

No. 15-1194 and 15-1616 (Cons.)

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

FOURTH STREET VILLAS, LLC, GOLF)	Appeal from the Circuit Court of Cook County.
BRIDGE APARTMENTS I, LLC, CS MWC, LLC,)	
TREYTON OAKS, LLC, GROUP 8888, LLC,)	
KMWC 845, LLC, BV WELLS, LLC, BV)	
EVERGREEN, LLC, LaPORTE/CUYLER)	
PARTNERSHIP, PARK NATIONAL BANK,)	
successor to Austin Bank of Chicago, as)	
trustee under trust agreement dated June 25, 1993)	
and known as Trust No. 6990, LAWRENCE)	
STARKMAN, and ALBERT BELMONTE,)	
)	No. 11 CH 24116
Plaintiffs/Counterdefendants-Appellees,)	
)	
v.)	
)	
UNITED CENTRAL BANK, AMRISH K.)	
MAHAJAN, and ALLYSON OESTERLE,)	
)	Honorable Franklin U. Valderrama Judge Presiding
Defendants/Counterplaintiffs-Appellants.)	

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendants' counterclaim. Defendants had voluntarily dismissed their claims on two prior occasions. The single refiling

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rule bars the third pursuit of claims that have already been voluntarily dismissed twice.

¶ 2 This case deals with several loans that defendant United Central Bank claims are in default. The bank filed seven separate cases against the plaintiff-borrowers to enforce the promissory notes and personal guaranties. The bank voluntarily dismissed those cases. Getting wind that the bank intended to refile the claims, the borrowers filed this case seeking to enjoin the bank from instigating enforcement proceedings. Around the same time, however, the bank filed two cases in federal court seeking essentially the same overall relief that it sought in the seven cases it voluntarily dismissed. The bank then filed a counterclaim in this case and voluntarily dismissed one of the federal cases. On plaintiffs' motion, the trial court found that the counterclaim asserted here was the third filing of claims that had already been voluntarily dismissed twice. Accordingly, the court dismissed the counterclaim, holding that it violated the single refiling rule for voluntarily dismissed cases. We agree with that disposition and, therefore, we affirm.

¶ 3 **BACKGROUND**

¶ 4 Mutual Bank made several loans to plaintiff-borrowers that were secured by mortgages on apartment buildings in Wisconsin and Illinois. Some individuals executed personal guaranties to further secure the loans. Mutual Bank was closed by Illinois regulators in 2009 and defendant United Central Bank (UCB) purchased the loans from the FDIC. After acquiring the loans, UCB brought various lawsuits against borrowers and guarantors alleging that they had defaulted on their obligations as a result of nonpayment.

¶ 5 Relevant to this appeal, UCB filed six separate cases in Illinois state court and one in federal court. The suits sought to enforce the promissory notes and guaranties. Between June 2010 and June 2011, UCB voluntarily dismissed the individual lawsuits with the apparent intention that

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it would refile all the claims in one suit.

¶ 6 On July 8, 2011, the borrowers and guarantors filed this case against UCB. They alleged that UCB had held a town hall meeting with borrowers and public officials and announced a moratorium agreement under which UCB would halt foreclosure actions against the borrowers while everyone worked to restructure the loans. Plaintiffs alleged that the reconciliation efforts were aimed at addressing administrative missteps and fraudulent banking practices by Mutual Bank, UCB's predecessor in interest. Plaintiffs apparently filed this case because, despite what transpired at the town hall meeting, UCB had expressed a renewed intention to file an enforcement suit in federal court.

¶ 7 Nine days after plaintiffs filed this case, on July 17, 2011, UCB filed a suit in federal court in the Northern District of Illinois against several borrowers and guarantors, effectively consolidating the seven suits it had voluntarily dismissed during the previous year. See *United Central Bank v. Starkman*, No. 11-cv-04820 (N.D. Ill. July 17, 2011). The suit again was an attempt to enforce the notes and guaranties against the borrowers and to foreclose on the attendant mortgages. Shortly after filing its federal suit in the Northern District of Illinois, on July 20, 2011, UCB filed another federal case in the Eastern District of Wisconsin. See *United Central Bank v. Wells St. Apartments, LLC*, 957 F. Supp. 2d 978 (E.D. Wis. 2013). That case was to foreclose on the mortgages secured by the properties situated in Wisconsin, all of which arose from the same loan transaction and alleged breaches that were the predicate for the case in the Northern District of Illinois. There is some indication that notice of the various suits crossed in the mail inasmuch as UCB was apparently not served with plaintiffs' complaint in this case until July 26th.

¶ 8 Plaintiffs filed a motion to dismiss UCB's case in the Northern District of Illinois. UCB

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filed a motion to dismiss plaintiff's state court case—this case. While the motions were pending, on November 15, 2011, UCB filed a counterclaim in this case, effectively restating the claims in its federal case which, again, were a restatement of the previously voluntarily dismissed claims.

UCB's supposed intention was simply to bring all claims together into one case. Having done so with its counterclaim here, UCB voluntarily dismissed its case in the Northern District of Illinois on January 9, 2012.

¶ 9 Plaintiffs subsequently moved to dismiss UCB's counterclaim in this case. Plaintiffs argued that, because UCB had voluntarily dismissed its initial seven cases and then voluntarily dismissed its case in the Northern District, UCB had run afoul of the "single refiling rule" and the counterclaim was subject to dismissal. Plaintiffs maintained that the counterclaim constituted UCB's third filing of the same claims that had been voluntarily dismissed twice previously and therefore they were barred. The trial court agreed and dismissed the counterclaim.

¶ 10 Two days after the trial court dismissed the counterclaim in this case, the Eastern District of Wisconsin granted summary judgment to the plaintiffs here on UCB's claims attempting to foreclose one of the mortgages securing the loans. There were three relevant mortgages in that federal case. Mortgage I contained a choice of law provision indicating that it was to be governed by Illinois law. Mortgages II and III are governed by Wisconsin law. The district court held that the plaintiffs here were entitled to summary judgment on the foreclosure claim covered by Illinois law, but not the claims covered by Wisconsin law. *United Central Bank*, 957 F. Supp. 2d at 991. The district court explained that, under Illinois law which governed Mortgage I, a creditor cannot

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foreclose a mortgage when an action on the underlying note is barred. *Id.* at 983.¹ The district court then analyzed Illinois' single refiling rule which allows one, but only one, refiling of a voluntarily dismissed cause of action. *Id.* The court then held that, because UCB had voluntarily dismissed its claims twice previously, its action on the note would be barred by the single refiling rule. *Id.* at 985-86. And, consequently, its foreclosure action would be barred since no claim could be made on the underlying note. *Id.*² The district court's judgment was affirmed on appeal. *United Central Bank v. KMWC 845, LLC*, 800 F.3d 307 (7th Cir. 2015)

¶ 11 On appeal, UCB argues that the single refiling rule does not apply to counterclaims or that it otherwise does not apply under these circumstances.

¶ 12 ANALYSIS

¶ 13 Like any pleading, a counterclaim is subject to a motion to dismiss. *Health Cost Controls v. Sevilla*, 307 Ill. App. 3d 582, 589 (1999). A section 2-619 motion to dismiss admits the legal sufficiency of the pleading. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of the litigation. *Henry v. Gallagher* (In re Estate of Gallagher), 383 Ill. App. 3d 901, 903 (2008). Although a section 2-619 motion admits the legal sufficiency of a pleading, it raises defects, defenses, or some other affirmative matter appearing on the face of the pleading or established by external submissions, that defeat the non-movant's claim. *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (2008). We review the trial court's decision to grant a motion to dismiss a counterclaim *de novo*. *Schaffner v.*

¹ The outcome is different on the claims governed by Wisconsin law, because Wisconsin law allows a creditor to foreclose a mortgage even if an action on the underlying note might be barred. *United Central Bank*, 957 F. Supp. 2d at 991.

² The district court apparently held that an action on the note would be barred without it having knowledge of the trial court's dismissal of the counterclaim in this case. Yet, both courts came to the same conclusion on the issue.

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514 W. Grant Place Condominium Ass'n, Inc., 324 Ill. App. 3d 1033, 1044 (2001).

¶ 14 UCB argues that the single refiling rule does not apply to counterclaims. In support of that argument, UCB directs us to section 13-207 of the Illinois Code of Civil Procedure. The rule set forth in that section is that when a claim is filed against a defendant, the defendant can respond with a counterclaim that would otherwise be barred by the statute of limitations. 735 ILCS 5/13-207 (West 2012). The problem with UCB's argument is that this case has nothing to do with a statute of limitations.

¶ 15 The rule embodied in section 13-207 is sometimes referred to as the "saving provision." *Village of Glendale Heights v. Glen Ayre Enterprises, Inc.*, 404 Ill. App. 3d 205, 211 (2010). The stated purpose of section 13-207 is to prevent plaintiffs from intentionally filing their claims as late as possible in order to preclude defendants from a reasonable opportunity to file their counterclaim within the original limitations period. *Board of Trustees of Rend Lake Conservancy Dist. v. City of Sesser*, 2011 IL App (5th) 110110, ¶ 13. Another purpose of the saving provision is to protect parties who have shorter limitations periods than their opponents. *Barragan v. Casco Design Corp.*, 216 Ill. 2d 435, 446 (2005). The saving provision is premised on the notion that potential litigants do not always promptly file every possible claim they may have; instead, some litigants may refrain from filing until after a claim is brought against them. *Id.* at 447. Application of the saving provision is based on the principle that a plaintiff waives application of the statute of limitations with regard to potential counterclaims. *Id.*

¶ 16 There is no issue with a statute of limitations in this case. The question here is not whether UCB's claims are time-barred, but whether UCB's claims are barred as a result of it filing its claims multiple times following voluntary dismissals. So section 13-207 does nothing to "save" UCB's

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claim. UCB does not point to any authority to support expanding the "saving provision" to anything other than the statute of limitations. Nor would such an expansion make any sense, as it would be in derogation of the statute's plain language and all of the underlying purposes for which the rule was enacted.

¶ 17 Different than the saving provision, the proper focus in this case is on the "single refiling rule." Section 2-1009(a) of the Code of Illinois Civil Procedure allows a plaintiff to dismiss his or her action without prejudice at any time before trial or hearing begins. 735 ILCS 5/2-1009(a) (West 2012). As a counterpart, section 13-217 allows a plaintiff to refile an action that has been voluntarily dismissed within one year from the date of the dismissal. 735 ILCS 5/13-217 (West 2012). However, upon taking a voluntary dismissal, a plaintiff is permitted one, *and only one*, refiling of that action. *Hurst v. Capital Cities Media, Inc.*, 323 Ill. App. 3d 812, 822 (2001). The single refiling rule applies regardless of whether the applicable statute of limitations has expired. *Id.*

¶ 18 Here, UCB voluntarily dismissed its claims twice—first on a piecemeal basis between June 2010 and June 2011, and for the second time in January 2012. The single refiling rule is, like *res judicata*, a rule of claim preclusion. *Carr v. Tillery*, 591 F.3d 909, 914 (7th Cir. 2010). After the first claim is filed and voluntarily dismissed, the dismissal is without prejudice. However, once the voluntarily dismissed claim is refiled and then voluntarily dismissed for a second time, the dismissal becomes one with prejudicial effect. *Id.*; see also *Bernstein v. Gottlieb Memorial Hospital*, 185 Ill. App. 3d 709, 716 (1989) (applying the same rule, but in the context of a dismissal for want of prosecution under the same statutory section).

¶ 19 It is immaterial that the claims being re-interposed here are pled as counterclaims because

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the single refiling rule works to bar the claim itself. *Carr v. Tillery*, 591 F.3d 909, 915 (7th Cir. 2010). The rule addresses a matter of procedure, but it operates as a substantive bar on the merits. *Bernstein*, 185 Ill. App. 3d at 716. The counterclaims pled here are clearly restatements of UCB's previously dismissed claims and UCB cannot meaningfully dispute that fact. Even where it half-heartedly attempts to do so, UCB later contradicts itself by arguing that the cases were mere consolidations of the various claims.

¶ 20 The refiling at issue in this case is UCB's third filing of the operative claims that it has voluntarily dismissed twice previously. The Illinois Supreme Court has long held that a claimant is not permitted to refile a claim after a second voluntary dismissal. *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 254 (1991). We are bound by that precedent. UCB's supposed plan to simply have the matters heard together may have been reasonable, but its intentions are irrelevant. *Timberlake v. Illini Hospital*, 175 Ill. 2d 159, 165 (1997) (it does not matter what the reason is for the second dismissal; the statute gives no right for a plaintiff to file claims a third time). UCB's method of achieving its supposedly desired ends runs afoul of the Code of Civil Procedure and longstanding precedent. As in *Koffski v. Village of North Barrington*, 241 Ill. App. 3d 479, 486-87 (1993), UCB's current predicament is a matter entirely of its own making. The procedural rules by which our courts operate are, and have to be, more than just aspirational. *Manning v. City of Chicago*, 407 Ill. App. 3d 849, 855 (2011). And here they mandate the dismissal of UCB's thrice filed claims.

¶ 21 UCB also argues that the legislature did not intend for section 13-217 to bar the refiling of a case after two voluntary dismissals (citing *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997)). However, we have explained that even after the supreme court's holding in *Best*, a

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plaintiff is permitted one, and only one, refiling of an action even if the applicable statute of limitations has not expired. *Hurst*, 323 Ill. App. 3d at 822 (PLA denied at *Hurst v. Capital Cities Media, Inc.*, 197 Ill. 2d 561, No. 92348 (Dec. 5, 2001)).

¶ 22 UCB drops a number of underdeveloped arguments into the final section of its brief which it claims should prevent the single refiling rule from applying to this case. In doing so, UCB relies on multiple unpublished decisions in its attempt to convince us to apply some sort of "continuing wrongs" or "continuing contracts" exception to the single refiling rule. UCB also intimates that we should find that the counterclaim filed in this case is somehow not a new action subject to the constraints of the single refiling rule. The arguments are unavailing.

¶ 23 Each of the three times UCB has filed these claims, the claims have been premised on a single incident of breach—nonpayment in 2009. The claims have been against the same parties, relate to the same transactions, and UCB has advanced the same causes of action at every turn. For purposes of section 13-217, a pleading is said to be a refiling of a previously filed pleading if it contains the same cause of action as defined by *res judicata* principles. *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 220, 681 N.E.2d 12, 16 (1997). That standard clearly is met here. UCB's current counterclaim is the third filing of the same claim, it violates the single refiling rule for voluntarily dismissed claims, and the trial court properly dismissed it.

¶ 24 CONCLUSION

¶ 25 Accordingly, we affirm.

¶ 26 Affirmed.