

No. 1-14-0542

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

COLIN CROWE,)	Appeal from the
)	Circuit Court of
)	Cook County
Plaintiff and Counterdefendant-Appellant,)	
)	
v.)	No. 11 M1 500648
)	
SEBASTIAN MANISCALCO,)	
)	Honorable
Defendant and Counterplaintiff-Appellee.)	Patrick W. O'Brien,
)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held:* Appeal dismissed for lack of appellate jurisdiction, where the circuit court's dismissal of plaintiff's section 2-1401 petition for want of prosecution and its refusal to vacate that dismissal were not final and appealable orders.

¶ 2 Plaintiff Colin Crowe appeals the January 14, 2014, order of the circuit court of Cook County that denied his section 2-1301 motion to vacate¹ the dismissal for want of prosecution

¹ We note that plaintiff's motion sought to "set aside" a court order, as described herein; the trial

(DWP) of his section 2-1401 petition. Because the DWP of plaintiff's section 2-1401 petition and the denial of plaintiff's motion to vacate that DWP were not final and appealable orders, we dismiss this appeal for lack of appellate jurisdiction.

¶ 3

BACKGROUND

¶ 4 On May 27, 2011, plaintiff filed a complaint in replevin against defendant Sebastian Maniscalco. In his complaint, plaintiff alleged that in 2007 he had purchased two vintage automobiles, a 1958 Chevrolet Corvette and a 1970 Chevrolet Malibu, for \$50,000 and \$70,000, respectively. Plaintiff stored these vehicles at the home of Victor Mirales. In 2009, plaintiff learned that Mirales without authorization sold the vehicles to defendant. Plaintiff requested defendant return the automobiles; however, defendant declined. As a result, plaintiff filed an action in replevin in the circuit court of Cook County seeking the return of the two automobiles. In a counterclaim, defendant alleged plaintiff would be unjustly enriched by the sums defendant had paid for insurance, restoration, repair, and storage of the automobiles.

¶ 5 The matter proceeded to trial, and on April 16, 2013, the trial court found in favor of plaintiff for replevin. The matter, however, was continued to May 21, 2013, for an evidentiary hearing on defendant's unjust enrichment counterclaim. On May 21, 2013, defendant presented affidavits and invoices from the mechanics that completed work on the automobiles. These affidavits indicated the work was completed and paid for by defendant. Plaintiff did not present any evidence in rebuttal. The trial court ultimately entered judgment in favor of defendant on his unjust enrichment counterclaim in the amount of \$27,525.51.

court referred to plaintiff's motion as a "motion to vacate." The parties' appellate briefs use both the terms "vacate" and "set aside" when referring to the relief requested in the motion. We view such terms to be interchangeable for purposes of this appeal; we use the term "vacate" for purposes of clarity. See Black's Law Dictionary 1495 (9th ed. 2009) (defining "set aside" as "(Of a court) to annul or vacate (a judgment, order, etc.)."

¶ 6 On August 29, 2013, plaintiff filed a motion to reconsider the May 21, 2013, judgment, which the trial court denied as untimely. Thereafter on October 18, 2013, plaintiff filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), in which he asserted the May 21, 2013, judgment should be vacated because after inspecting the vehicles on July 12, 2013, it was discovered that a majority of the work defendant alleged was performed on the automobiles was not completed. Plaintiff further asserted that he was diligent in making this discovery because the sheriff of Cook County was unable to retrieve the automobiles pursuant to court order in June 2013 as they were being stored in DuPage County.² Plaintiff argued he had a meritorious defense against defendant's unjust enrichment claim because the mechanic affiants falsified their affidavits and fabricated invoices.

¶ 7 The parties entered into a briefing schedule on plaintiff's section 2-1401 petition; however, defendant failed to file a response due to the fact the parties were in the midst of settlement negotiations. On December 10, 2013, pursuant to an agreed order, the trial court stayed the briefing schedule pending a settlement agreement and set the matter for status on December 17, 2013.

¶ 8 On December 17, 2013, plaintiff's counsel failed to appear in court and the matter was continued to December 20, 2013. On that date, plaintiff's counsel again did not appear and the trial court entered an order, which states in pertinent part:

"The matter coming on for status, due notice given, [plaintiff's counsel] failing to appear in court on December 17 and 20, 2013, and the court being advised;

It is ordered that:

(1) Mr. Crowe's 2-1401 petition is denied for want of prosecution ***."

² Plaintiff alleged that he "was finally able to retrieve the vehicles" on June 26, 2013.

¶ 9 On December 26, 2013, plaintiff filed a motion to vacate the December 20, 2013, order pursuant to section 2-1301 of the Code (735 ILCS 5/2-1301 (West 2012)) in which he asserted that he was unable to appear in court on December 17, 2013, because counsel was "engaged with the U.S. Attorney's Office representing a client on a seizure warrant." He further asserted that he failed to appear in court on December 20, 2013, because he did not "see" the email defendant's counsel had forwarded to him regarding the December 17, 2013, order continuing the matter. Plaintiff requested the order of December 20, 2013, be vacated as his absence was due to an "unforeseen client emergency" and that to allow the order to stand would be unjust.

¶ 10 On January 14, 2014, the trial court denied defendant's section 2-1301 motion. No reason is set forth in the order for the denial and no transcript of proceedings is included with the record on appeal. Thereafter, plaintiff filed a motion to reconsider the order of January 14, 2014, which was denied by the trial court on February 10, 2014. This appeal followed.

¶ 11 ANALYSIS

¶ 12 In the appellate briefs, neither party has questioned this court's appellate jurisdiction. We, however, have an independent duty to determine whether we have jurisdiction to decide the issues presented. *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). This court only has jurisdiction to review final judgments, orders, or decrees, except as specifically provided by the Illinois Supreme Court Rules. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). A judgment or order is "final" if it disposes of the rights of the parties, either on the entire case or on some definite or separate part of the controversy. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997).

¶ 13 Here, plaintiff has appealed from the trial court's denial of his motion to vacate the DWP of his section 2-1401 petition. The filing of a section 2-1401 petition is considered a new

proceeding, not a continuation of the old one. 735 ILCS 5/2-1401(b) (West 2012). In that regard, the filing of a section 2-1401 petition is similar to the filing of a complaint. See *Blazyk v. Daman Express, Inc.*, 406 Ill. App. 3d 203, 207 (2010) ("As an initial pleading, a section 2-1401 petition is procedurally the counterpart of a complaint and subject to all the rules of civil practice that that character implies."). As a section 2-1401 petition is the procedural counterpart of a complaint, it can similarly be dismissed for want of prosecution. A DWP is "a type of involuntary dismissal which our courts have always had the inherent power to enter [Citation], is not an adjudication on the merits, does not prejudice the case of the party against whom it is entered, and does not bar a subsequent suit on the same issues. [Citation]." *Kraus v. Metropolitan Two Illinois Center*, 146 Ill. App. 3d 210, 212 (1986); see *BankFinancial, FSB v. Tandon*, 2013 IL App (1st) 113152, ¶ 29 (order dismissing certain counts for want of prosecution was not a final judgment because it did not terminate the litigation between the parties on the merits). A DWP is an interlocutory order for the year after a court enters it. *Illinois Bone & Joint Institute v. Kime*, 396 Ill. App. 3d 881, 884 (2009). Pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 2012)), after a DWP, a plaintiff generally has one year in which to refile its complaint. Therefore, a DWP is not final and appealable since section 13-217 permits refiling. *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 507 (1998). Thus, a DWP remains an unappealable interlocutory order until the plaintiff's option to refile expires. *Id.*; *Jackson v. Hooker*, 397 Ill. App. 3d 614, 618 (2010). "A nonfinal DWP—by virtue of its nonfinal status—is subject to vacatur under section 2-1301(e) of the Code." *Federal National Mortgage Ass'n v. Tomei*, 2014 IL App (2d) 130652, ¶ 9. The issue of whether the plaintiff's conduct is so wanting as to warrant dismissal rests within the discretion of the court. *In re Marriage of Hanlon*, 83 Ill. App. 3d 629, 632 (1980). Moreover, because a DWP order "is

made nonfinal and nonappealable by the fact that there is an absolute right to refile, a trial court's order denying the vacature of the DWP must also be nonfinal and nonappealable since there is an absolute right to refile following that order." *Wilson v. Evanston Hospital*, 257 Ill. App. 3d 837, 840 (1994); see *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367, 375 (2001).

¶ 14 Here, plaintiff appeals the January 14, 2014, order denying his section 2-1301 motion to vacate the order of December 20, 2013, which dismissed his section 2-1401 petition for want of prosecution. According to the above stated authority, we do not have jurisdiction to consider plaintiff's appeal.

¶ 15 We note that where a timely motion to vacate a DWP has been filed, the one-year refiling period does not begin to run until the circuit court has ruled on the motion to vacate the DWP. *Wilson*, 257 Ill. App. 3d at 839. In addition, "after the period for refiling provided by section 13-217 expires, a DWP order operates as a termination of the litigation between the parties, and constitutes a final and appealable order." *S.C. Vaughan Oil Co.*, 181 Ill. 2d at 508. In the present matter, the trial court denied plaintiff's motion to vacate on January 14, 2014, and the postjudgment motion to reconsider on February 10, 2014. Over a year has passed since the motion to vacate and the motion to reconsider were denied. The record indicates, however, that rather than refile his petition, plaintiff instead pursued this appeal; accordingly, plaintiff has missed his opportunity to timely refile the petition pursuant to section 13-217. "While this conclusion may seem harsh, we note that plaintiff, rather than seek the more costly means of appealing the decisions of the trial court, could have simply refiled the complaint to preserve her cause of action." *Wilson*, 257 Ill. App. 3d at 840. Plaintiff, here, similarly could have refiled his section 2-1401 petition, but chose not to do so.³

³ We note that the record on appeal includes a Motion for Turnover Order filed by defendant on

¶ 16 On a final note, we observe that plaintiff acknowledges in his appellate brief that "[o]nly where specifically provided by the Illinois Supreme Court Rules does an appellate court have jurisdiction to review other than final judgments, orders, or decrees." He contends, however, that "the unique circumstances under which the DWP was entered fall within one such instance where the Rules provide appellate jurisdiction." According to plaintiff, Illinois Supreme Court Rule 304(b) provides: "A judgment or order granting or denying any of the relief prayed in a petition of the Code of Civil Procedure . . . [is] appealable without the finding required for appeals under paragraph (a) of this Rule." Plaintiff asserts that "[t]his Court therefore has jurisdiction to review the trial court's December 20, 2013 Order dismissing Crowe's Section 2-1401 Petition for Relief from Judgment."

¶ 17 Plaintiff's argument is misplaced.⁴ Rule 304 is entitled "Appeals from Final Judgments That Do Not Dispose of an Entire Proceeding." Ill. S. Ct. R. 304 (eff. Feb. 26, 2010). Rule 304(a) provides, in pertinent part, "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no

June 17, 2013. The court's December 20, 2013 order — addressed herein — also provided, in part, that "Mr. Maniscalco's motion for turnover is granted (as more fully set forth in separate order)." In a separate order entered on December 20, 2013, the court granted defendant's turnover motion and related relief. We observe that plaintiff's notice of appeal indicates that the order being appealed was entered on January 14, 2014. The January 14, 2014, order provided, in part, that "the motion to vacate December 20, 2013 orders is denied and the denial of the 2-1401 petition and granting of the motion for turnover shall stand." In his appellate briefs, the plaintiff did not advance any arguments regarding the trial court's grant of defendant's turnover motion. Such arguments are thus waived. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (points not argued in appellant's brief are waived).

⁴ We note that plaintiff did not properly quote the language of Rule 304(b). The pertinent subsection provides that "[t]he following judgments or orders are appealable without the finding required for appeals under paragraph (a) of this rule: *** (3) A judgment or order granting or denying any of the relief prayed in a petition under section 2-1401 of the Code of Civil Procedure." Ill. S. Ct. R. 304(b) (eff. Feb. 26, 2010).

just reason for delaying either enforcement or appeal or both." *Id.* Rule 304(b)(3) provides that a judgment or order "granting or denying any of the relief prayed in a petition under section 2-1401" is appealable without a Rule 304(a) finding. We do not read Rule 304(b)(3) as expanding the scope of 304(a) or as negating the finality requirement that is at the core of the rule. Furthermore, plaintiff does not cite any support for the proposition that Rule 304(b)(3) would apply in this case where, in light of the DWP, the trial court did not consider the section 2-1401 petition on the merits.

¶ 18

CONCLUSION

¶ 19 For the reasons stated, we dismiss the appeal for lack of appellate jurisdiction.

¶ 20 Appeal dismissed.