

No. 1-12-0847

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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JOHN P. MILLER,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellant,	)	of Cook County
	)	
v.	)	No. 11 L 848
	)	
PELLA CORPORATION, sometimes called	)	
PELLA PRODUCTS, INC., an Iowa	)	
Corporation, <i>et al.</i> ,	)	Honorable
	)	Thomas R. Mulroy, Jr.,
Defendant-Appellee.	)	Judge Presiding.

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JUSTICE QUINN delivered the judgment of the court.  
Presiding Justice Harris and Justice Murphy concurred in the judgment.

**ORDER**

¶ 1 *HELD*: Plaintiff sought to refile an action for a third time against the defendant after he voluntarily dismissed his previous state court action and refiled in federal district court, but the federal case was dismissed for lack of supplemental jurisdiction. It is well-settled that section 13-217 of the Code of Civil Procedure (735 ILCS 5/13-217 (West 2008)) permits only one refiling of any claim and that the federal refiling counts as his one opportunity to refile notwithstanding plaintiff's arguments for application of judicial estoppel and enforcement of a discovery agreement to preserve this third claim.

¶ 2

## Background

¶ 3 This suit arose out of allegations that defendant's windows installed in plaintiff's home caused property damage to his home. Plaintiff initially filed his lawsuit in 2005 in state court in McHenry County, Illinois. Plaintiff voluntarily dismissed that first lawsuit. In 2006, plaintiff then refiled his state claims in federal district court along with certain allegations of breach of warranty claims pursuant to the Magnuson-Moss Act which provides a federal cause of action, which also may be filed in state courts, for consumers "damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation...or under a written warranty, implied warranty, or service contract...." 15 U.S.C. §2301(d)(1) (West 2008). During discovery in the federal litigation, the parties entered into a stipulation which read in its entirety, as follows: "By agreement of the parties, any discovery taken in this case can be used in State Court in the event jurisdiction is not found to exist in Federal Court." In 2010, plaintiff's federal claims were dismissed by the district court and this dismissal was affirmed on appeal. *Miller v. Herman*, 600 F.3d 726 (7th Cir. 2010). However, the federal appellate court vacated the dismissal of plaintiff's state claims and remanded those claims "so the district court may consider whether it should exercise supplemental jurisdiction over the state law claims..." *Id.* at 739. On remand, the district court refused to exercise supplemental jurisdiction over the remaining state court claims and dismissed the state claims on May 6, 2010. No appeal was filed by plaintiff from this district court order. Instead, plaintiff refiled the instant complaint on January 24, 2011, in the Circuit Court of Cook County. Defendant filed a motion to dismiss pursuant to section 13-217 of the Code of Civil Procedure because plaintiff is permitted only one refiling of a claim and the current complaint constitutes his third filing. 735 ILCS 5/13-217 (West

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2008). After full briefing and oral argument, the circuit court dismissed the case pursuant to section 13-217. *Id.* Plaintiff filed a motion for reconsideration which was denied. This timely appeal followed.

¶ 4 Analysis

¶ 5 As a preliminary matter, we observe that plaintiff's appendix attached to his opening brief fails to conform to the requirements delineated in Rule 342. Ill. S. Ct. Rule 342 (eff. Jan. 1, 2005). The appendix does not include a table of contents and does not provide a copy of the judgment appealed from or the notice of appeal as required by Rule 342. *Id.* These rules are not guidelines, but requirements. Even *pro se* litigants are not relieved of the obligation to comply. *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001). While this noncompliance provides this court with the authority to dismiss the appeal, (*LaGrange Memorial Hospital v. St. Paul Insurance Co.*, 317 Ill. App. 3d 863, 876 (2000)), we decline to impose such a harsh sanction as the record is small and the issues raised are straightforward..

¶ 6 Plaintiff argues that the circuit court was wrong when it dismissed plaintiff's third filing (second refiling) of his suit against the defendant pursuant to section 13-217 of the Code of Civil Procedure. 735 ILCS 5/13-217 (West 2008).

¶ 7 This court's analysis begins with the statutory text, which provides:

"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 motion in

arrest of judgment, the judgment is entered against the plaintiff, or the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, 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 after the action is voluntarily dismissed by the plaintiff, or the action is dismissed for want of prosecution, or the action is dismissed by a United States District Court for lack of jurisdiction, or the action is dismissed by the United States District Court for improper venue." 735 ILCS 5/13-217 (West 2008).

¶ 8 Section 13-217 is a saving provision that allows a plaintiff to refile a cause of action just once if its prior disposition was based on the reasons enumerated in the statute. *Id.*

¶ 9 First, it is clear beyond any reasonable doubt that this current refiled case cannot withstand scrutiny under section 13-217. The statutory language of section 13-217 indicates that the legislature did not want the state courts to entertain anything but one refiling of an action. On the basis of the statutory language, the circuit court was correct in refusing to entertain anything more than one

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refiling. This case represented a second refiling.

¶ 10 Plaintiff acknowledges that our supreme court has long held that a plaintiff who voluntarily dismisses a suit may commence only one new refiling of the action whether it be in state or federal court. *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 163 (1997) (federal filing counted as the one permitted refiling of a claim); *Flesner v. Youngs Development Co.*, 145 Ill.2d 252 (1991) (only one refiling of a claim is permitted even if applicable statute of limitations has not expired); *Gendek v. Jehangir*, 119 Ill.2d 338 (1988). Plaintiff concedes that the one-filing rule is applicable to count his federal court suit which was originally filed in McHenry County state court as his one permissible refiling. *Timberlake v. Illini Hospital*, 175 Ill.2d 159 (1997). Our supreme court could not have been clearer when it held that "[n]o matter why the second dismissal took place, the statute does not give the plaintiff the right to refile again." *Id.* at 165.

¶ 11 Plaintiff argues that despite the statutory, procedural and case precedent bars to the instant third filing of his lawsuit, he should be allowed to pursue his claims against the defendant because:

- 1) defendant should be judicially estopped from arguing for dismissal pursuant to section 13-217 based on the parties' 2007 discovery agreement entered into while the federal case was pending, and
- 2) the federal judge's dismissal order rejecting a request to exercise supplemental jurisdiction over plaintiff's state claims which stated that "if plaintiffs choose to refile their claims in state court, as they are free to do so, potential duplications of discovery efforts should be minimal." Plaintiff argues that the *dicta* in the district court order is both an indication by the federal court that the third refiling is proper and an implication that the federal court would have exercised supplemental jurisdiction had the discovery agreement not been in place.

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¶ 12 The first issue plaintiff wishes this court to address on appeal is whether the position defendant took in the parties' 2007 stipulation on the use of discovery in federal court and the current position defendant asserted in its motion to dismiss the present state court case are mutually exclusive positions, barring defendant from proceeding with his argument for dismissal of this case under the doctrine of judicial estoppel.

¶ 13 It is well settled that this court reviews a circuit court's application of the doctrine of judicial estoppel for an abuse of discretion regardless of the procedural manner in which the issue was raised. *Berge v. Mader*, 2011 IL App. (1st) 103778, ¶ 9. The doctrine of judicial estoppel bars a party from making a factual representation in a case after he has successfully taken a contrary position in another case. *Id.* ¶ 12. The goal of the application of judicial estoppel is to protect the integrity of our system of justice and prevent a party from manipulating and making a mockery of our system of dispensing justice, in all its forms. *Id.* ¶ 12. Judicial estoppel focuses on the relationship between the judicial process and the litigant. The primary focus of judicial estoppel is to prohibit a party from stating at different times, two conflicting factual positions as their private interests change. *Finley v. Kesling*, 105 Ill. App. 3d 1, 9 (1982). In other words, a party cannot be permitted to assert a contrary factual position.

¶ 14 We fail to see how the actions of the defendant in the parties' 2007 agreement regarding use of discovery and its position in its motion to dismiss were inconsistent factual positions such that any court would feel the need to protect the integrity of the judicial process from such assertions because they perverted the judicial process. We find that the circuit court exercised its discretion appropriately when it ruled that defendant is not judicially estopped from pursuing his motion to

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dismiss pursuant to section 13-217. 735 ILCS 5/13-217 (West 2008). Without belaboring the point, we also note that even if the defendant did not raise the issue of the court's jurisdiction over the third filing of the state court claims *via* its motion to dismiss, it has long been the law that a circuit court or appellate court has an obligation to raise jurisdiction, *sua sponte*. *Clark v. Evans*, 138 Ill. 56 (1907); *People v. Holmes*, 235 Ill. 2d 59, 66 (2009) (courts have independent duty to consider jurisdiction). It has also long been the law that if a court has no jurisdiction, it cannot obtain it by stipulation of the parties. *Phillips v. Benfield*, 249 Ill. 139 (1911). Our legislature has statutorily barred plaintiff's third filing (second refiling) and no agreement between the parties, even if one existed, can override the application of section 13-217 to this case.

¶ 15 Next, the plaintiff argues that had the federal district court known that the state court would dismiss his refiling pursuant to section 13-217, it would have retained supplemental jurisdiction. This argument falls flat. The federal appellate court, in its opinion, alerted the district court to plaintiff's concern that any state court refiling by him would be promptly dismissed pursuant to section 13-217.

¶ 16 The federal court of appeals stated in its opinion, as follows:

"Miller has expressed concern, albeit only in the last paragraph of his reply brief, ..., about the fate of his case if the district court declines to exercise supplemental jurisdiction. He fears that Illinois' "one-filing" rule, 735 Ill. Comp. Stat. 5/13-217..., *Timberlake v. Illini Hospital*, 175 Ill. 2d 159 (1997), the operation of which was triggered by the [plaintiff's] voluntary dismissal of their initial state

court action, will prevent him from seeking relief in state court. We do not consider this or any other issue that may bear on the district court's ultimate decision. Whether it chooses to exercise its supplemental jurisdiction is a question the district court must take up in the first instance. We therefore vacate the district court's unconsidered dismissal of [plaintiff's] state law claims...and remand so the district court can determine whether the exercise of supplemental jurisdiction is warranted here and, if necessary, conduct appropriate proceedings incidental to that discretionary determination." *Miller v. Herman*, 600 F.3d 726, 738 (7th Cir. 2010).

¶ 17 Clearly, as indicated by the federal appellate court opinion, the district court had discretion to retain or dismiss the supplemental state court claims once federal jurisdiction was determined to be non-existent. Furthermore, the district court was alerted to the potential consequences of any future state court filings by the plaintiff when the federal appellate court cited both section 13-217 and the *Timberlake* case in its instruction to the district court on remand. *Id.*

¶ 18 On remand, the district court determined that there was no basis on which the plaintiff's state law claims could be retained in federal court as there was no jurisdiction over the plaintiff's alleged federal claim, relying on 28 U.S.C. § 1367(c)(3), *Groci v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999) and *Williams Electronic Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007). Plaintiff did not request reconsideration or appeal this ruling.

¶ 19 In its May 2010 order, the district court stated:

"Looking to concerns of economy of litigation, we note that, with respect to the discovery conducted in this case, the following docket entry was made on February 13, 2007: "By agreement of the parties, any discovery taken in this case can be used in the State Court case in the event jurisdiction is not found to exist in Federal Court." Therefore, if Plaintiffs choose to refile their claims in state court, which they are free to do, potential duplication of discovery efforts should be minimal." *Miller v. Herman*, 06 C 3573, (N.D. IL. May 6, 2010) .

¶ 20 Plaintiff argues that the above-quoted excerpt of the ruling demonstrates that the federal judge was misled by the agreement and this *dicta* in his order when refusing to accept supplemental jurisdiction over plaintiff's state law claims indicates that the federal judge read the 2007 discovery agreement as defendant's waiver of any defense under section 13-217 of the Code of Civil Procedure. 735 ILCS 5/13-217 (West 2008). Plaintiff further argues that defendant anticipated a possible third state court action back in 2007 when it agreed to have the federal discovery serve as state court discovery and, therefore, should have preserved their grounds for dismissal in the discovery agreement. We have reviewed the one-line discovery agreement. It is not unlike many other discovery agreements whose purpose is to avoid duplication of discovery and save the clients unnecessary time and expense. The parties' 2007 discovery agreement in no way restricts the defendant from raising its statutory and/or procedural defenses to any future lawsuits. Additionally, a federal court cannot, through *dicta* in its ruling, determine a state court's ability and jurisdiction

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to entertain any lawsuit. The federal court did not go so far. It merely stated the obvious: plaintiff was free to file an action in state court. It did not express any opinion on either the procedural or substantive merits of any future state lawsuit. How could it? No draft complaint was before the federal court. In any event, any advisory opinion by the federal court on this court's jurisdiction would not be controlling.

¶ 21 If the plaintiff believed the federal court was confused about the application and effect of the 2007 discovery agreement, plaintiff should have requested clarification, reconsideration or appealed. All of these remedies were at his disposal at the time the federal court ruled. In any event, it is hard to believe that the federal district court was unaware of plaintiff's grave concerns regarding any future refiling in state court being doomed, as those concerns were outlined by the federal appellate court opinion remanding the matter to the district court.

¶ 22 Conclusion

¶ 23 The circuit court properly granted defendant's motions to dismiss and refused to entertain anything more than one refiling of plaintiff's case. We affirm.

¶ 24 Affirmed.