

No. 1-16-3068

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 DISTRICT

MARVIN McDOWELL,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 16 M1 40296
)	
UNIFAY PEARSON,)	Honorable
)	Kenneth Wright Jr.,
Defendant-Appellee.)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Appeal dismissed for lack of appellate jurisdiction, where the circuit court's dismissal of plaintiff's complaint for want of prosecution was not a final and appealable order.

¶ 2 Plaintiff Marvin McDowell appeals *pro se* from a trial court order denying him a continuance to present a witness and dismissing, for want of prosecution, his *pro se* complaint against his landlord defendant, Unifay Pearson. On appeal, Mr. McDowell contends that the trial court erred in entering the order. We dismiss Mr. McDowell's appeal for lack of appellate jurisdiction because the dismissal for want of prosecution was not a final and appealable order.

¶ 3 The record shows that on May 23, 2016, Mr. McDowell filed a *pro se* complaint against Ms. Pearson for restitution of property allegedly seized on May 3, 2016, and in Ms. Pearson's possession. The trial court dismissed Mr. McDowell's complaint for want of prosecution (DWP) on August 18, 2016, and again on September 9, 2016. These DWP orders were vacated on October 6, 2016. On November 17, 2016, after Mr. McDowell requested a continuance because his witness failed to appear, the trial court issued a third DWP order. On the same date, Mr. McDowell filed a *pro se* notice of appeal. Mr. McDowell filed his appellate brief on June 28, 2017. Although no brief was filed by Ms. Pearson in response to this appeal, we may consider this appeal based solely on the appellant's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 4 This court has an independent duty to consider whether or not it has jurisdiction to hear an appeal. *Daewoo International v. Monteiro*, 2014 IL App (1st) 140573, ¶ 72; see also *People v. Lewis*, 234 Ill. 2d 32, 36-7 (2009) (subject matter jurisdiction is a threshold issue and "courts of review have an independent duty to consider [their own subject matter] jurisdiction"). Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) provides that "[e]very final judgment of a circuit court in a civil case is appealable." "An order is final and thus appealable if it either terminates the litigation between the parties on the merits or disposes of the rights of the parties, either on the entire controversy or a separate branch thereof." *Bankfinancial, FSB v. Tandon*, 2013 IL App (1st) 113152, ¶ 18 (citing *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 19).

¶ 5 Here, Mr. McDowell has appealed the trial court order denying his request for a continuance and issuing a DWP order. Mr. McDowell did not move to refile his complaint. Instead, he filed a notice of appeal. But a DWP order is not a final order which can be appealed, because a plaintiff has an absolute right to refile the suit within one year of the dismissal.

Bankfinancial, FSB, 2013 IL App (1st) 113152 at ¶¶ 7-8; *Wold v. Bull Valley Management Co., Inc.*, 96 Ill. 2d 110, 112 (1983); *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982). “ ‘In other words, a dismissal for want of prosecution does not prejudice plaintiffs’ case nor bar a subsequent suit on the same issues.’ ” *Farrar v. Jacobazzi*, 245 Ill. App. 3d 26, 32 (1993) (quoting, *O’Reilly v. Gerber*, 95 Ill. App. 3d 947, 950 (1981)). If a plaintiff does not refile the action within the one year period, “the DWP order operates as a termination of the litigation between the parties and constitutes a final and appealable order.” *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 508 (1998).

¶ 6 Although the circuit court’s DWP order in this case did not indicate that Mr. McDowell’s complaint was dismissed without prejudice, “a dismissal for want of prosecution, by its nature, is without prejudice.” *Id.* Because Mr. McDowell was able to refile his complaint, the dismissal of his complaint was not an appealable order. *Flores*, 91 Ill. 2d at 114; *Paul H. Schwendener, Inc., v. Jupiter Electric Co.*, 358 Ill. App. 3d 65, 73 (2005) (“An order dismissing an action ‘without prejudice’ is not deemed final for the purposes of appeal.”). Therefore, we do not have jurisdiction to hear Mr. McDowell’s appeal.

¶ 7 For the reasons stated, we dismiss Mr. McDowell’s appeal for lack of jurisdiction.

¶ 8 Appeal dismissed.