2018 IL App (1st) 17-1297-U

THIRD DIVISION
March 7, 2018

No. 1-17-1297

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT NO. 508 (CITY COLLEGES OF CHICAGO),	)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division.
Defendant-Appellant,	)	No. 15 L 5531
v.	)	The Honorable Raymond W. Mitchell, Judge Presiding.
MARIO DE LA HAYE, M.D.,	)	
Plaintiff-Appellee.	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

Held: Certified question on appeal is answered in the following manner: A defendant acquiesces to claim-splitting solely by filing a successful motion to dismiss in a concurrently pending lawsuit on a basis other than that there are two lawsuits pending about the same subject matter.

¶ 1 This cause of action arises from two separate lawsuits, filed by the plaintiff, Mario De La Haye, a former tenured faculty and Associate Dean of Health Career Programs at Malcom X College, against his employer, the defendant, Board of Trustees of Community College District

No. 508 (the Board). Prior to his termination as a faculty member, the plaintiff filed the instant complaint in the Law Division, in case No. 2015 L 5531, solely seeking relief on the basis of claims arising from his termination from the position of Associate Dean of Health Career Programs at Malcolm X College (*De La Haye I*). More than a year later, represented by the Cook County College Teachers Union (the college teachers' union) attorney, the plaintiff also filed a complaint in the Chancery Division based upon claims arising from his termination from the position of full-time faculty member (*De La Haye II*). After the defendant successfully litigated a motion to dismiss in *De La Haye II*, it immediately filed a motion for summary judgment in the instant action, *De La Haye I*, on the basis of *res judicata*. The trial court denied the motion, holding that while the defendant had established the requisite elements of *res judicata*, it had failed "to object on the basis of another action pending in either case," thereby acquiescing to the plaintiff's splitting of claims. The trial court therefore permitted the plaintiff to proceed in the instant cause of action (*De La Haye I*), despite the final judgment in the chancery case. The trial court subsequently denied the defendant's motion to reconsider, but certified the following question for interlocutory appeal pursuant to Illinois Supreme Court Rule 308(a) (Ill. S. Ct. R. 308(a) (eff. Feb. 26, 2010)):

> "Does a defendant acquiesce to claim splitting solely by filing a successful motion to dismiss in a concurrently filed lawsuit on a basis other than that there are two lawsuits pending about the same subject matter?"

This court allowed the interlocutory appeal. For the reasons that follow, we answer the certified question in the affirmative.

¶ 2 I. BACKGROUND

¶ 3 The relevant facts here are not in dispute. The defendant, the Board, is a body politic and

corporate established pursuant to the provisions of the Illinois Public Community College Act (110 ILCS 805/1-1 *et seq*. (West 2014)) and has jurisdiction over Community College District No. 508, whose territory includes the City of Chicago (City). The defendant operates a community college system known as the City Colleges of Chicago, which is comprised of seven colleges located within the City, including Kennedy King College and Malcom X College.

¶ 4 The plaintiff was a hired by the defendant in 2008 as a full-time faculty member. The plaintiff's first appointment as faculty member was to the Biology Department at Kennedy King College. In early 2012, the plaintiff transferred to a faculty position in the Physician Assistant Program at Malcom X College. In May 2012, he was promoted to an administrative position as Academic Coordinator of Medical Programs at Malcolm X College. All of these positions were in a bargaining unit represented by the college teachers' union.

¶ 5 In March 2014, the plaintiff became Interim Associate Dean of Health Career Programs at Malcolm X College. In July 2014, this position became permanent and he was appointed as Associate Dean of Health Career Programs at the college. This appointment was a non-union position.

¶ 6 On April 20, 2015, the plaintiff was terminated form his position as the Associate Dean of Health Career Programs at Malcom X College, and returned to a faculty position in the bargaining unit of the college on paid leave pending a pre-disciplinary hearing to determine whether his employment was to be terminated altogether. The charges against the plaintiff included, *inter alia*, discrimination against others and incompetence and inefficiency in the performance of his duties. The pre-disciplinary hearing was conducted on May 5, 2015, after which a recommendation was made to the defendant to terminate the plaintiff.

¶ 7 Before the defendant officially approved the termination, however, on June 1, 2015, the

plaintiff filed the instant complaint in the Law Division (*De La Haye I*). His complaint solely related to his termination from his non-union position as Associate Dean at Malcom X College, and alleged the following: (1) common law retaliation; (2) violation of the Illinois Whistleblower Act (740 ILCS 174/20 (West 2014)); and (3) wrongful termination. With respect to all three counts, the plaintiff contended that his termination was made in retaliation for his complaint and refusal to participate in the continued cover-up of the inhumane storage and treatment of human cadavers at Malcom X College.

¶ 8 On June 4, 2015, only three days after he filed his complaint, the defendant officially approved the plaintiff's termination and the plaintiff was terminated from his position as full-time faculty member.

¶ 9 The plaintiff did not request the hearing available to him pursuant to the Public Community College Act (110 805/3B-4 (West 2014))) within ten days after the defendant approved his termination. Nor did he amend his complaint in *De La Haye I* to include claims based on his termination as full-time faculty member. Instead, represented by the college teachers' union attorney he attempted to arbitrate his termination with the defendant pursuant to the collective bargaining agreement covering tenured faculty members like him. After the defendant refused to arbitrate, a year later, on June 6, 2016, again represented by the college teachers' union attorney, the plaintiff filed a separate cause of action in the Chancery Division in case No. 2016 CH 7609 (*De La Haye II*), relating to claims arising from his termination as full-time faculty member at the college. That complaint contained three counts: (1) mandamus based upon violations of the Public Community College Act (110 805/3B-4 (West 2014)) in the manner in which the plaintiff's termination was handled; (2) violation of procedural due process in the post-termination proceedings; and (3) declaratory judgment.

¶ 10 On October 13, 2016, the trial court in *De La Haye II* held a hearing on the defendant's motion to dismiss. At that hearing, the defendant argued that all three counts in *De La Haye II* should be dismissed because the plaintiff failed to seek proper post-termination relief, *i.e.*, when he failed to request a hearing ten days after his termination as expressly required under the relevant statute (110 ILCS 805/3B-4 (West 2014)). The defendant also argued that the complaint should be dismissed on the basis of laches because more than six months had elapsed between the time that he was terminated and the time he filed his action in chancery court. After arguments by both parties, the plaintiff voluntarily dismissed the mandamus count of his complaint with prejudice. The trial court then dismissed the remaining two counts with prejudice. In doing so, the court found that the plaintiff had adequate notice of his impending formal termination and that the pre-termination hearing satisfied his right to procedural due process, so that declaratory judgment was inappropriate and dismissed both counts pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). The court also held that both the due process and declaratory judgment counts were barred by laches and dismissed them pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)).

¶ 11 The plaintiff did not appeal the dismissal of *De La Haye II*. The defendant did not file any other pleadings in *De La Haye II*.

¶ 12 After the time to appeal *De La Haye II* had expired, on February 8, 2017, the defendant moved for summary judgment in the instant action, *De La Haye I*, on the basis of *res judicata* and collateral estoppel. In response, the plaintiff argued that *res judicata* did not bar his claims in the instant action. In addition, the plaintiff argued that the defendant had acquiesced to the

splitting of the two claims by not objecting to the instant action (*De La Haye I*) for eight whole months since *De La Haye II* had been filed.

¶ 13 On April 25, 2017, the trial court denied the defendant's motion to summary judgment in *De La Haye I*. In doing so, the trial court held that all three requisites for *res judicata* had been met,[1] but refused to grant summary judgment on that basis, finding that the defendant had acquiesced to the claim-splitting. As the court explained in its written order:

> "While [p]laintiff maintained separate actions in both the present case [*De La Haye I*] and the chancery case [*De La Haye II*] based upon parts of the same claim, [d]efendant failed to object on the basis of another action pending in either case. Thus, [d]efendant's failure to object is effective as an acquiescence to [p]laintiff's splitting of claims, and judgment in the chancery case does not preclude plaintiff from proceeding in his claims in the case at bar."

¶ 14 The defendant filed a motion to reconsider on April 26, 2017, and in the alternative to certify a question pursuant to Illinois Supreme Court Rule 308(a) (Ill. S. Ct. R. 308(a) (eff. Feb. 26, 2010)). The trial court denied the motion to reconsider on May 1, 2017, but certified the question that is the subject of this appeal. This court granted the defendant's application for interlocutory appeal.[2]

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[1] The three requirements that must be satisfied for *res judicata* to apply are: (1) a final judgment on the merits has been rendered by a court of competent jurisdiction; (2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions. *Hudson v. City of Chicago*, 228 Ill.2d 462, 467 (2008).

[2] We note that the proceedings in the action below (*De La Haye I*) were not stayed pending this appeal, and that on July 27, 2017, the trial court denied the defendant's second motion for summary judgment on the merits of the common law retaliatory discharge and Illinois Whistleblower Act counts in that action. The matter is currently scheduled for trial by jury.

¶ 15 II. ANALYSIS

¶ 16 We begin by setting forth the scope of review that governs Illinois Supreme Court Rule 308 appeals. Generally, appellate courts only have jurisdiction to review final judgments entered in the trial court, absent a statutory exception or rule of the supreme court. *Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17 (citing *Walker v. Carnival Cruise Lines, Inc*., 383 Ill. App. 3d 129, 133 (2008). Illinois Supreme Court Rule 308 provides one such exception. *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 20. That rule states in pertinent part:

> "When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved." Ill. S. Ct. R. 308(a) (eff. Feb. 26, 2010)

¶ 17 Our courts have repeatedly explained that Rule 308 was not intended as a mechanism for expedited review of an order that merely applies the law to the facts of a particular case. *Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17 (citing *Walker*, 383 Ill.App.3d at 133); see *Rozsavolgyi*, 2017 IL 121048, ¶ 21 ("Certified questions must not seek an application of the law to the facts of a specific case."). Nor does the rule permit us to review the propriety of the order entered by the lower court. *Luccio*, 2012 IL App (1st) 121153, ¶ 17 (citing *Walker*, 383 Ill. App. 3d at 133). Rather, we are limited to answering the specific question certified by the trial court. *Luccio*, 2012 IL App (1st) 121153, ¶ 17 (citing *Moore v. Chicago Park District*, 2012 IL 112788, ¶ 9); see also *Abrams v. v. Oak Lawn-Hometown Middle School*, 2014 IL App (1st) 132987, ¶ 5 (In answering a certified question our role is to "answer the specific question and return the

parties to the trial court without analyzing the propriety of the underlying order."). Since, by definition, a certified question is a question of law, we apply a *de novo* standard of review. *Rozsavolgyi*, 2017 IL 121048, ¶ 21.

¶ 18 Initially, we note that the answer to the certified question lies in interpreting section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)) in the context of the acquiescence exception to the general rule against claim-splitting articulated by section 26(1) of the Restatement (Second) of Judgments (Restatement (Second) Judgments § 26(1) (1982)) as adopted by our supreme court.

¶ 19 It is well-accepted that "[t]he principle that *res judicata* prohibits a party from later seeking relief on the basis of issues, which might have been raised in the prior action also prevents a litigant from splitting a single cause of action into more than one proceeding." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 339 (1996); see also *Green v. Northwest Community Hospital*, 401 Ill. App. 3d 152, 154 (2010) (citing *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co.*, 189 Ill. App. 3d 638, 657 (1989)). Accordingly, under the well-established rule against claim-splitting, in Illinois "a plaintiff cannot sue for part of a claim in one action and then sue for the remainder of the claim in another action." *Dinerstein v. Evanston Athletic Clubs, Inc.*, 2016 IL App (1st) 153388, ¶ 16 (citing *Rein*, 172 Il. 2d at 340). Instead, a plaintiff must assert all the grounds of recovery he or she may have against the defendant arising from a single cause of action in one lawsuit. *Green*, 401 Ill. App. 3d at 154 (citing *Best Coin-Op*, 189 Ill. App. 3d at 657). The rule against claim-splitting is "founded on the premise that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of lawsuits." *Rein*, 172 Ill. 2d at 340.

¶ 20 Our supreme court has adopted six equitable exceptions to the rule against claim-splitting

set forth in section 26(1) of the Restatement (Second) of Judgments (Restatement (Second) of Judgments § 26(1) (1982)). *Rein* 172 Ill. 2d at 341; *Hudson*, 228 Ill. 2d at 472-73; see also *Dinerstein*, 2016 IL App (1st) 153388, ¶ 29. These exceptions permit the filing of a second claim where:

> "(1) the parties have agreed in terms or in effect that plaintiff may split his claim or the defendant has acquiesced therein; (2) the court in the first action expressly reserved the plaintiff's right to maintain the second action; (3) the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason." (Emphasis added.) *Rein* 172 Ill. 2d at 341.

¶ 21 In answering the certified question, we are concerned with the first exception. This exception applies where the parties have acquiesced or agreed in terms or in effect to the claim-splitting. *Dinerstein*, 2016 IL App (1st) 15338, ¶45, citing Restatement (Second) of Judgments §26(1) (1982). As indicated by the disjunctive "or" this exception includes three discrete concepts: acquiescence, agreement in terms and agreement in effect. *Dinerstein*, 2016 IL App (1st) 153388, ¶ 45. We address only acquiescence.

¶ 22 Our courts have repeatedly held that "acquiescence" is defined as a defendant's "failure to object" to the claim-splitting in either action. See *Dinerstein*, 2016 IL App (1st) 153388, ¶ 48, 59 ("Acquiescence could be mere silence –the failure to object--after an action is refiled, because by doing nothing the defendant is allowing the claim-splitting to go forward."); *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 896 (2009) ("According to Black's Law Dictionary, to

acquiesce is "[t]o accept tacitly or passively; to give implied consent to (an act)." Black's Law Dictionary (8th ed. 2004).) As Comment *a* of section 26 of the Restatement explains in relevant part:

> "Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim." Restatement (Second) of Judgments § 26, Comment *a*, at 234-35(1982).

Comment *a* also provides an illustration:

> "After a collision in which A suffers personal injuries and property damage, A commences in the same jurisdiction one action for his personal injuries and another for the property damage against B. B does not make known in either action his objection (usually called "other action pending") to A's maintaining two actions on parts of the same claim. After judgment for A for the personal injuries, B requests dismissal of the action for property damage on the ground of merger. Dismissal should be refused as B consented in effect to the splitting of the claim." Restatement (Second) of Judgments § 26, Comment *a*, at 234-35(1982).

¶ 23 Our courts have also addressed the appropriate timing for the objection to the claim-splitting and have held that a defendant must object when the second law suit is filed. See *Quintas v. Asset Mgmt. Group, Inc*., 395 Ill. App. 3d 324, 334 (2009) ("The appropriate time to object is *when the action is refiled*." (emphasis added.)); *Dinerstein*, 2016 IL App (1st) 153388, ¶ 18 (Explaining that "[t]he defendant has almost no basis to object *** before plaintiffs have even

refiled the action," and holding that "acquiescence is the failure to object to claim-splitting, *once* the action is refiled."); see also *Piagentini v. Ford Motor Co.*, 387 Ill. App. 3d 887, 896 (2009) (holding that "failure to file a timely objection *when* plaintiffs refiled their suit constitutes an acquiescence").

¶ 24 On appeal, the defendant does not take issue with this principle. Rather, the defendant argues that we must answer the certified question in the negative because the time to object to the claim-splitting had not yet expired under section 2-619(d) of the Code (735 ILCS 5/2-619(d) (West 2014)). According to the defendant because under the plain language of section 2-619(d) (735 ILCS 5/2-619(d) (West 2014)) a defendant is permitted to raise the issue of another action pending about the same subject matter in an answer, regardless of whether the defendant first files a motion to dismiss based on an alternative theory, a defendant does not acquiesce to claim-splitting solely by filing such a motion in a concurrently filed lawsuit. In support, the defendant cites to our decision in *Treadway v. Nations Credit Financial Services Corp.*, 383 Ill. App. 3d 1124 (2008). For the reasons that follow, we disagree and find *Treadway* inapposite.

¶ 25 Section 2-619 of the Code permits a defendant to file a motion to dismiss based upon certain defects or defenses. See 735 ILCS 5/2-619(a) (West 2014)). Subsection (a) of section 2-619 provides nine grounds for such dismissal. One such ground is that "[t]here is another action pending between the same parties for the same cause of action." 735 ILCS 5/2-619(a)(3) (West 2014)). Subsection (d) of section 2-619, to which the defendant here cites, further provides that "[t]he raising of any of the foregoing matters by motion under this [s]ection does not preclude the raising of them subsequently by answer unless the court has disposed of the motion on its merits; and a failure to raise any of them by motion does not preclude raising them by answer." 735 ILCS 5/2-619(d) (West 2014)).

¶ 26 A plain reading of section 2-619(d) of the Code (735 ILCS 5/2-619(d) (West 2014)) reveals that it does not impede the application of the acquiescence exception to claim-splitting as phrased by the certified question before us. That section permits a defendant to file an answer raising a section 2-619(a)(3) (735 ILCS 5/2-619(a)(3) (West 2014) as an affirmative defense only if the defendant first files an *unsuccessful* motion to dismiss. If a motion to dismiss is successful, by definition, a plaintiff will have no reason to subsequently file an answer and affirmative defense raising *res judicata*. The certified question here explicitly asks whether a defendant acquiesces to claim-splitting *solely* by filing a *successful* motion to dismiss in a concurrently pending lawsuit on a basis other than section 2-619(a)(3) (735 ILCS 5/2-619(a)(3) (West 2014). That question, as phrased, is limited to the filing of a *successful* motion to dismiss on an alternative ground. In addition, it contemplates the filing of such a motion as the *sole* action taken by the defendant in either of the two lawsuits. Since, as previously articulated, on review, we are limited to answering the certified question before us (see *Luccio*, 2012 IL App (1st) 121153, ¶ 17 (citing *Moore v. Chicago Park District*, 2012 IL 112788, ¶ 9)), we are compelled to conclude that it must be answered in the affirmative.

¶ 27 In that respect, we find that the defendant's reliance on *Treadway* misplaced. In that case, after the plaintiff's state case had been removed to federal court, the defendant filed an answer and affirmative defenses explicitly stating, *inter alia*, that "in the event [the] case was remanded to state court, [the plaintiff's] claim would be barred by section 2-619(a)(3) of the Code because there was another action pending between the same parties for the same cause." *Treadway*, 383 Ill. App. 3d at 1133. While the defendant later moved to withdraw this answer, and filed a motion to dismiss on other grounds, (*i.e.*, federal preemption), the court refused to find that the filing of this subsequent motion constituted acquiescence. *Treadway*, 383 Ill. App. 3d at 1133.

However, in *Treadway*, the court was already on notice that there were two pending actions when the initial answer and affirmative defenses were filed. *Treadway*, 383 Ill. App. 3d at 1133. Accordingly, *Treadway* does not apply to the certified question on appeal, which contemplates no action whatsoever by the defendant, aside from a successful motion to dismiss on grounds that do not notify the court about the existence of another action pending.

¶ 28 The remainder of the cases cited to by the defendant are similarly inapposite, because in each the defendant placed the court on notice of the claim-splitting, at the time the second action was filed. See *e.g.*, *Employees Retirement System v. Clarion Partners*, 2017 IL App (1st) 161480, ¶ 23-25 (holding that the defendant had not acquiesced in the claim-splitting because in its motion to dismiss it stated that the plaintiff's second action was duplicative of its previously filed action and that it would therefore file a summary judgment motion raising the *res judicata* issue, later if necessary); *Hasbun v. Resurrection Health Care Corp*., 2015 IL App (1st) 140537, ¶ 36 (holding that the defendant had not acquiesced to claim-splitting because it had "*promptly* moved to dismiss the case under the doctrine of *res judicata*." (Emphasis added.).

¶ 29 Contrary to the defendant's position, an affirmative answer to the certified question does not mean that the defendant must always move immediately to dismiss the second cause of action on the basis that there are multiple pending actions for the same cause. Rather, such an answer acknowledges that *solely* filing a successful motion to dismiss on an alternative ground without apprising the court in either action of the existence of another concurrent action constitutes acquiescence. See *Piagentini*, 387 Ill. App. 3d at 895 ("Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and *in neither action does the defendant make the objection that another action is pending based on the same claim*, judgment in one of the actions does not preclude the plaintiff from proceeding and obtaining judgment in

the other action. The failure of the defendant to object to the splitting g of the plaintiffs' claim is effective as an acquiescence in the splitting of the claim" (emphasis added.)) (quoting Restatement (Second) of Judgments § 26(1) (1982)).

¶ 30 If we were to agree with the defendant's argument and accept its answer to the certified question, the acquiescence exception would become meaningless. It would encourage defendants to remain silent about the existence of another pending law suit, while rushing to file successful motions to dismiss on alternative grounds for the sole purpose of obtaining a final judgment on the merits that would then guarantee them dismissal of the original suit on *res judicata* grounds. This is exactly the type of action that the acquiescence exception aims to circumvent. See *e.g.*, *Piagentini*, 387 Ill. App. 3d at 896 ("[T]he key element in determining acquiescence is the failure of the defendant to object to the claim-splitting."). At its core, *res judicata* is a doctrine of equity, not law. *Federal Signal Corp.*, 318 Ill. App. 3d 1101, 1116 (2001). As such it was intended to be applied by the defendant "as a shield, not a sword." *Federal Signal Corp.*, 318 Ill. App. 3d at 1116; see also *Longo v. Globe Auto Recycling, Inc.*, 318 Ill. Ap. 3d 1028, 1028 (2001); see also *Thornton v. Williams*, 89 Ill. App. 3d 544, 546 (1980) ("The doctrine of *res judicata* was intended to be used as a shield, not a sword.").

¶ 31 For all of the aforementioned reasons, we answer the certified question in the affirmative, and find that a defendant acquiesces to claim-splitting when at the time the concurrent law suit is filed it solely files a successful motion to dismiss in that concurrently filed lawsuit on a basis other than that there are two lawsuits pending about the same subject matter (735 ILCS 5/2-619(a)(3) (West 2014)).

¶ 32 Certified question answered; cause remanded.