 Before this court, plaintiff argues that the complaints he filed against defendant in 2008 and 2009 are both "void *ab initio*" and "legal nullities" because they were filed against a non-existent entity, *i.e.* "ANET." Accordingly, plaintiff asserts that his current complaint is his first lawsuit against the "present" defendant, ANET internet solutions, Incorporated, a wholly owned subsidiary of Continental Visinet Broadband, Incorporated.

¶ 12 In response, defendant argues that the circuit court did not err in dismissing plaintiff's complaint because plaintiff's current complaint, his third, was filed after his previous two complaints were dismissed for want of prosecution. Under section 13-217 of the Code (735 ILCS 5/13-217 (West 1994)), defendant asserts that plaintiff is only allowed to refile a case that has been dismissed for want of prosecution within one year of the dismissal date and that he may only refile a case a single time. In this case, plaintiff filed his current complaint over a year after the circuit court dismissed his 2009 complaint for want of prosecution and it was the second time he had refiled his complaint, both in violation of section 13-217 of the Code. 735 ILCS 5/13-217 (West 1994). Defendant points out that plaintiff does not dispute that he has filed the exact same cause of action, with the same plea for relief, and with the same exact facts in all three of the

complaints he filed. Defendant argues that plaintiff's "purported misidentification of [defendant] constituted, at best, a misnomer under Illinois law." In the alternative, defendant argues that plaintiff's first two complaints, the 2008 and 2009 complaint, were not nullities because the 2008 complaint was filed within the applicable time period allowed by the Business Corporation Act (805 ILCS 5/12.80 (West 2010)) and the 2009 complaint was filed within one year of the date that the 2008 complaint was dismissed for want of prosecution.

¶ 13 Plaintiff did not file a reply brief before this court.

¶ 14 Only the legal sufficiency of the complaint is challenged in a section 2-615 motion to dismiss. *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). "The proper inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Id.* Our review is *de novo*. *Id.*

¶ 15 Section 13-217 of the Code provides, in relevant part:

"Reversal or dismissal. 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 dismissed for want of prosecution \*\*\* then, whether or not the time limitation for bringing such an 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 \*\*\* the

action is dismissed for want of prosecution." 735 ILCS 5/13-217

(West 1994).<sup>4</sup>

¶ 16 Our supreme court has held "that section 13-217 expressly permits one, and only one, refiling of a claim even if the statute of limitations has not expired." *E.H. Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 254 (1991); see also *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 163-64 (1997). Refiling is only permitted under section 13-217 of the Code "when the court can determine, by an inspection of the record in the two suits, that the first was for the identical claim and cause of action averred in the second." *Winger v. Franciscan Medical Center*, 299 Ill. App. 3d 364, 368 (1998); see also *Gonzalez v. Thorek Hospital and Medical Center*, 143 Ill. 2d 28, 36-37 (1991) ("The extension of the applicable statute of limitations is afforded by section 13-217 because the defendant already has had notice of litigation arising out of the same facts and circumstances."). Section 13-217 should not be used to prolong litigation or to harass opponents. *Wilson v. Evanston Hospital*, 276 Ill. App. 3d 885, 888 (1995). "The rationale behind this rule is that section 13-217 acts as a limited extension to prevent injustice, but should not be permitted to become a harassing renewal of litigation." *Id.*

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<sup>4</sup> We note that Public Act 89-7 (Pub. Act. 89-7, § 15, eff. March 9, 1995 (1995 Ill. Laws 309)), amended section 13-217 of the Code. *Hurst v. Capital Cities Media, Inc.*, 323 Ill. App. 3d 812, 820 (2001). However, in 1997, our supreme court declared Public Act 89-7 to be unconstitutional in its entirety. *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 467 (1997). The legislature has not subsequently amended section 13-217 of the Code. See 735 ILCS 5/13-217 (West 2010). "The effect of enacting an unconstitutional act is to leave the law in force as it was before the enactment of the unconstitutional act." *Hurst*, 323 Ill. App. 3d at 822. Accordingly, we will apply section 13-217 of the Code as written prior to its amendment in 1995. *Id.*, see 735 ILCS 5/13-217 (West 1994).

¶ 17 In this case, we hold the circuit court properly granted defendant's motion to dismiss. Plaintiff's three complaints are all based on the same email which plaintiff contends shows there was an agreement between the parties. In all three complaints, plaintiff sought \$33,876, *i.e.* the amount he claims he was owed by defendant in commissions. In all three complaints he names "ANET" as defendant. We disagree with plaintiff's contention that his first two complaints were nullities. In his first two complaints, plaintiff referred to defendant as "ANET, an Illinois Corporation." In his third complaint, he named defendant as "ANET Internet Solutions, Inc., a subsidiary of Visinet Continental Broadband, Inc." According to the allegations of plaintiff's complaint, which we must take as true (*Loman*, 229 Ill. 2d at 109), defendant "ANET" is a wholly owned subsidiary of "Visinet Continental Broadband." A corporation is a distinct and separate legal entity, "even where one corporation wholly owns another and the two have mutual dealings." *In re Rehabilitation of Centaur Insurance Co.*, 158 Ill. 2d 166, 172 (1994). Accordingly, in all three complaints plaintiff named defendant as "ANET."

¶ 18 Under section 13-217 of the Code, plaintiff was allowed to refile his 2008 complaint, which was dismissed by the circuit court for want of prosecution, one time. *E.H. Flesner*, 145 Ill. 2d at 254. He did so in 2009. Plaintiff's filing of his third and current complaint, in 2011, therefore, was improper because section 13-217 of the Code "permits one, *and only one*, refiling of a claim." (Emphasis added). *Id.* Therefore, the circuit court did not err when it dismissed plaintiff's 2011 complaint.

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¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court is affirmed.

¶ 21 Affirmed.