2014 IL App (1st) 112808-U
No. 1-11-2808

THIRD DIVISION
NOVEMBER 5, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LIUTAURAS P. DARGIS,	)	
	)	
v.	)	
	)	
MICHAEL F. SHEAHAN, Individually and as former Sheriff of Cook County, THOMAS J. DART, Individually and as Sherriff of Cook County, and a/k/a and d/b/a COOK COUNTY SHERIFF'S OFFICE OF CORRECTIONS, ERNESTO VELASCO, Individually and as former Executive Director of the Cook County Sheriff's Office of Corrections, MARCUS LYLES, Individually and former Assistant Executive Director of Cook County Sheriff's Office of Corrections, the COUNTY OF COOK, a political subdivision of the State of Illinois, JOHN R. MORALES, Cook County Chief Financial Officer, and JOHN CHAMBERS, Cook County Comptroller	)	Appeal from the Circuit Court of Cook County. 09 L 5831 The Honorable Bill Taylor, Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: In an action for backpay by a Sheriff for allegedly being wrongfully placed on "zero pay status," where plaintiff did not include review of the dismissal of certain counts in his notice of appeal, the court was without jurisdiction to review the dismissal of those claims.

Plaintiff also waived review of other counts by amending his complaint and pleading over without incorporating the original complaint alleging those counts and without pursuing an immediate appeal. The remaining two state law claims were properly dismissed as barred by *res judicata* based on his prior federal action because the federal case resulted in a final adjudication on the merits, the claims were based on the same set of operative facts and thus the same cause of action, and involving the same parties, but these claims were not brought in the federal case.

¶ 2 BACKGROUND

¶ 3 Plaintiff, Sergeant Liutaural P. Dargis, filed a complaint and a further amended complaint seeking back pay, damages, and other relief against defendants, which included his employer, Sheriff Michael Sheehan, as well as Marcus Lyles, the former Assistant Executive Director of the Cook County Sheriff's Office of Corrections, and Ernesto Velasco, the former Executive Director of the Cook County Sheriff's Office of Corrections, as well as the remaining defendants, for having wrongfully placed him on a "zero pay status" and refusing to allow him to return to work as a correction officer, without due process. The court dismissed plaintiff's entire amended complaint. The court granted defendants' section 2-619 (735 ILCS 5/2-619 (West 2010)) motions to dismiss Counts I and V of plaintiff's first amended complaint based on grounds of *res judicata*. The court granted defendants' section 2-615 (735 ILCS 5/2-615 (West 2010)) motions to dismiss Counts II through IV and VI through XII of plaintiff's first amended complaint for failure to state a cause of action.

¶ 4 Plaintiff was employed by the Cook County Sheriff's Department from February 1982 to July 2001. Plaintiff was appointed a correctional officer on May 3, 1982 and a correctional sergeant on May 17, 1992. On February 9, 2001, plaintiff suffered a stroke while at work. As of this date plaintiff was a correctional sergeant assigned duty as a supervisor of approximately 75 other correctional officers at the Cook County Sheriff's Department of Corrections, Division 11 at 28th and California in Chicago. After being hospitalized, plaintiff underwent physical therapy. Plaintiff recovered but was subjected to specific restrictions imposed by his treating physician.

Under those restrictions, plaintiff was able to return to his position as a correctional officer, but was to no longer have inmate contact.

¶ 5 Plaintiff returned to work on July 2, 2002, at the request of his supervisor, defendant Maul. Maul had assured plaintiff he would be reassigned to one of the several positions involving no inmate contact. Plaintiff was ushered into an office where defendant Lysles allegedly refused to allow plaintiff to return to work and reassign him to a position not involving inmate contact. Instead, defendant Lysles denied plaintiff's request for a hearing and caused plaintiff to be placed on "zero (no) pay status" and never allowed plaintiff to return to work or receive any pay. Plaintiff states that he requested but was denied relief through his union.

¶ 6 Plaintiff then filed a complaint with the Equal Employment Opportunity Commission (EEOC), on November 29, 2001. Plaintiff received a right-to-sue letter from the EEOC and on September 26, 2002 filed an action in the United States District Court for the Northern District of Illinois, *Dargis v. Sheahan, et al.*, No. 02 CV 6872. Plaintiff thereafter filed an amended complaint on April 3, 2003.

¶ 7 Plaintiff's claims in federal court included the following: violation of the Americans with Disabilities Act, (42 U.S.C. § 1211 *et seq*.) (Count I); violation of his civil rights and the ADA under 42 U.S.C. § 1983 (Counts II and III)[1]; conspiracy to violate his ADA and civil rights under 42 U.S.C. § 1985 (Count IV); violations of the Illinois Human Rights Act, 775 ILCS 5/2-102 et seq. (Count V); a claim for imposition of liability for state claims under the doctrine of

[1] The district court noted there was confusion in plaintiff evoking the ADA in the context of the Civil Rights Act and stated as follows: "Plaintiff claims that Defendants failed to satisfy their obligation to engage initiate an interactive process. There is some confusion, however, regarding the federal statute underlying the § 1983 claims. The complaint itself purports to invoke the Civil Rights Act of 1964. (Count II.) But in his reply brief, Plaintiff discusses the claims as though they arise out of Defendants' failure to engage in the interactive process required under the ADA. For purposes of this motion, the court will presume that Plaintiff invokes § 1983 in an attempt to vindicate his rights under the ADA."

respondeat superior (Count VI); violation of the Illinois Governmental Employees Tort Immunity Act, 745 ILCS 10/9–102 (Count VII); violation of the Due Process Clause of the Illinois Constitution (Count VIII); wrongful constructive discharge (Count IX); breach of the collective bargaining agreement (Count X); violation of Cook County Human Rights Ordinance, No. 93-0-13 (Count XI); and conspiracy to violate the Illinois Human Rights Act and Cook County Human Rights Ordinance (Count XII).

¶ 8 The United States District Court granted defendants summary judgment on Counts I, II, III, and IV. The court denied defendants' motion for summary judgment and entered judgment in favor of plaintiff on Counts II (violation of procedural due process rights under § 1983) and VIII (violation of the Due Process Clause of the Illinois Constitution). The court directed defendants to conduct a hearing within 30 days regarding plaintiff's employment status pursuant to section 3-7012 of the Illinois Counties Code (Cook County Ordinance No. 93-O-13 *et seq*. (amended November 19, 2002)). The court decided, in its discretion, not to exercise pendent jurisdiction over the remaining state law claims and dismissed them without prejudice because "[h]aving disposed all of the federal law claims, grounds no longer exist for federal subject matter jurisdiction over Plaintiff's state and local law claims."

¶ 9 In the meantime, plaintiff had resigned from his employment on August 24, 2004 in order to receive his disability pension. On July 6, 2005, pursuant to the federal court's order that plaintiff receive a hearing, the Sheriff filed a complaint with the Merit Board. On April 18, 2006 the Merit Board issued an order declining to reach the merits of the case because plaintiff was no longer employed, and the Merit Board has jurisdiction only over current Sheriff's Office merit status employees. Plaintiff appealed, but the circuit court affirmed the Merit Board's decision on May 16, 2008.

¶ 10 Plaintiff also appealed the federal district court decision, arguing that: (1) there existed genuine issues of material fact which should have prevented the district court from entering summary judgment against him on his ADA claims; (2) although judgment was entered in his favor on his due process claims, plaintiff argued that the district court erred by directing the Sheriff's Office to hold a hearing instead of proceeding to trial; (3) that the district court abused its discretion in dismissing his state law claims; and (4) that the district court erred when it denied his motion to alter or amend the judgment against him.

¶ 11 On March 16, 2008 the Seventh Circuit Court of Appeals rendered a final decision, *Dargis v. Sheahan*, 526 F. 3d 981 (7th Cir. 2008), affirming the District Court's judgment on plaintiff's federal and state due process claims, holding that: "placement of [plaintiff] on a 'zero pay status' and refusal to return him to active duty constitutes a deprivation of a protected property interest, despite the fact that Plaintiff technically remains an employee of the Department of Corrections. In light of this deprivation, Plaintiff was entitled, under Illinois statute (55 ILCS 5/3-7012) and [the] Constitution, to notice and a hearing." The Seventh Circuit further held that the district court did not err in ordering a hearing instead of proceeding to trial:

¶ 12 "Furthermore, in declining to consider the merits of Dargis' placement on 'zero pay status,' the district court did not foreclose Dargis' opportunities for monetary relief. We have previously noted that an officer in Dargis' position can obtain back pay to which he is entitled by petitioning the Merit Board, initiating an action of mandamus, or, unless the applicable statute of limitations has run, filing suit under the Illinois wage payment statute. *Ellis v. Sheahan*, 412 F. 2d 754, 756-57 (7th Cir. 2005) ***."

¶ 13 Further, the Seventh Circuit held that the district court did not abuse its discretion in dismissing plaintiff's remaining state law claims without prejudice and also committed no error

in denying plaintiff's motion to alter or amend the judgment. Plaintiff did not appeal the decision of the Seventh Circuit Court of Appeals.

¶ 14 On September 2, 2009, plaintiff filed a complaint in circuit court and a subsequent amended complaint, seeking back pay, damages, and other relief against defendants for having wrongfully placed him on a "zero pay status" and refusing to allow him to return to work as a correctional officer, without due process. Plaintiff alleged the following claims in his original complaint: (1) violation of the Illinois Wage Payment and Collection Act (820 ILCS 1115/1 *et seq*. (West 2004)) (Count I); (2) mandamus (Count II); (3) declaratory judgment (Count III); (4) violation of the Due Process Clause of the Illinois Constitution (Count IV); (5) breach of employment contract (Count V); (6) violation of the Illinois Human Rights Act (775 ILCS 5/10-101 *et seq*. (West 2004)) (West 2004)) (Count VI); (7) *respondeat superior* (Count VII); (8) violation of section 9-102 of the Illinois Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/9-102 (West 2004)) (Count VIII); (9) constructive discharge (Count IX); (10) breach of collective bargaining agreement (Count X); (11) violation of the Cook County Human Rights Ordinance (Cook County Ordinance No. 93-O-13 *et seq*. (amended November 19, 2002)); and (12) conspiracy to violate the Illinois Human Rights Act and the Cook County Ordinance (Count XII).

¶ 15 Defendants filed a combined section 2-619.1 (735 ILCS 5/2-619.1 (West 2008)) motion to dismiss plaintiff's complaint. Defendants sought dismissal of Count I for violation of the Illinois Wage Payment and Collection Act pursuant to section 2-619 (735 ILCS 5/2-619 (West 2008)) based on *res judicata* grounds, arguing that the claim was available in the federal action but plaintiff chose not to pursue it, that the claim was barred by the general five-year statute of limitations, and that the court lacked subject matter jurisdiction because plaintiff failed to

exhaust his administrative remedies by filing a grievance with his union. Defendants sought dismissal of Count II for mandamus pursuant to section 2-615 (735 ILCS 5/2-615 (West 2008)) for failure to state a claim and pursuant to section 2-619 as being barred by *res judicata*. Defendants sought dismissal of Count III for declaratory judgment pursuant to both section 2-615 and section 2-619, arguing that plaintiff failed to state a claim and that the claim was barred by *res judicata*. Defendants sought dismissal of Count IV for a violation of due process rights under the Illinois Constitution pursuant to section 2-619 based on *res judicata* because plaintiff had an opportunity to litigate this claim in federal court but did not do so. Defendants sought dismissal of Count V for breach of employment contract pursuant to section 2-615 for failure to state a claim and also pursuant to section 2-619 as barred by *res judicata* because plaintiff did not bring this claim in federal court. Defendants sought dismissal of Count VI for a violation of the Illinois Human Rights Act pursuant to both section 2-615 for lack of subject matter due to plaintiff having failed to exhaust his administrative remedies before the Commission and because it fails to state a claim where Illinois does not recognize a cause of action for retaliatory constructive discharge. Defendants sought dismissal of Count VII for *respondeat superior* pursuant to section 2-615 for failure to state a claim where there is no underlying liability. Defendants sought dismissal of Count VIII for a violation of the Illinois Government and Governmental Employees Tort Immunity Act pursuant to section 2-615 for failure to state a claim. Defendants sought dismissal of Count IX for constructive discharge pursuant to section 2-615 for failure to state a claim and pursuant to section 2-619 as barred by the Tort Immunity Act's one-year statute of limitations. Defendants sought dismissal of Count X for breach of the collective bargaining agreement pursuant to section 2-619 for failure to exhaust the arbitration procedure pursuant to the collective bargaining agreement and failure to allege that his union

breached its duty of fair representation. Defendants sought dismissal of Count XI for breach of the Cook County Human Rights Ordinance pursuant to section 2-619 based on lack of jurisdiction for failure to exhaust his administrative remedies. Finally, defendants sought dismissal of Count XII for conspiracy to violate the Illinois Human Rights Act and the Cook County Ordinance pursuant to section 2-615 for failure to state a claim.

¶ 16 The court granted defendants' motion to dismiss Counts II through IV and VI through XII with prejudice. The court denied the motion to dismiss as to Count I for violation of the Illinois Wage Payment and Collection Act and Count V for breach of employment contract and granted plaintiff leave to amend those two counts.

¶ 17 Plaintiff filed his amended complaint on May 17, 2010, realleging his claims in Counts I and V. Instead of amending the two claims in Counts I and V, plaintiff refilled the same counts with identical allegations. Defendants filed a combined section 2-619.1 motion to dismiss the amended complaint pursuant to sections 2-615 and 2-619, again arguing that the claims failed to state a cause of action, the claims were barred by *res judicata*, the court did not have jurisdiction to hear the claims, and the claims were barred by the statute of limitations. The court granted defendant's motion to dismiss Counts I and V of the amended complaint based on res judicata and, therefore, did not reach defendants' remaining arguments. The court specifically found in its written order that plaintiff had the opportunity to litigate these claims in federal court.

¶ 18 Plaintiff appealed.

¶ 19 ANALYSIS

¶ 20 Plaintiff argues: (1) the circuit court erred in granting defendant's section 2-619 motion to dismiss Counts I and V of plaintiff's first amended complaint on grounds of *res judicata*; and (2)

the circuit court erred in granting defendants' section 2-615 motion to dismiss Counts II through IV and VI through XII for failure to state a cause of action.

¶ 21 I. Scope of this Appeal

¶ 22 A. Jurisdiction: Notice of Appeal

¶ 23 We first address the Sheriff's argument that this appeal should be limited to the circuit court's order of September 6, 2011 dismissing Counts I and V of plaintiff's first amended complaint because plaintiff did not timely appeal the court's May 5, 2010 order dismissing Counts II through IV and VI through XII of the original complaint. The Sheriff argues that we have no jurisdiction to review the dismissal of Counts VI through XII because plaintiff's notice of appeal only appealed from the order dismissing Counts II, III, and IV entered May 5, 2010 and the order dismissing Counts I and V entered September 2, 2011.

¶ 24 Illinois Supreme Court Rule 303(b)(2) provides that the notice of appeal shall specify the judgment or part thereof appealed from and the relief sought from the reviewing court. Ill. Sup. Ct. R. 303(b)(2) (eff. June 4, 2008). Pursuant to Illinois Supreme Court Rule 303(a)(1), a notice of appeal must be filed within 30 days after entry of the final judgment appealed from, or if a timely posttrial motion directed against the final judgment had been filed, within 30 days after entry of the order disposing of the last pending postjudgment motion. Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). In his notice of appeal, plaintiff sought to appeal "from the orders dismissing his Complaint, Counts II, III & IV, entered on or about May 5, 2010 by Judge Henry Winker, and his First Amended Complaint, Counts 1 & V, entered on September 2, 2011 by Judge Bill Taylor." Plaintiff did not include the dismissal of Counts VI through XII in his notice of appeal.

¶ 25 Where a plaintiff's notice of appeal is from a judgment order as to certain counts and does not refer to an earlier order dismissing other counts, we lack jurisdiction to consider the earlier

dismissal order. See *Diocese of Quincy v. Episcopal Church*, 2014 IL App (4th) 130901, ¶ 35; *Village of Lisle v. Village of Woodridge*, 192 Ill. App. 3d 568, 572-73 (1989); *Long v. Soderquist*, 126 Ill. App. 3d 1059, 1062 (1984)). Thus, we lack jurisdiction to consider the dismissal of Counts VI through XII, as plaintiff included only the dismissal of Counts I through V in his notice of appeal.

¶ 26 Although defendants argue that we also lack jurisdiction to review Counts II, III and IV because plaintiff did not file a notice of appeal within 30 days of the May 5, 2010 order dismissing those counts, Illinois Supreme Court Rule 304(a) expressly provides that "[i]f 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 just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Feb.26, 2010). See also *In re Marriage of Jensen*, 2013 IL App (4th) 120355, ¶ 34 (without a finding under Illinois Supreme Court Rule 304(a), an order disposing of fewer than all claims is not appealable). The court's order of May 5, 2010 dismissing Counts II, through IV did not contain a Rule 304(a) finding and so was not immediately appealable at that time.

¶ 27 B. Waiver

¶ 28 Instead, we need not review the dismissal of Counts II, III, and IV because plaintiff effectively waived review of the dismissal of all counts other than Counts I and V. Under the "*Foxcroft* rule," a party who files an amended complaint forfeits any objection to the trial court's rulings on any former complaints " '[w]here an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.' " *Foxcroft Townhome Owners Ass'n v.*

Hoffman Rosner Corp., 96 Ill. 2d 150, 154 (1983) (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)). To avoid forfeiture under the *Foxcroft* rule, a party wishing to preserve a challenge to an order dismissing with prejudice fewer than all of the counts in his or her complaint has several options: (1) the plaintiff may stand on the dismissed counts and argue the matter at the appellate level; (2) the plaintiff may file an amended complaint realleging, incorporating by reference, or referring to the claims set forth in the prior complaint; or (3) the plaintiff may perfect an appeal from the order dismissing fewer than all of the counts prior to filing an amended pleading that does not include reference to the dismissed counts. *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 719 (2010). See *Zurich Ins. Co. v. Baxter Int'l*, 173 Ill. 2d 235, 242 (1996) (holding previous pleadings were abandoned where the plaintiff did not stand on those pleadings or appeal the dismissal); *Pfaff v. Chrysler Corp*., 155 Ill. 2d 35, 61-62 (1992) (holding that the third-party plaintiff abandoned and withdrew its original complaint alleging claims for indemnification and breach of contract incorporate those allegations in its second-amended third-party complaint). See also *Barnett v. Zion Park District*, 171 Ill. 2d 378, 384 (1996) (citing *Foxcroft*, 96 Ill.2d at 155) (where, after a dismissal of certain counts in her complaint, plaintiff did not stand on the dismissed counts and appeal their dismissal prior to pleading over by filing a subsequent amended complaint, she waived any contention of error regarding the dismissal); *Tabora v. Gottlieb Memorial Hospital*, 279 Ill. App. 3d 108, 114 (1996) (noting that "[a] simple paragraph or footnote in the amended pleadings notifying [the] defendants and the court that [the] plaintiff was preserving the dismissed portions of his former complaints for appeal" is sufficient to protect against forfeiture under *Foxcroft*). Plaintiff failed to do any of the above.

¶ 29 Because plaintiff effectively abandoned Counts II, III and IV and waived review of their dismissal by pleading over and not standing on those counts or timely appealing their dismissal, we only address the dismissal of Counts I and V.

¶ 30 II. Dismissal of Counts I and V Based on *Res Judicata*

¶ 31 Plaintiff argues that the court erred in dismissing Counts I and V under section 2-619 based on *res judicata*. A motion pursuant to section 2-619(a)(9) of the Code asserts the claim is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). Our supreme court has explained the phrase " 'affirmative matter' encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). Section 2-619 motions present a question of law, which we review *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006); *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993).

Three requirements must be met for application of the doctrine of *res judicata*: "(1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). Federal law governs the *res judicata* effect of cases litigated in federal court. *Peregrine Financial Group, Inc. v. Trademaven, L.L. C.*, 391 Ill. App. 3d 309, 313 (2009). The elements of *res judicata* are the same under federal and Illinois law, requiring: (1) a final judgment on merits rendered by court of competent jurisdiction; (2) identity of cause of action; and (3) identity of parties or their privies. *Diversified Financial Systems, Inc. v. Boyd*, 286 Ill. App. 3d 911, 914-15 (1997).

Plaintiff concedes the third element that "there is no question that there is an identity of parties in the two suits," and makes no argument as to the second element. Plaintiff argues that the first element of *res judicata* is not met because there was no final judgment on the merits where the pendent state counts in the federal case were dismissed "without prejudice" only for lack of supplemental jurisdiction after the federal claims were dismissed.

¶ 32 We find, to the contrary, the federal case did result in a final judgment on the merits of plaintiff's cause of action. First, the federal case resulted in a judgment on the merits. The district court granted judgment in plaintiff's favor on his federal and state procedural due process claims, Counts II (violation of procedural due process rights under § 1983) and VIII (violation of the Due Process Clause of the Illinois Constitution) and held that plaintiff's procedural due process rights were violated and ordered a hearing. "Summary judgment is the procedural equivalent of a trial and is an adjudication on the merits." *Freedberg v. Ohio National Insurance Co.*, 2012 IL App (1st) 110938, ¶ 54 (quoting *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 84 (2001)).

¶ 33 The doctrine of *res judicata* mandates that a final judgment on the merits of a case rendered by a court of competent jurisdiction is an absolute bar to future suits between the same parties regarding the same "claim, demand or cause of action." *Riverdale Industries, Inc. v. Malloy*, 307 Ill. App. 3d 183, 185 (1999). In River Park, the Illinois Supreme Court explicitly adopted the Second Restatement of Judgments test (see Restatement (Second) of Judgments § 24, Comment a, at 197 (1982)), commonly known as the "transactional test," for determining whether a second suit constitutes the same cause of action for *res judicata* purposes. To determine whether a second suit constitutes the same cause of action as a previous suit for res judicata purposes, we look to the "transactional test," which asks whether the subsequent action

arises from the same set of operative facts as the original action. *River Park*, 184 Ill. 2d at 309. " ' " '[T]he assertion of different kinds or theories of relief still constitutes a single cause of action if a single group of operative facts give rise to the assertion of relief.' " ' " *River Park*, 184 Ill. 2d at 307 (quoting *Rodgers v. St. Mary's Hospital*, 149 Ill. 2d 302, 312 (1992), quoting *Pfeiffer v. William Wrigley Jr. Co.*, 139 Ill. App. 3d 320, 323 (1985), quoting *Baird & Warner, Inc. v. Addison Industrial Park, Inc.*, 70 Ill. App. 3d 59, 64 (1979).

¶ 34 Plaintiff's complaint in his federal case alleged the same single groups of operative facts as alleged in the present case. In both cases, plaintiff alleged he suffered a stroke and was unlawfully placed on "zero-pay status" when he attempted to return to work with restrictions and refused to reinstate him to employment. In both cases, plaintiff sought backpay based on the same incident. There is no question we are dealing with the same group of operative facts and that there is an identity of the cause of action. See *Stillo v. State Retirement Systems*, 366 Ill. App. 3d 660, 664-65 (2006) (holding that "[w]hile plaintiff here asserts a different theory under which he seeks the return of a portion of his pension contributions (now challenging the method of calculation of the refund, whereas previously he contended that he was entitled to a continuation of benefits until his appeals were exhausted), the underlying set of operative facts is identical in both cases.").

¶ 35 Instead of appropriately looking to the disposition of his federal action as a whole, plaintiff focuses solely on the disposition of his other pendent state claims in federal court and argues that dismissals without prejudice and dismissals for lack of subject matter jurisdiction are not decisions on the merits, ignoring the fact that the disposition of his federal case concerned the same cause of action and was a final judgment on the merits. The merits of the claim for violation of plaintiff's procedural due process rights was addressed and fully adjudicated to a

final judgment. Merely asserting different theories of relief does not change the fact that plaintiff is bringing the same cause of action. " '[S]eparate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief.' " *Hayashi v. Illinois Dept. of Financial and Professional Regulation*, 2014 IL 116023, ¶ 46 (quoting *River Park*, 184 Ill. 2d at 311). Under the transactional test, "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park*, 184 Ill. 2d at 311. As the supreme court explained, " '[t]he purpose of *res judicata* is to promote judicial economy by requiring parties to litigate, in one case, all rights arising out of the same set of operative facts and also [to] prevent[ ] the unjust burden that would result if a party could be forced to relitigate what is essentially the same case.' " *River Park*, 184 Ill. 2d at 319 (quoting *Henstein v. Buschbach*, 248 Ill. App. 3d 1010, 1015-16 (1993)). "This purpose would be undermined if plaintiffs were permitted to pursue their state claims after bringing the same cause of action against defendant in federal court." *River Park*, 184 Ill. 2d at 319.

¶ 36 Also as part of his argument against the application of *res judicata*, plaintiff argues that the decision by the Seventh Circuit in his federal case "specifically ordered" that plaintiff could file the current case in state court. Plaintiff argues that "the Seventh Circuit Court of Appeals expressly told this plaintiff and these Defendants that he could sue for monetary relief in an Illinois Court." Lest the Seventh Circuit's statement be taken out of context, we underscore the fact that plaintiff's federal claims in the federal district court were indeed considered on the merits and resulted in a final decision on the merits, thereby satisfying the second element of *res*

judicata. Plaintiff relies on the following comments by the Seventh Circuit on appeal in his appellate federal case:

¶ 37 "Furthermore, in declining to consider the merits of Dargis's placement on 'zero pay status,' the district court did not foreclose Dargis's opportunities for monetary relief. We have previously noted that an officer in Dargis's position can obtain back pay to which he is entitled by petitioning the Merit Board, initiating an action of mandamus, or, unless the applicable statute of limitations has run, filing suit under the Illinois wage payment statute. *Ellis v. Sheahan*, 412 F. 3d 754, 756-57 (7th Cir. 2005) (citations omitted)." *Dargis v. Sheahan*, 526 F. 3d 981, 990 (7th Cir. 2008).

¶ 38 Relying on this statement by the Seventh Circuit is unavailing for several reasons. First, although the Seventh Circuit stated that the federal district court "declin[ed] to consider the merits of Dargis's placement on 'zero pay status,' " the federal district court did, indeed, consider the merits of plaintiff's federal and state procedural due process claims, held that plaintiff's procedural due process rights were violated, and granted summary judgment in plaintiff's favor on those claims and ordered a hearing. What the court did not reach was the actual determination of the merits of plaintiff's monetary claim for backpay.

¶ 39 Also, as defendants point out, this statement by the Seventh Circuit is merely *dicta*. The Seventh Circuit was not holding that plaintiff was, in fact, entitled to do any of the above. The Seventh Circuit did not hold that plaintiff could in fact proceed to bring state claims in state court which could have been brought in federal court but were not, nor would we have been bound by such a holding. See *People v. Wanke*, 303 Ill. App. 3d 772, 784 (1999) (" 'we are not bound by a Federal court decision other than a decision of the United States Supreme Court' " (quoting *Cavarretta v. Department of Children & Family Services*, 277 Ill. App. 3d 16, 23 (1996))). The

Seventh Circuit was merely pointing out that the district court was not foreclosing plaintiff monetary relief by ordering a hearing instead of reaching its own decision. The only issue before the Seventh Circuit was plaintiff's federal due process claim, and "whether, after finding a violation, the district court's order for a hearing was the proper remedy." *Dargis*, 526 F. 3d at 988-89. The circuit court in this case appropriately found that this *dicta* in the Seventh Circuit decision was neither a "reservation of Plaintiff's rights to maintain the present action [n]or a foresight as to Plaintiff's likelihood of success in the present action."

¶ 40 Further, the case cited by the Seventh Circuit, *Ellis*, is distinguishable from the present case because the plaintiff in *Ellis* brought a claim for deprivation of due process for failure to receive a pre-deprivation hearing and the Seventh Circuit held that the plaintiff was *not* denied procedural due process. In *Ellis*, the Seventh Circuit held as follows:

¶ 41 "But to have and lose an entitlement is not enough to establish a deprivation of property without due process of law; it establishes only that a deprivation of property has taken place. The plaintiff had to show that the property was taken away from her without notice and the opportunity for a hearing at which she could try to contest the deprivation. She had and indeed still has adequate procedural routes by which to obtain such a hearing. She could have asked the Merit Board to award her backpay. [Citations.]. Unless the statute of limitations has run, she can still obtain the missing backpay, if she has any right to it, by a suit under the Illinois wage payment statute, [citations], or by an action for mandamus. [Citations.]." *Ellis*, 412 F. 3d at 756-57.

¶ 42 Whereas the district court in plaintiff's case held that plaintiff was denied due process, the plaintiff in *Ellis* did not establish a deprivation of procedural due process. The Seventh Circuit's recitation of various remedies concerned different avenues available to the plaintiff to obtain

procedural due process because no relief was being afforded to her in that case since she failed to establish a due process violation. In the federal case for our plaintiff, the Seventh Circuit affirmed the district court's holding that plaintiff *was* denied procedural due process and ordering a hearing before the Merit Board. The Seventh Circuit concluded that "the district court correctly decided that the Merit Board could better determine whether Dargis's placement on involuntary unpaid leave was justified." *Dargis*, 526 F.3d at 990. In the present case plaintiff was afforded due process by the federal district court itself in ordering one of the remedies recited by *Ellis* and echoed in plaintiff's Seventh Circuit decision on appeal: a hearing before the Merit Board. Unfortunately for plaintiff, however, he chose to voluntarily retire, thereby depriving the Merit Board of jurisdiction to review his claim.

¶ 43 Although plaintiff does not directly argue that there is no identity of the cause of action under the second element of *res judicata*, he cites to cases holding that there was no identity of the causes of action in support of his argument that his claims were never adjudicated on the merits. Plaintiff relies on *Rodgers v. St. Mary's Hospital of Decatur*, 149 Ill. 2d 302 (1992), and *Torcasso v. Standard Outdoor Sales, Inc*., 157 Ill. 2d 484 (1993). In *Rodgers*, the causes of action were different because a claim for failure to keep an X-Ray under the X-Ray Retention Act was based on a different transaction or incident from the claim for medical malpractice liability. *Rodgers*, 149 Ill. 2d at 313. In *Torcasso*, notwithstanding the fact that the same contract was involved in two suits, the prior suit for recovery of a commission due under the terms of a brokerage contract was a different cause of action from a later suit for breach of the same brokerage agreement arising out of the failure to procure a lessee for the property. Not only was there a different theory of recovery, but it was based on differing facts; in the federal case a commission was not paid, and in the state case the transaction was a failure to procure a lessee.

¶ 44 Contrary to the cases cited by plaintiff, here there was an identity of the cause of action, because precisely the same transaction is involved – placing plaintiff on "zero pay status" and refusing to reinstate him to a position with restrictions – and so a judgment on the claims in the federal case was a judgment on the merits of plaintiff's cause of action.

¶ 45 Plaintiff's federal case judgment is also final. The Seventh Circuit Court of Appeals reviewed the federal district court's decision granting summary judgment on plaintiff's due process claims and granting summary judgment in favor of defendants on the remainder of his federal claims and affirmed. *See Dargis*, 526 F. 3d 981. As to the grant of judgment in favor of plaintiff's federal and state procedural due process claims, "[a]n order granting summary judgment is a final order*." Shutkas Electric, Inc. v. Ford Motor Co.*, 366 Ill. App. 3d 76, 80 (2006) (cit*ing Diggs v. Suburban Medical Center*, 191 Ill. App. 3d 828, 836 (1989)). As to the denial of defendants' motion for summary judgment on the remainder of plaintiff's federal claims, that portion of the judgment became final after plaintiff did not appeal the decision by the Seventh Circuit. *See Illinois Department of Healthcare and Family Services ex rel. Hanhardt v. Trinza*, 2014 IL App (1st) 130829, ¶ 28 (" 'A judgment *is res judicata* where an appeal has not been perfected ***.' " (quot*ing In re Application of Cook County Collector*, 228 Ill. App. 3d 719, 736 (1991)). The federal court judgment is final. Thus, there is a prior final adjudication on the merits of plaintiff's cause of action, contrary to plaintiff's argument, establishing the first element *of res judicata*.

¶ 46 Plaintiff also argues that a plaintiff has the right to re-file claims which were dismissed for lack of jurisdiction in federal court under section 13-217. Section 13-217 permits a party whose cause of action was dismissed for lack of jurisdiction and improper venue in the federal court to re-file the same cause of action in the state court within one year, regardless of whether

the cause is otherwise time-barred. 735 ILCS 5/13-217 (West 2008). Section 13-217 was enacted to facilitate disposition of litigation upon the merits and to protect plaintiffs from losing a cause of action because of a technical default unrelated to the merits. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 106-07 (1996). Dismissal of a state claim in federal court based on lack of any type of jurisdiction, pendent or subject matter, suffices to come within the ambit of this rule. See *Raper v. St. Mary's Hospital*, 181 Ill. App. 3d 379, 382 (1989) (holding federal court dismissal for lack of any type of jurisdiction was sufficient to trigger this provision).

Under this statutory provision, plaintiff is correct that he had the right to re-file the state claims he brought in federal court which were dismissed without prejudice for lack of pendent supplemental jurisdiction.

¶ 47 But *res judicata* serves as a bar to litigation not only of all issues that were actually decided but also "all issues that *could have been raised and determined* because they were properly involved by the subject matter of the earlier action." (Emphasis added.) *Riverdale Industries, Inc. v. Malloy*, 307 Ill. App. 3d 183, 185 (1999). In Counts I and V in the present case, plaintiff is alleging new claims, which were *not* brought in the federal case, but could have been brought along with his other state claims. As a result, plaintiff is barred from bringing these claims now.

¶ 48 Two leading Illinois Supreme Court cases on the issue illustrate this point. In *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 392 (2001), the Illinois Supreme Court held that state law claims raised in federal court were not barred by *res judicata* after the federal court dismissed the federal cause of action and declined to exercise supplemental jurisdiction over the state law claims. In *River Park*, 184 Ill. 2d 290, on the other hand, the Illinois Supreme Court held that state law claims not raised by the plaintiff in a prior federal suit were barred under *res judicata*

by dismissal of the federal suit because the state law claims could have been decided in the federal suit subject to court's supplemental jurisdiction over pendent state claims. The Illinois Supreme Court rejected the plaintiff's assertion that it could not have brought its state claims in federal court because the district court would have lacked subject-matter jurisdiction. *River Park*, 184 Ill. 2d at 317. Specifically, the supreme court stated the following: "Contrary to [River Park's] assertion, a district court is not required to dismiss pendent state claims after dismissing the claim from which its original jurisdiction stems. Instead, a district court has the discretion to exercise supplemental jurisdiction over pendent state claims under these circumstances." *Id*., at 317-18.

¶ 49 The line of precedent under *Nowak* applies where state claims *are* raised in federal court. Those state claims are not barred by *res judicata* after a dismissal of the federal action and refusal to reach those pendent state claims, protects those plaintiffs who do avail themselves of the opportunity to bring state claims in federal court but ultimately the federal court chooses not to rule on them and dismisses them solely for lack of pendent jurisdiction. The line of precedent under *River Park* applies to state claims that are *not* brought in federal court. State claims not brought in a prior federal action are barred by *res judicata* after a final determination on the merits in the federal action, "promotes judicial economy by requiring parties to litigate all rights arising out of the same set of operative facts in one case." *Cooney*, 2012 IL 113227 at ¶ 35.

¶ 50 The present case does not fall under *Nowak*. The state claims plaintiff alleges in this case in Counts I and V of his amended complaint, violation of the Illinois Wage Payment and Collection Act and breach of employment contract, were not brought in federal court. The state claims dismissed by the federal court for lack of pendent jurisdiction were *other* state claims. Thus, the *Nowak* line of precedent holding that *res judicata* does not result from a federal court's

dismissal of state claims solely for lack of pendent jurisdiction does not apply to plaintiff's Counts I and V. Plaintiff never brought those claims in federal court.

¶ 51 Here, plaintiff's claims in Counts I and V were not brought in federal court and thus are within the holding of *River Park*. These claims are barred by *res judicata*.

¶ 52 Plaintiff attempts to distinguish *River Park* by arguing the following in his brief:

¶ 53 "In *River Park*, plaintiffs were seeking to, unlike here, recover in a second state court action based *upon exactly the same facts* that had been at issue in the prior federal court action, merely by asserting different theories of recovery in the second suit. In contrast, Plaintiff is seeking to recover for entirely separate injuries arising out of separate transactions that took place at separate times, based upon distinct factual matters and after the Federal Court's ruling but within the statute of limitations. Unlike *River Park*, the factual allegations in these two cases concern separate transactions are different and occurred subsequently [*sic*]. (Emphasis in original.)"

¶ 54 Plaintiff fails to explain how the facts in the present case are different from the facts in the federal case or what the "separate transactions" are. To the extent that plaintiff argues that some facts occurred at separate times, the fact remains that all of the facts alleged are part of the same dispute and the same transaction, i.e., placing plaintiff on "zero pay status." See *Davis v. City of Chicago*, 53 F. 3d 801, 803 (1995) ("different phases of the same basic dispute are not separate claims."). Just as the circuit court concluded, we fail to perceive how the facts alleged are different at all. Plaintiff's present case is precisely within the holding of *River Park*; plaintiff is attempting to recover in a subsequent state court action based upon entirely the same facts that had been at issue in the prior federal court case, merely by asserting different theories of recovery in the second suit.

¶ 55 The Illinois Supreme Court has recognized that plaintiffs who have federal courts dismiss their action and then have state courts find their later state claims barred by *res judicata* based on the prior federal case are in a "Catch-22" situation. *River Park*, 184 Ill. 2d at 318. But, as the Illinois Supreme Court explained, plaintiffs created this dilemma when they choose not to assert their state causes of action in federal court by including the claims in the federal complaint. *River Park*, 184 Ill. 2d at 318-19.

¶ 56 The Illinois Supreme Court recently reiterated this point in *Cooney v. Rossiter*, 2012 IL 113227. In *Cooney*, the court held that the plaintiff mother's, grandparents', and son's action against a court-appointed psychiatrist alleging intentional infliction of emotional distress was barred by *res judicata* because a federal court had entered final judgment on the plaintiffs' civil rights claim against the psychiatrist and the federal claim arose out of the same operative facts as the state intentional infliction of emotional distress claim, and the intentional infliction of emotional distress claim could have been brought in the federal action. Similar to the plaintiffs in *River Park*, the plaintiff in *Cooney* chose not to make her state claim a part of her federal case and, because of her choice, she was later barred by *res judicata*. The court held that "the situation was of her own making, and it was her decision not to assert both claims in federal court." *Cooney*, 2012 IL 113227 at ¶ 30. Similarly here, the problem is of plaintiff's own making; he could have brought his claims in Count I and V in federal court but did not.

¶ 57 As defendants cogently point out in their discussion o*f River Park*, "[h]ad plaintiff in that case asserted all of its claims in the federal action, the worst case scenario for plaintiff would have entailed a dismissal of certain claims by the federal court for lack of federal jurisdiction. Plaintiff could then have properly pursued its claims in state court."

¶ 58 This is exactly the case here. Plaintiff could have, and should have, brought his state claims in Counts I and V in the federal case. The worst that could have happened is that the federal district court would have still declined to exercise supplemental jurisdiction for these state claims as well. But plaintiff would have then at least preserved his right to re-file those claims in state court, pursuant to *Nowak* and section 13-217. As the facts of this case stand, however, the state claims plaintiff did file in the federal case were the claims he failed to include in his notice of appeal (Counts VI through XII) and waived by pleading over (Counts II through IV). The claims plaintiff did not file in federal court, Counts I and V, are barred by *res judicata*. We affirm the circuit court's dismissal of Counts I and V based on *res judicata*. Given our disposition, we need not reach any of the parties' remaining arguments.

¶ 59 CONCLUSION

¶ 60 As plaintiff did not include review of the dismissal of Counts VI through XXII in his notice of appeal, we are without jurisdiction to review the dismissal of those claims. Further, plaintiff waived review of the dismissal of counts II through IV by amending his complaint and pleading over without incorporating the original complaint alleging those counts and without pursuing an immediate appeal.

¶ 61 Counts I and V were properly dismissed as barred by *res judicata* based on his prior federal action because the federal case resulted in a final adjudication on the merits, the claims are based on the same set of operative facts and thus the same cause of action, involving the same parties, but these claims were not brought in that case.

¶ 62 Affirmed.