2014 IL App (5th) 130233-U

NO. 5-13-0233

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SUSAN C. HILEMAN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Pulaski County.
	)	
v.	)	No. 05-L-6
	)	
LOUIS MAZE, SHARON McGINNESS, WARREN "BUDDY" MITCHELL, LOUIS R. McROY, LARRY WOOLARD, EDWARD SMITH, JOEY THURSTON, JOHN PRICE, JIM AVEARY, JAMES TAYLOR, DANNY BROWN, THE COMMITTEE TO ELECT TRUE DEMOCRATS, THE COMMITTEE TO ELECT SHARON McGINNESS, CITIZENS FOR WOOLARD, and LABORERS LOCAL 773,	)	Honorable
	)	Brian D. Lewis,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Welch and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff's action was dismissed by a United States District Court for lack of jurisdiction on October 24, 2002, and plaintiff's filing in the circuit court was time-barred as over one year after the dismissal.

¶ 2 Plaintiff, Susan C. Hileman, filed suit against defendants, Louis Maze, Sharon McGinness, Warren "Buddy" Mitchell, Louis R. McRoy, Larry Woolard, Edward Smith, Joey Thurston, John Price, Jim Aveary, James Taylor, Danny Brown, The Committee to Elect True Democrats, The Committee to Elect Sharon McGinness, Citizens for Woolard, and Laborers Local 773, in the circuit court of Pulaski County. Defendants moved to dismiss on the grounds that the action was untimely under section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 2012)). The circuit court granted the motion and dismissed the complaint. On appeal, plaintiff raises issues as to: (1) whether the declination of supplemental jurisdiction by a United States District Court constitutes a dismissal for lack of jurisdiction for purposes of section 13-217, (2) whether plaintiff's action was timely pursuant to section 13-217, and (3) whether defendants should be precluded by collateral estoppel or acquiescence from raising issues with the filing of the state claims. We affirm.

¶ 3 FACTS

¶ 4 On June 25, 2002, plaintiff filed a three-count amended complaint in the United States District Court for the Southern District of Illinois. The first count alleged violation of 42 U.S.C. § 1983. The other counts alleged violations of the laws of the State of Illinois and were submitted under color of supplemental jurisdiction. 28 U.S.C. § 1367 (2000).

¶ 5 On October 24, 2002, the district court entered an order dismissing the amended complaint. The court found that the federal claim was time-barred. The court also found

that "the balance of judicial economy, convenience, fairness, and comity does not warrant retention of the state law claims." The court ruled:

> "The Court DISMISSES with prejudice Count I of [plaintiff's] amended complaint based upon the statute of limitations (Doc. 63). Further, the Court sua sponte DISMISSES without prejudice Counts II and III of [plaintiff's] amended complaint for lack of jurisdiction (Doc. 63). No claims remain against any Defendants."

Plaintiff appealed.

¶ 6 On May 10, 2004, the Seventh Circuit Court of Appeals issued an opinion reversing the district court. *Hileman v. Maze*, 367 F.3d 694 (7th Cir. 2004). The opinion lays out the substance of plaintiff's allegations. The court ruled: "[W]e REVERSE the district court's order dismissing [plaintiff's] complaint. With the federal claims reinstated, the district court should also revisit on remand its decision not to retain supplemental jurisdiction over [plaintiff's] state-law claims under 28 U.S.C. § 1367." *Hileman*, 367 F.3d at 699.

¶ 7 On July 12, 2004, District Judge David Herndon entered a memorandum and order for the purpose of docket control, which stated, in part:

> "On appeal, the Seventh Circuit reinstated Plaintiff's federal claim and directed this Court to reconsider the dismissal of Plaintiff's state claims. Because section 1367 supplemental jurisdiction over Plaintiff's state claims (Counts II and III) returns upon the reinstatement of Plaintiff's federal claim (Count I), the Court REINSTATES Plaintiff's state claims found in Counts II and III of her amended

complaint. In addition, the Court Directs the Magistrate to reinstate the discovery process with regard to all of Plaintiff's claims."

¶ 8 On March 28, 2005, the district court entered another memorandum and order. In the introduction section of the order, the court stated:

"This Court originally granted Defendant's motions to dismiss based on a failure to comply with the statute of limitations, but on appeal the Seventh Circuit held that [Plaintiff] had timely filed her complaint [citation]. On remand, Plaintiff's state claims were reinstated [citation], and Defendants reassert their dismissal motions sans the statute of limitations argument."

The court found that discretion called for it to decline supplemental jurisdiction. The court concluded:

"The Court GRANTS Defendants' arguments to the extent they request dismissal based on 28 U.S.C. 1367(c). In its discretion, the Court DISMISSES without prejudice Plaintiff Hileman's claims for violation of Illinois election procedure (Count II) and civil conspiracy (Count III) since these state claims (1) are novel and complex and/or (2) predominate over the federal claim. The only claim remaining is the section 1983 claim in Count I against Defendant Maze."

¶ 9 On May 26, 2005, plaintiff filed the present action in the circuit court of Pulaski County. Over the ensuing months, the parties filed several pleadings including a motion to dismiss for want of prosecution. After the court denied the motion, several defendants filed answers to the amended complaint.

¶ 10 On October 17, 2012, defendant Woolard filed a motion to dismiss on the grounds that the complaint was untimely under section 13-217 of the Code. On April 24, 2013, the trial court entered an order dismissing the complaint. The court held that section 13-217 did not apply because the district court had declined supplemental jurisdiction and not dismissed the action for lack of jurisdiction. The court also held that, if section 13-217 were to apply, plaintiff would have been required to file her action in a circuit court within one year following the district court's order of October 24, 2002.

¶ 11 Plaintiff appeals.

¶ 12 ANALYSIS

¶ 13 The Illinois "savings statute" is found at section 13-217 of the Code. Section 13-217 provides:

> "§ 13-217. Reversal or dismissal. 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 judgment is entered for the plaintiff but reversed on appeal, or if there is a verdict in favor of the plaintiff and, upon a motion in arrest of judgment, the judgment is entered against the plaintiff, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue, then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, after

such judgment is reversed or entered against the plaintiff, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by a United States District Court for improper venue. No action which is voluntarily dismissed by the plaintiff or dismissed for want of prosecution by the court may be filed where the time for commencing the action has expired." 735 ILCS 5/13-217 (West 2012).

¶ 14 Noting that the exercise of supplemental jurisdiction rested in the discretion of the federal courts, the trial court found that a declination of supplemental jurisdiction was not a dismissal for "lack of jurisdiction." This was incorrect.

¶ 15 Supplemental jurisdiction is a form of subject matter jurisdiction. *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 164, 676 N.E.2d 634, 637 (1997). In *Timberlake* our supreme court concluded, "[A] dismissal for lack of supplemental jurisdiction has no different effect on a plaintiff's right to refile under section 13-217 than does a dismissal for lack of subject matter jurisdiction generally." *Timberlake*, 175 Ill. 2d at 165, 676 N.E.2d at 637. Illinois courts have repeatedly recognized that section 13-217 applies when a federal court has declined supplemental jurisdiction. See, *e.g.*, *Suslick v. Rothschild Securities Corp.*, 128 Ill. 2d 314, 320, 538 N.E.2d 553, 556 (1989) (pendent jurisdiction), *Timberlake*, 175 Ill. 2d at 164, 676 N.E.2d at 637; *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 218, 681 N.E.2d 12, 14 (1997); *Ko v. Eljer Industries, Inc.*, 287 Ill. App. 3d 35, 45, 678 N.E.2d 641, 648 (1997).

¶ 16 Nonetheless, a resurrection allowable under section 13-217 may occur only once. Section 13-217 permits one, and only one, reinstatement. *Flesner v. Youngs*

Development Co., 145 Ill. 2d 252, 254, 582 N.E.2d 720, 721 (1991); see, *e.g.*, *Fiorito v. Bellocchio*, 2013 IL App (1st) 121505, ¶ 10, 999 N.E.2d 42. The restriction to a single reinstatement applies even to refilings occurring before the expiration of the limitations period. *Flesner*, 145 Ill. 2d at 254, 582 N.E.2d at 721; *Ko*, 287 Ill. App. 3d at 45, 678 N.E.2d at 648.

¶ 17 Accordingly, under the plain language of section 13-217, plaintiff's complaint was untimely. The action was "dismissed by a United States District Court for lack of jurisdiction" on October 24, 2002. 735 ILCS 5/13-217 (West 2002). Any action in state court invoking section 13-217 needed to be filed within one year of the district court's order.

¶ 18 Plaintiff asserts that because she successfully appealed the dismissal, the 2002 order did not operate as the commencement date for section 13-217. Underlying plaintiff's stance is the premise that the reversed order of 2002 became null and void with no preclusive effect once reversed. See *Butler v. Eaton*, 141 U.S. 240, 242-43 (1891); *Garley v. Columbia LaGrange Hospital*, 377 Ill. App. 3d 678, 683, 881 N.E.2d 370, 375 (2007). The significance of the district court's order does not rest on the substance of the ruling or on a continuing preclusive effect. Instead, once the district court entered the order, plaintiff was given notice that the one-year period of section 13-217 had commenced. Plaintiff's assertion runs counter to the plain language of the statute and case law interpreting the provision. Illinois courts have consistently found that the appeal of a dismissal does not toll the period for the savings statute. See, *e.g.*, *Wade v. Byles*,

295 Ill. App. 3d 545, 546-47, 692 N.E.2d 750, 751-52 (1998); *Suslick*, 128 Ill. 2d at 320, 538 N.E.2d at 556; *Hupp v. Gray*, 73 Ill. 2d 78, 84, 382 N.E.2d 1211, 1214 (1978).

¶ 19 *Wade* is directly on point. In *Wade*, plaintiff filed a three-count complaint in the United States District Court for the Northern District of Illinois. The district court entered summary judgment on the federal claim and "dismissed the state law claims for lack of federal supplemental subject matter jurisdiction." *Wade*, 295 Ill. App. 3d at 546, 692 N.E.2d at 750. Plaintiff appealed to the Seventh Circuit, which affirmed. After the United States Supreme Court denied *certiorari*, plaintiff filed suit in the circuit court of Cook County. *Wade* summarized:

> "The plaintiff contends the one-year requirement was tolled during the pendency of the federal appellate process. This issue has been decided twice by our supreme court. In *Hupp v. Gray*, 73 Ill. 2d 78, 382 N.E.2d 1211 (1978), and again in *Suslick v. Rothschild Securities Corp.*, 128 Ill. 2d 314, 538 N.E.2d 553 (1989), the supreme court held the language of section 13-217 and its virtually identical predecessor (Ill. Rev. Stat. 1977, ch. 83, par. 24(a)) is clear: there is no tolling while a case dismissed for lack of jurisdiction is on appeal. It follows here that once the district court judge dismissed the plaintiff's action it no longer was 'pending,' appeal or not. See also *Sager Glove Corp. v. Continental Casualty Co.*, 37 Ill. App. 2d 295, 185 N.E.2d 473 (1962)." *Wade*, 295 Ill. App. 3d at 546-47, 692 N.E.2d at 751.

¶ 20 Plaintiff asserts that *Wade*, *Suslick*, and *Hupp* are inapplicable because in this case the dismissal order was reversed on appeal. Plaintiff draws an analogy to reinstatements

after a dismissal for want of prosecution. *O'Connor v. Ohio Centennial Corp.*, 124 Ill. App. 3d 281, 283, 463 N.E.2d 1376, 1378 (1984). *O'Connor* found that two prior dismissals for want of prosecution did not trigger section 13-217 because the trial court had placed the plaintiff in the same position she had occupied before the dismissal by reinstating the actions.

¶ 21 *O'Connor*, however, specifically distinguished the first two dismissals that were entered for want of prosecution from other dismissals. *O'Connor*, 124 Ill. App. 3d at 283, 463 N.E.2d at 1378 (distinguishing *Luebbing v. Copley Memorial Hospital*, 60 Ill. App. 3d 780, 783, 377 N.E.2d 345, 347 (1978)). The legislature subsequently deleted dismissals for want of prosecution from the grounds for invoking section 13-217 and inserted a provision expressly prohibiting such dismissals after the time for commencing an action has expired. Pub. Act 89-7 § 15 (eff. Mar. 9, 1995). Moreover, in *O'Connor*, the first two dismissals were not final, appealable orders. In contrast, in the case at hand, after the district court entered an order declining supplemental jurisdiction, the action was appealed to a higher court.

¶ 22 The plain language of the statute and subsequent precedent decrying any tolling during an appeal belie plaintiff's attempted analogy to *O'Connor*. If the plain language of the statute were not clear enough, *Suslick* and *Wade* informed plaintiff that the clock had started on any claim she wished to save for presentation in state court. *Suslick* and *Wade*, issued after *O'Connor*, clearly informed plaintiff that an appeal will not toll the commencement date for section 13-217.

¶ 23 *Wade* concluded by citing the long-standing precedent of *Sager Glove*. *Sager Glove*, 37 Ill. App. 2d at 302, 185 N.E.2d at 476. Plaintiff contends that *Sager Glove* suggested that the success on appeal should determine whether a savings statute should apply as " 'a judgment appealed from is still a judgment and remains one until reversed or set aside on appeal.' " *Sager Glove*, 37 Ill. App. 2d at 302, 185 N.E.2d at 476 (quoting *State v. Hart Refineries*, 92 P.2d 766, 769 (Mont. 1939)). The context of this quote reveals why an exception for time on appeal should not be read into a savings statute. *Sager Glove* was looking to precedent from Montana which concluded that any tolling of a savings period needed to be explicitly defined. Accordingly, *Sager Glove* suggested that the vagueness of what constituted a judgment required the legislature to explicitly state any exception for time on appeal. *Sager Glove* indicated that in Illinois, as well as Montana, the legislature would need to define the terms of such an exception in the statute:

> "The [Montana] Court said, 'Under our statute there is no exception that extends the time for bringing an action on a judgment so as to permit exclusion of the time when appeals were pending or when a supersedeas bond was in effect. If the legislature so intended it would have so provided.' " *Sager*, 37 Ill. App. 2d at 302, 185 N.E.2d at 476 (quoting *Hart Refineries*, 92 P.2d at 769).

¶ 24 Despite the lack of any language calling for a tolling during appeal, plaintiff claims that policy calls for section 13-217 to apply only to the second dismissal by the district court. Plaintiff asserts that any state action filed during the pendency of her federal appeal would likely have been dismissed. This claim is indistinguishable from

that addressed in *Wade*. As in *Wade*, plaintiff, not defendants, had control over the filing of her suit. As in *Wade*, this court has no basis to engage in speculation about the potential scenarios faced by plaintiff once the district court entered its order of dismissal. The function of this court is to follow the plain language of the statute. Nothing in the language of section 13-217 suggests that an appeal should stay the commencement date for the savings period.

¶ 25 The plain language of the savings statute and consistent interpretation of its terms informed plaintiff that the period for any use of the savings statute began once the United States District Court entered an order of dismissal on October 24, 2002. Nevertheless, plaintiff contends that doctrines of collateral estoppel and acquiescence should operate to bar claims by defendants. The record does not suggest that defendants impeded diligent action by plaintiff in this decade-long litigation. Moreover, plaintiff's arguments rest on events that occurred after the savings period had already expired. Plaintiff's reliance on the district court order of March 28, 2005, is undermined by the fact that this date was well after the running of the savings period, and the reversal by the Seventh Circuit was over a year following the commencement date. Nothing suggests that the plain language of the statute should not be applied. Regardless of any action by defendants, the plain language of the savings statute notified plaintiff that, if she were to invoke section 13-217 to file a state action, she would have to commence the action within one year of October 24, 2002.

¶ 26 The plain language of section 13-217 establishes a bright-line commencement date. The date is firmly set at the entry of the order, making any success on appeal

irrelevant. Section 13-217 allows a plaintiff to file a new action within one year after "the action is dismissed by a United States District Court for lack of jurisdiction." 735 ILCS 5/13-217 (West 2012). The action was so dismissed by a United States District Court on October 24, 2002. The state suit was untimely.

¶ 27 Accordingly, the order of the circuit court is hereby affirmed.

¶ 28 Affirmed.