2013 IL App (5th) 120229-U

NO. 5-12-0229

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

BILL RUSSELL, d/b/a Frank Russell & Son Trucking Company, Plaintiff-Appellee, v. JIM RUSSELL SUPPLY COMPANY, INC., a Corporation, JIM RUSSELL, Individually, DONNA RUSSELL, Individually, JIM RUSSELL SALES, INC., a Corporation, and JIM RUSSELL SERVICE, INC., a Corporation, Defendants-Appellants.	)	Appeal from the Circuit Court of Franklin County. No. 93-L-122 Honorable Robert W. Lewis, Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217 (West 2010)) bars the adjudication of a cause of action that has been voluntarily dismissed without prejudice twice; and an action based on an alleged breach of a noncompete agreement seeking purely equitable relief constitutes the same "cause of action" as one seeking money damages where the theories of relief arise from the same core group of operative facts. Certified questions answered.

¶ 2 This case is based on an alleged breach of a noncompete clause in a contract for the sale of an ownership interest in a family business. The circuit court of Franklin County certified two questions of law on which it found that there were substantial grounds for a difference of opinion and that the answers to those questions might materially advance the termination of the litigation. The certified questions are as follows: (1) "Is an action based

upon the alleged breach of a covenant not to compete contained in a contract for purchase of an ownership interest in a closely held business seeking purely equitable relief the same 'cause of action' as one premised upon the same clause seeking money damages for purposes of 735 ILCS 5/13-217?" and (2) "Does the operation of 735 ILCS 5/13-217 preclude the adjudication of a cause of action which has previously been voluntarily dismissed twice?" This court granted the defendants' application for leave to appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010). After reviewing the record, we answer both questions in the affirmative and remand this case for further proceedings.

¶ 3 I. FACTS AND PROCEDURAL HISTORY

¶ 4 The facts and procedural history pertinent to the certified questions are set forth below.

¶ 5 *Cause No. 86-CH-38*

¶ 6 The plaintiff, Bill Russell, doing business as Frank Russell & Son Trucking Company, filed a complaint for injunctive relief (cause No. 86-CH-38) in the circuit court of Franklin County, in 1986, against his brother, Jim Russell, his brother's wife, Donna Russell, and their business, Jim Russell Supply, Inc. The complaint alleged that prior to July 15, 1985, the brothers owned and operated Frank Russell & Son Trucking Company, a partnership engaged in the transportation of a product called magnatite from places throughout the United States to coal mine operations in Southern Illinois; that on July 15, 1986, the brothers entered into a written agreement in which Jim agreed to sell his interest in the partnership to Bill; that the written agreement included a noncompete clause which provided that Jim, as seller, would not engage in the business of trucking, hauling, general moving, and storage within a 100-mile radius of West Frankfort for a period of 10 years; and that the defendants breached the noncompete provision in that Jim Russell, acting in concert with Donna Russell, formed a corporation, Jim Russell Supply, Inc., and in June 1986, began to transport magnatite to a

former customer of the partnership located within a 100-mile radius of Illinois. The plaintiff claimed he had no adequate remedy at law, and he requested injunctive relief, attorney fees, and such other relief as the court deemed just and proper. On January 4, 1987, the plaintiff moved to dismiss his action without prejudice. On January 12, 1987, the circuit court of Franklin County granted the plaintiff's motion and dismissed the action without prejudice.

¶ 7 *Cause Nos. 87-L-15 & 87-L-76*

¶ 8 On January 22, 1987, the plaintiff refiled his action for injunctive relief (cause No. 87-L-15), against the same defendants in the circuit court of Williamson County. The complaint alleged that the defendants violated the same noncompete clause in the same ways as claimed in 86-CH-38. On June 10, 1987, the circuit court of Williamson County granted a motion to transfer the case to Franklin County. The court file was transferred to Franklin County and assigned cause No. 87-L-76. On July 9, 1993, the plaintiff filed a motion to voluntarily dismiss the action without prejudice. On July 12, 1993, the circuit court of Franklin County entered an order granting the plaintiff's motion to dismiss the action without prejudice.

¶ 9 *Cause No. 93-L-122*

¶ 10 On November 9, 1993, the plaintiff brought a third action (cause No. 93-L-122) against Jim Russell Supply, Inc., Jim Russell, and Donna Russell. The complaint, filed in Franklin County, alleged that the defendants violated the same noncompete clause in the same ways as claimed in 86-CH-38 and in 87-L-15 and 87-L-76. But this time the plaintiff did not seek injunctive relief. Instead, the plaintiff sought money damages, claiming the loss of long-standing customers and the losses of goodwill, profits, and revenue as a result of the breach.

¶ 11 The plaintiff amended the complaint in February 1994. Therein, the plaintiff added a count alleging that defendants, Jim Russell Supply, Inc., and Donna Russell, intentionally and unjustifiably induced Jim Russell to breach the noncompete clause in the sales

agreement. The plaintiff filed a second amended complaint in March 1998. In the 1998 version, the plaintiff added Jim Russell Service, Inc., and Jim Russell Sales, Inc., as defendants, and he claimed that the noncomplete clause was violated during two time periods in addition to June 1986. The second amended complaint alleged that the defendants, Jim Russell, Donna Russell, and Jim Russell Service, Inc., violated the noncompete clause in May 1989 and for some period thereafter, and that the defendants, Jim Russell, Donna Russell, and Jim Russell Sales, Inc., violated the noncompete clause for a period sometime after 1991.

¶ 12 On July 21, 2011, the defendants filed a motion to dismiss the complaint with prejudice for want of prosecution. In a docket entry dated October 17, 2011, the circuit court denied the defendants' motion. The defendants filed a motion for clarification of the court's ruling and a motion to reconsider the ruling. The defendants argued that section 13-217 of the Code of Civil Procedure permits only one refiling of the same cause of action within one year of a voluntary dismissal of the action, and that the circuit court lacked jurisdiction of the subject matter of the action because the plaintiff had twice voluntarily dismissed the same cause of action. In the alternative, the defendants asked the circuit court to certify a question of law for interlocutory appeal pursuant to Supreme Court Rule 308. On March 20, 2012, the court denied the defendants' motions.

¶ 13 The defendants filed a second motion requesting certification of two different questions of law pursuant to Rule 308. The circuit court determined that the questions presented a substantial ground for differences of opinion and that the answers to those questions might materially advance the termination of the litigation, and certified the following questions for interlocutory review: (1) "Is an action based upon the alleged breach of a covenant not to compete contained in a contract for purchase of an ownership interest in a closely held business seeking purely equitable relief the same 'cause of action' as one

premised upon the same clause seeking money damages for purposes of 735 ILCS 5/13-217?" and (2) "Does the operation of 735 ILCS 5/13-217 preclude the adjudication of a cause of action which has previously been voluntarily dismissed twice?" We granted the defendants' application for interlocutory review and now consider those questions in reverse order. Because the appeal involves questions of law certified pursuant to Supreme Court Rule 308, our review is *de novo*. *In re M.M.D.*, 213 Ill. 2d 105, 113, 820 N.E.2d 392, 398 (2004).

¶ 14 II. ANALYSIS

¶ 15 Section 13-217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 2010)) states in pertinent part as follows:

> "In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, if *** the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, *** then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff *** may commence a new action within one year or within the remaining period of limitation, whichever is greater, after *** the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution." 735 ILCS 5/13-217 (West 2010).

¶ 16 Section 13-217 provides the plaintiff with an absolute right to refile a cause of action within one year of an order of voluntary dismissal or the remaining period of limitations, whichever is greater. 735 ILCS 5/13-217 (West 2010). The Illinois Supreme Court has interpreted section 13-217 and held that it expressly authorizes only one refiling of a claim, even where the statute of limitations has not expired. *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 254, 582 N.E.2d 720, 721 (1991); *Gendek v. Jehangir*, 119 Ill. 2d 338, 343, 518 N.E.2d 1051, 1053 (1988). Section 13-217 is a saving clause to prevent the statute-of-

limitations bar that otherwise would be applicable. It provides for a limited extension to prevent injustice; it does not authorize an endless recycling of litigation. *Gendek*, 119 Ill. 2d at 343, 518 N.E.2d at 1053. Section 13-217 precludes the adjudication of a cause of action that has been voluntarily dismissed twice. The answer to the second certified question, whether the operation of section 13-217 precludes the adjudication of a cause of action which has previously been voluntarily dismissed twice, is yes.

¶ 17 Next, we consider whether under section 13-217, a claim based on an alleged breach of a noncompete clause in a contract for purchase of an ownership interest in a closely held business that seeks purely equitable relief is the same cause of action as a claim based on the same alleged breach of the same noncompete clause that seeks money damages.

¶ 18 For purposes of section 13-217, a complaint is deemed to be a refiling of a previously filed complaint if it constitutes the same cause of action under principles of *res judicata*. *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 220, 681 N.E.2d 12, 16 (1997). The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction constitutes an absolute bar to a subsequent suit between the parties involving the same cause of action. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334, 665 N.E.2d 1199, 1204 (1996). The Illinois Supreme Court has adopted the transactional test for purposes of determining whether there is an identity of causes of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 310, 703 N.E.2d 883, 893 (1998). Under the transactional test, separate claims will be considered the same cause of action for purposes of *res judicata* if both claims arise from a single group of operative facts, regardless of whether they assert different theories of relief. *River Park*, 184 Ill. 2d at 311, 703 N.E.2d at 893. The transactional test permits claims to be considered part of the same cause of action even if there is not a substantial overlap of evidence, so long as they arise from the same transaction. *River Park*, 184 Ill. 2d at 311, 703 N.E.2d at 893.

¶ 19 In this case, each of the three complaints filed by the plaintiff alleged that the defendants breached the noncompete clause in the written agreement for sale of the defendants' interest in Frank Russell & Son Trucking Company, by transporting a product from outside southern Illinois and delivering it to a former customer or customers within a 100-mile radius of West Frankfort. A single group of operative facts gave rise to the original action for injunctive relief (86-CH-38), the subsequent action for injunctive relief (87-L-15 and 87-L-76), and the action for money damages (93-L-122). The plaintiff's assertion of different substantive theories of liability and different kinds of relief arising from a single group of operative facts constitutes a single cause of action. Accordingly, the answer to the first certified question, whether an action based upon the alleged breach of a covenant not to compete contained in a contract for purchase of an ownership interest in a closely held business seeking purely equitable relief is the same "cause of action" as one premised upon the same clause seeking money damages for purposes of section 13-217, is yes.

¶ 20 A plaintiff is permitted one, and only one, refiling of an action under section 13-217. Section 13-217 precludes the adjudication of a cause of action that has been voluntarily dismissed twice. We decline, however, the defendants' request to enter a judgment in their favor because factual issues remain that must be considered by the trial court. There is no question that section 13-217 bars the claim arising from the alleged breach that began in June 1986 and the claim for tortious interference. But, as previously noted, the second amended complaint asserted two additional periods during which the defendants violated the noncompete agreement. Based on the record before us, we are unable to determine whether the violations that allegedly occurred during the periods in May 1989 and in 1991 constitute separate and distinct breaches of the noncompete clause or an ongoing breach that began in June 1986.

¶ 21 For the foregoing reasons, we answer yes to each of the certified questions and remand this case for further proceedings.

¶ 22 Certified questions answered; cause remanded.