

No. 1-13-1337

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

DEBRA SEGER,)
) Appeal from the
) Circuit Court of
) Cook County
)
 Plaintiff-Appellant,)
)
)
 v.) No. 10 L 5021
)
)
 SCHYLER, ROCHER & ZWIRNER, P.C.,)
)
) Honorable
 Defendant-Appellee.) James N. O'Hara,
) Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed the dismissal of the plaintiff's refiled legal malpractice lawsuit against the defendant, pursuant to the rule which allows only one refileing under section 13-217 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 1994)), where the plaintiff's original legal malpractice lawsuit was voluntarily dismissed but plaintiff had pursued a counterclaim, based on virtually identical facts, in the divorce proceedings which formed the basis of the legal malpractice lawsuit.
- ¶ 2 Plaintiff Debra Seger (Seger) appeals orders of the circuit court of Cook County

dismissing her refiled legal malpractice lawsuit against defendant Schyler, Rocher & Zwirner (Schyler) as barred under the rule which allows only one refiling under section 13-217 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 1994)) and denying Seger's motion for reconsideration. On appeal, Seger argues she refiled her legal malpractice case against Schyler only once after the voluntary dismissal of her initial legal malpractice lawsuit and the trial court erred in its application of the law to the facts in this case. For the following reasons, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 The pleadings and other documents in the record on appeal disclose the following facts. On December 30, 2009, Seger filed a complaint alleging legal malpractice against Schyler in case number 09 L 15911 (initial law division lawsuit). In the initial law division lawsuit, Seger alleged Schyler represented her from August 16, 2005, through approximately February 15, 2007, in her divorce proceedings (case number 04 D 5842). Seger alleged Schyler failed to disclose a retained expert, resulting in the exclusion of the expert's opinions as to the value of a partnership which was part of the marital estate. Seger also alleged Schyler had filed a petition in the divorce proceedings seeking fees for services rendered, including those related to evaluating the marital estate. Seger asserted Schyler should be denied any monies for its legal services and refund monies already billed.

¶ 5 On January 5, 2010, Seger also filed a counterclaim in her divorce proceedings under case number 04 D 5842 (divorce counterclaim), seeking to bar Schyler's recovery of attorney fees and expenses. The divorce counterclaim contained allegations of negligent legal representation virtually identical to those Seger asserted in the initial law division lawsuit and sought the same relief.

¶ 6 The parties on appeal assert that on January 8, 2010, on Seger's motion in the divorce action, the divorce counterclaim was transferred to the law division. The record on appeal does not contain Seger's motion or the order entered thereupon, however, both Seger and Schyler refer to the January 8, 2010, order in their statements of facts, citing pleadings in the record which merely refer to that order.

¶ 7 On January 11, 2010, the circuit court entered an order granting Seger leave to voluntarily dismiss case number 09 L 15911 pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2009)). This order does not refer to the divorce counterclaim. The record on appeal does not contain a motion seeking the voluntary dismissal.

¶ 8 On April 29, 2010, Seger filed the complaint for legal malpractice against Schyler which is at issue in this appeal under case number 10 L 5021 (second law division lawsuit). The complaint in the second law division lawsuit specifically stated it was a refiling of case number 09 L 15911. The allegations in the second law division matter are virtually identical to those in Seger's initial law division case and divorce counterclaim.

¶ 9 On April 30, 2010, after a status hearing, the circuit court entered an order stating the "[counterclaim] by Debra Seger is restored to this call" in 04 D 5842. Seger filed a motion to consolidate the divorce counterclaim into the second law division lawsuit on June 14, 2010. The motion to consolidate argued in part that the divorce proceedings would not afford Seger the ability to recover sums which would have been recovered had the divorce proceedings been adequately prosecuted. The motion also argued Seger would be denied her right to a jury trial in the divorce proceedings. On August 9, 2010, the circuit court denied the motion to consolidate.

¶ 10 On September 1, 2010, Schyler filed a motion to dismiss the second law division lawsuit pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)). Schyler argued the

second law division lawsuit should be dismissed because: (1) "the action was not commenced within the time limited by law" (735 ILCS 5/2-619(a)(5) (West 2010); see 735 ILCS 5/13-214.3(b) (West 2010)); and (2) there was a prior pending action, the divorce counterclaim, between the same parties for the same cause (735 ILCS 5/2-619(a)(3) (West 2010)). On September 30, 2010, Seger filed a response to the motion to dismiss. Seger argued the second law division lawsuit was filed within the statute of limitations. Seger also argued the pending divorce counterclaim should not preclude the second law division lawsuit. Seger asserted the divorce counterclaim remained pending in the law division when the first law division lawsuit was dismissed and when the second law division lawsuit was filed. Seger suggested the second law division lawsuit should be heard and the divorce counterclaim be dismissed without prejudice or, in the alternative, the second law division lawsuit should be dismissed without prejudice to the divorce counterclaim which was "restored" to the domestic relations division call after the legal malpractice lawsuit was refiled. On January 26, 2011, the circuit court entered an order denying Schyler's motion to dismiss on both grounds, but stayed the second law division lawsuit pending resolution of the divorce counterclaim.

¶ 11 On June 7, 2012, in case number 04 D 5842, the circuit court entered an order which stated Seger's divorce counterclaim was voluntarily dismissed and granted Seger leave to file an amended answer to Schyler's petition for attorney fees omitting allegations of legal malpractice.

¶ 12 On August 10, 2012, Schyler filed another motion to dismiss the second law division lawsuit pursuant to section 2-619 of the Code, arguing that in light of the divorce counterclaim, the second law division lawsuit should be dismissed because it violated the "one refiling" rule under section 13-217 of the Code. Schyler also asserted that a cause of action which is filed in violation of the "one refiling" rule is barred by the principles of *res judicata*. On September 13,

2012, Seger filed a response to the motion to dismiss, arguing she had refiled only one lawsuit after the voluntary dismissal of the initial law division lawsuit. Seger also disagreed with Schyler's contention that the initial law division lawsuit and the divorce counterclaim had been consolidated and that the divorce counterclaim was voluntarily dismissed at the same time as the initial law division lawsuit. On September 30, 2012, Schyler filed a reply in support of the motion to dismiss, reiterating its previously stated arguments. Schyler maintained that even if the initial law division lawsuit and the divorce counterclaims had not been consolidated, the "one refiling" rule had been violated.

¶ 13 On November 6, 2012, the circuit court entered an order granting Schyler's motion to dismiss the second law division lawsuit. The order stated:

"Debra Seger pursued her first filing on December 30, 2009, [the initial law division lawsuit] and a second filing on January 5, 2010 [the divorce counterclaim], and both now have been voluntarily dismissed. Each of Debra Seger's filed claims arises from the same set of operative facts. Therefore, pursuant to the One-Refiling Rule, Debra Seger's third filing of the current lawsuit is dismissed."

¶ 14 On December 3, 2012, Seger filed a motion to reconsider the ruling dismissing the second law division matter, arguing the circuit court erred in the application of existing law to the facts of this case. Seger, at this time, argued the initial law division lawsuit and the divorce counterclaim, filed contemporaneously, were consolidated into a single action before the initial law division lawsuit was voluntarily dismissed. Seger contended the circuit court erred in focusing on the number of filings rather than the number of refilings after the voluntary dismissal of the consolidated initial law division lawsuit and divorce counterclaim. On January 10, 2013,

Schyler filed its response to the motion for reconsideration, arguing Seger merely reiterated the evidence and argument which was presented to the court on the motion to dismiss. On March 30, 2013, the circuit court denied the motion to reconsider. On April 18, 2013, Seger filed a timely notice of appeal to this court.

¶ 15

ANALYSIS

¶ 16 On appeal, Seger argues the circuit court erred in dismissing her second law division lawsuit under section 2-619 of the Code. Under section 2-619 of the Code, our standard of review is *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Accordingly, this court conducts an independent review of the propriety of dismissing the complaint and is not required to defer to the trial court's reasoning. *E.g., In re Marriage of Sullivan*, 342 Ill. App. 3d 560, 563 (2003).

¶ 17 The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). Section 2-619(a)(9) of the Code permits dismissal where "the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). Schyler's motion to dismiss was based on the rule that there can be only one refiling under section 13-217 of the Code, an affirmative matter which may be raised under section 2-619(a)(9). See *Lydon v. Eagle Food Centers, Inc.*, 297 Ill. App. 3d 90, 92 (1998).

¶ 18 Seger also appeals from the circuit court's denial of her motion to reconsider the dismissal. "The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of existing law." *Duresa v. Commonwealth Edison*

Co., 348 Ill. App. 3d 90, 97 (2004) (quoting *Sacramento Crushing Corp. v. Correct/All Sewer, Inc.*, 318 Ill. App. 3d 571, 577 (2000)). Generally, the circuit court's ruling on a motion to reconsider is reviewed under the abuse of discretion standard. *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, ¶ 20. Yet where a motion to reconsider only asks the circuit court to reevaluate its application of the law to the case as it existed at the time of judgment, the standard of review is *de novo*. See *id.* Such is the case here.

¶ 19 Section 13-217 of the Code governs the refiling of a lawsuit after a voluntary nonsuit and provides in relevant part:

"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, *** 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 the action is voluntarily dismissed by the plaintiff ***." 735 ILCS 5/13-217 (West 1994).¹

In short, section 13-217 of the Code provides that following a voluntary dismissal, a plaintiff may commence a new action within the proscribed time limitations. See *Dubina v. Mesirov*

¹ This version of section 13-217 preceded the amendments of Public Act 89-7, § 15, eff. March 9, 1995. Our supreme court found Public Act 89-7 unconstitutional in its entirety in *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 2012). The version of section 13-217 currently in effect is, therefore, the version that preceded the amendments of Public Act 89-7. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n.1 (2008).

Realty Development, Inc., 178 Ill. 2d 496, 504 (1997). Our supreme court has interpreted section 13-217 as "permitting only one refiling even in a case where the applicable statute of limitations has not yet expired." *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 163 (1997). This "one refiling" rule was the basis of Schyler's motion to dismiss and the circuit court's order granting that motion.

¶ 20 Schyler's motion to dismiss relied on *Schrager v. Grossman*, 321 Ill. App. 3d 750 (2000), which involved four lawsuits. *Id.* at 751-53. The first lawsuit (Case I) was filed in the United States District Court for the Northern District of Illinois in April 1995 and voluntarily dismissed on March 12, 1997, with leave to refile the action in a state court. *Id.* at 751-52. The second lawsuit (Case II) was filed in the circuit court of Lake County in March 1996, but was removed to the United States District Court for the Northern District of Illinois and dismissed on February 13, 1997, as duplicative of Case I which remained pending at that time. *Id.* at 752. The third lawsuit (Case III) was filed in the circuit court of Cook County on April 2, 1996, and voluntarily dismissed on October 10, 1996, after the defendants in Case III filed a motion to dismiss contending the facts alleged in Case III arose from the same core of operative facts alleged in Case I which was pending through the duration of Case III. *Id.* at 753. The fourth lawsuit (Case IV), the subject of the appeal in *Schrager*, was filed in the circuit court of Cook County on March 27, 1997. *Id.* The defendants in Case IV filed a motion to dismiss pursuant to sections 2-619(a)(4) and (a)(9) of the Code (735 ILCS 5/2-619(a)(4), (a)(9) (West 1998)), arguing in part the claims were barred by the "one refiling" rule. After the circuit court ultimately denied the motion to dismiss, the appellate court, pursuant to Illinois Supreme Court 308(a) (eff. Feb. 1, 1994), decided a certified question regarding the "one refiling" rule.

¶ 21 On appeal, the plaintiff asserted the argument that Case II should not be considered a

second filing because it was commenced during the pendency and not following the dismissal of Case I and therefore could not be properly characterized as a "refiling" of Case I. *Id.* at 754.

After reviewing the relevant case law, the appellate court disagreed and reasoned:

"Case II, arising out of the same core of operative facts, is unquestionably a 'new action' as contemplated by section 13-217. Furthermore, the fact that Case II was the second claim filed but the first to be dismissed has no bearing on the determination of whether plaintiff has fully availed himself of the opportunity afforded by the statute to refile. It is clear plaintiff filed two separate, although identical, claims against defendants in two separate forums and both cases were involuntarily dismissed. Plaintiff now attempts to secure a third bite of the apple because the first bite turned sour. Unfortunately for plaintiff, the statute prohibits a third bite." *Id.* at 756; see also *Carr v. Tillery*, 591 F.3d 909, 914-15 (7th Cir. 2010) (following *Schrager* to conclude the "one refiling" rule is not limited to situations where the first refiled suit is dismissed before the second one is filed).

¶ 22 Following the reasoning in *Schrager*, a case arising out of the same operative core of facts as an earlier filed case may be considered a refiling under section 13-217 of the Code. Applying the reasoning in *Schrager* to the facts at hand, the divorce counterclaim is considered a refiling even if it was filed prior to the dismissal of the initial law division lawsuit. See *id.* Seger argues *Schrager* is distinguishable because the second law division lawsuit was the one refiling after the voluntary dismissal, but this argument fails because, pursuant to *Schrager*, the sequence of the filing of the lawsuits is not determinative. See *id.* Instead, the divorce counterclaim is treated as a refiling of Seger's initial law division lawsuit. See *id.*

¶ 23 Seger also argues the circuit court failed to account for the consolidation of the initial law

division lawsuit and the divorce counterclaim, which Seger argues resulted in a single voluntary dismissal of the consolidated matter prior to the refile of the second law division matter.

Schyler responds that "[i]n contrast to the position taken here on appeal," Seger argued in the circuit court that the divorce counterclaim was not consolidated and voluntarily dismissed on January 11, 2010.² A review of the record establishes that in response to Schyler's second motion to dismiss, Seger argued Schyler had failed to demonstrate the initial law division lawsuit and the divorce counterclaim had been consolidated or that the divorce counterclaim was voluntarily dismissed at the same time as the initial law division lawsuit. In her motion to reconsider, Seger, however, expressly argued the initial law division lawsuit and the divorce counterclaim were consolidated. Accordingly, Seger has not asserted for the first time on appeal that the initial law division lawsuit and the divorce counterclaim were consolidated. Rather, Seger has changed her position in this matter,

¶ 24 The record on appeal, however, does not establish that the initial law division lawsuit and the divorce counterclaim were ever consolidated. As the appellant, Seger "has the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error." *Midstate Siding & Window Co., Inc. v. Rogers*, 204 Ill. 2d 314, 319 (2003) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). In the absence of a complete record, a reviewing court presumes that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. "In fact, when the record on appeal is incomplete, a reviewing court should actually 'indulge in every reasonable presumption favorable to the judgment from which the appeal is taken, including that the trial court ruled or acted correctly.'" *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006) (quoting *People v.*

² Schyler does not expressly contend that Seger forfeited the argument on appeal.

Majer, 131 Ill. App. 3d 80, 84 (1985)).

¶ 25 In this case, the record does not include any order consolidating the initial law division lawsuit and the divorce counterclaim. The parties refer to a January 8, 2010, order which purportedly granted Seger's motion to transfer the divorce counterclaim to the law division. The January 8, 2010, order, however, is not included in the record on appeal. The record does include the January 11, 2010, order voluntarily dismissing the initial law division lawsuit. The January 11, 2010, order bears only the docket number of the initial law division lawsuit. The January 11, 2010, order does not establish whether the divorce counterclaim was ever consolidated with the initial law division lawsuit or voluntarily dismissed with the initial law division lawsuit. In sum, the record on appeal is not sufficiently complete to review Seger's argument. Accordingly, Seger's argument regarding consolidation fails.

¶ 26 For the reasons stated, the circuit court did not err in granting Schyler's motion to dismiss or in denying Seger's motion for reconsideration. Because we have found the dismissal was proper under the "one refiling" rule of section 13-217 of the Code, we need not consider Schyler's argument that the dismissal was proper under the principles of *res judicata*. See *Schrager*, 321 Ill. App. 3d at 759.

¶ 27 **CONCLUSION**

¶ 28 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 29 Affirmed.