2016 IL App (1st) 151486-U

SIXTH DIVISION
Order Filed: August 5, 2016

No. 1-15-1486

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

EDELHEIT & EDELHEIT, LTD.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 14 CH 9454
	)	
STEVEN EDELHEIT and CHUNOWITZ,	)	
TEITELBAUM & MANDEL, LTD.,	)	Honorable
	)	LeRoy K. Martin,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The decision of the circuit court is reversed and the cause remanded, where the court erred in dismissing the plaintiff's complaint, which was refiled as a matter of right pursuant to section 13-217, for lack of jurisdiction based upon the pendency of an appeal in the underlying action.

¶ 2 The plaintiff, Edelheit & Edelheit, Ltd. (E & E), filed suit against the defendants, Steven Edelheit, and Cunowitz, Teitelbaum & Mandel, Ltd. (CTM), seeking relief for an alleged breach of fiduciary duty, among other claims. The suit was dismissed for want of prosecution, and E &

E appealed from that dismissal. While the appeal was pending, E & E refiled its complaint against Steven and CTM pursuant to section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 2014)), which permits the refiling of an action in the circuit court within one year after it has been dismissed for want of prosecution. The circuit court dismissed the refiled action for lack of jurisdiction under section 2-619(a)(1) of the Code (735 ILCS 5/2-619(a)(1) (West 2014)), based upon the pending appeal. E & E now appeals, arguing that the circuit court erred in determining that it lacked jurisdiction over his refiled claim. For the reasons that follow, we reverse the decision of the circuit court and remand this case for further proceedings.

¶ 3 E & E is an accounting firm owned by Lawrence Edelheit, who is the father of the defendant, Steven Edelheit. Lawrence and Steven practiced together at E & E as partners for many years until June 2011, when Steven informed Lawrence that he would be leaving the firm as of August 1, 2011, to join CTM. Steven also notified Lawrence that he would be taking a portion of E & E's client base with him to CTM. On November 15, 2011, following Steven's departure, Lawrence and E & E filed suit against Steven and CTM (Case No. 2011 CH 39449) (Edelheit I), seeking an accounting, an injunction and declaratory relief. The three-count complaint charged both defendants with breach of fiduciary duty and usurpation of corporate opportunity, and requested a declaration as to stock ownership.

¶ 4 On September 4, 2012, the court entered an order dismissing the claims as to CTM with leave to amend. As Steven had already answered the complaint, the court ordered that the plaintiffs re-plead with separate counts against Steven and CTM.

¶ 5 On October 2, 2012, Lawrence and E & E filed a four-count amended complaint for "Injunction, Accounting, Constructive Trust, Excrow [*sic*] Deposit Order, Aiding and Abetting

Breach of Fiduciary Duty and Other Relief." On April 4, 2013, on motion of the defendants, the court dismissed the amended complaint for failure to state a claim on which relief could be granted. 735 ILCS 5/2-615 (West 2012). In a written opinion, the court pointed out that the amended complaint failed to comply with the order of September 4, 2012, in that it added new factual allegations against Steven that were not in the original complaint, and commingled claims involving Steven and CTS into single counts. The court granted the plaintiffs "one more opportunity," until May 1, 2013, to re-plead the complaint in compliance with its directives, and set a status hearing for June 5, 2013.

¶ 6 On the June 5, 2013, status date, the plaintiffs had not yet filed a second amended complaint, and neither of their attorneys of record appeared for the scheduled hearing. The court therefore dismissed the cause for want of prosecution. The dismissal order referenced a pattern of late and improperly noticed filings and a disregard of deadlines on the part of the plaintiffs. Later on June 5, counsel for Lawrence filed a motion to vacate the dismissal for want of prosecution (DWP), and for leave to file his second amended complaint, which was attached to the motion. E & E was also listed as a party to the motion to vacate.

¶ 7 On June 17, 2013, CTM filed a motion seeking a dismissal of the case with prejudice.

¶ 8 At a hearing on June 25, 2013, with counsel for CTM, Lawrence and Steven present, the court denied CTM's motion and granted Lawrence leave, until July 5, 2013, to present his motion to vacate the DWP and to submit a proposed second amended complaint. The court made it clear that Lawrence's failure to file the motion and attached second amended complaint by the July 5 deadline "will result in a dismissal with prejudice."

¶ 9 On January 28, 2014, after extensive briefing, the court entered an order vacating the DWP against Lawrence. The court refused, however, to vacate the DWP as to E & E. It

observed that, although Lawrence had claimed that E & E was joining in the motion to vacate, "it has not appeared through counsel or otherwise since the cause was DWP'd." The court denied Lawrence leave to file the proposed second amended complaint, finding it to be "virtually identical" in substance to the first amended complaint. It then dismissed the remainder of the action with prejudice.

¶ 10 On February 6, 2014, E & E and Lawrence filed a joint notice of appeal from, among other orders, the court's orders of April 4, June 5 and June 25, 2013, and January 28, 2014. The plaintiffs' assignments of error included, in relevant part, the court's denial of E & E's motion to vacate the DWP, and the dismissal of the first and second amended complaints pursuant to section 2-615 of the Code for failure to state a claim on which relief could be granted.

¶ 11 On June 5, 2014, while the appeal in Edelheit I remained pending, E & E, as sole plaintiff, filed a complaint against Steven and CTM "[f]or Injunction, Accounting, Constructive Trust, Declaratory Judgment and Other Relief" (case No. 14 CH 09454) (Edelheit II).

¶ 12 On February 3, 2015, the defendants filed separate motions to dismiss the complaint in Edelheit II under sections 2-619(a)(1) and (a)(3) of the Code (735 ILCS 5/2-619(a)(1), (a)(3) (West 2014)). The defendants argued that the complaint in Edelheit II was "entirely duplicative" of the first amended complaint that was currently on appeal in Edelheit I, and that, in addition, the circuit court lacked jurisdiction over the refiled complaint because of the pending appeal.

¶ 13 On March 30, 2015, E & E moved to stay briefing on the defendants' motion to dismiss until August 4, 2015, or, alternatively, to stay the "entire proceeding" until the appellate court issued a decision in Edelheit I. E & E argued that it filed the action in Edelheit II merely to preserve its rights under section 13-217, to refile its claim within one year of a DWP. 735 ILCS 5/13-217 (West 2014).

¶ 14 On April 20, 2015, the defendants responded to the motion to stay, arguing that a stay would be improper because the circuit court lacked jurisdiction over the refiled complaint based upon the pending appeal in Edelheit I. Instead, the defendants contended that the proper course would be a dismissal of the action with prejudice.

¶ 15 Following a hearing, the circuit court entered an order on May 20, 2015, granting the defendants' motions to dismiss the complaint in Edelheit II "for the reasons stated on the record, with prejudice."[*] The court determined that the appeal in Edelheit I involved, among other issues, a review of the circuit court's dismissal of the first amended complaint, which was essentially the same complaint filed in the new action. Based upon its determination, the court then denied the plaintiff's motion to stay the action as moot. On May 21, 2015, E & E filed the instant appeal from this order.

¶ 16 On July 16, 2015, this court entered an order granting a motion apparently filed by Steven, which is absent from the record, to dismiss the appeal of Edelheit I for lack of jurisdiction.

¶ 17 In the instant appeal, E & E first argues that the circuit court erred in dismissing its refiled action for lack of jurisdiction. It contends that, notwithstanding the pending appeal in Edelheit I, it had an absolute right to refile its case under section 13-217 of the Code, and that the refiling constituted a separate action from the original action. E & E concludes, therefore, that the dismissal of Edelheit II for lack of jurisdiction was in error. We agree.

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[*] It is not entirely clear from the transcript whether the court based its dismissal exclusively upon a finding of lack of jurisdiction under section 2-619(a)(1), as the court also conducted an analysis under section 2-619(a)(3). However, as the dismissal was made with prejudice, we presume that it was based upon a finding of lack of jurisdiction.

¶ 18 As E & E's contention involves a question of law based upon undisputed facts, our review is *de novo*. *People v. Smith*, 191 Ill. 2d 408, 411 (2000). Pursuant to section 13-217 of the Code, where a plaintiff's action has been dismissed for want of prosecution, it is granted the option to refile the complaint within one year of the entry of the dismissal order or within the remaining period of limitations, whichever is greater. 735 ILCS 5/13-217 (West 2014); *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489, 497 (1998). Section 13-217 "operates as a savings statute, with the purpose of facilitating the disposition of litigation on the merits and to avoid its frustration upon grounds unrelated to the merits." *S.C. Vaughan*, 181 Ill. 2d at 497 (citing *Gendek v. Jehangir*, 119 Ill. 2d 338, 343-44 (1988)). It has been repeatedly established that the plaintiff's right to refile is "absolute," (*S.C. Vaughn*, 181 Ill. 2d at 497; *Flores v. Dugan*, 91 Ill. 2d 108, 112 (1982)), and that his refiled action is considered "separate and distinct" from the original dismissed claim. *Dubina v. Mesirow*, 178 Ill. 2d 496 (1997). Accordingly, because of the absolute right to refile, it is axiomatic that a DWP constitutes a non-final, non-appealable order. *Wold v. Bull Valley*, 96 Ill. 2d 110 (1983); *Flores*, 91 Ill. 2d at 112. Consequently, a trial court's order denying the vacature of the DWP is also deemed to be non-final and not subject to appeal. *Wilson v. Evanston Hospital*, 257 Ill. App. 3d 837, 840 (1994).

¶ 19 In this case, the circuit court entered the DWP against both E & E and Lawrence on June 5, 2013. In its order of January 28, 2014, the court granted a motion to vacate the DWP as to Lawrence, but denied it as to E & E. E & E then filed its complaint in Edelheit II on June 5, 2014, well within the one-year period following the January 28, 2014, denial of its motion to vacate the DWP.

¶ 20 CTM argues, however, that E & E lost its right to refile because it was a party to the appeal filed on February 6, 2014, in Edelheit I. CTM maintains that the filing of the appeal

divested the circuit court of jurisdiction over the refiled complaint, and the complaint was properly dismissed.

¶ 21 It is generally true that the filing of a timely notice of appeal operates to immediately transfer jurisdiction to the appellate court, and the circuit court is divested of jurisdiction to rule upon any matter that is substantive to *the underlying judgment*. (Emphasis added) *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 173 (2011). However, the refiling of an action under section 13-217 constitutes "an entirely new and separate action, not a reinstatement of the old action." *Dubina*, 178 Ill. 2d at 504; *Wilson v. Bryant*, 374 Ill. App. 3d 306, 311 (2007). The court in *Dubina* reasoned that, upon the filing of the appeal, the original action has essentially ceased and the circuit court's jurisdiction over the substantive part of that action no longer exists. See *Dubina*, 178 Ill. 2d at 504. For this reason, *Dubina* held that appellate jurisdiction over an action will lie simultaneously with that of the circuit court in the event the plaintiff refiles the action under section 13-217 while the appeal remains pending. *Id.* at 504, 507.

¶ 22 In contrast to this case, *Dubina* involved an appeal from an order that the court found to be final and appealable. However, even though the order appealed from here was neither final nor appealable, we find the rationale in *Dubina* to be equally applicable to this case. After the court in Edelheit I entered its order of January 28, 2014, refusing to vacate the DWP as to E & E and dismissing the remainder of the case with prejudice, nothing remained for the court to do in that case. As E & E's refiled case was a new and distinct action from Edelheit I, the appeal from Edelheit I had no effect upon the court's jurisdiction over the refiled action. Accordingly, the court erred in finding that it lacked jurisdiction over Edelheit II.

¶ 23 Steven contends that dismissal of the refiled action was nonetheless required under section 2-619(a)(3) of the Code, because the complaint in the refiled action was virtually

identical to the first amended complaint that was under review by this court in the then-pending Edelheit I.

¶ 24 Section 2-619(a)(3) allows a defendant to seek the dismissal or stay of an action where there is another action pending "between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2014); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447 (1986). The express purpose of the section is "to relieve both courts and litigants of the unnecessary burden of duplicative litigation." *Ransom v. Marrese*, 122 Ill. 2d 518, 530 (1988). Dismissal is not automatically warranted even when the "same cause" and "same party" requirements have been met; rather, the decision of whether to grant relief under section 2-619(a)(3) is left to the sound discretion of the trial court. *May v. SmithKline Beecham Clinical Laboratories, Inc.*, 304 Ill. App. 3d 242, 247 (1999). The court "must also weigh the prejudice resulting to the nonmovant against the public policy of avoiding duplicative litigation." *May*, 304 Ill. App. 3d at 246.

¶ 25 Steven and CTM argue that this court should not countenance E & E's lack of diligence with regard to the management of its case. Specifically, they assert that, in refiling the same complaint that was pending on appeal in Edelheit I, E & E was merely attempting to "hedge its bets" against an unfavorable ruling in Edelheit I.

¶ 26 The defendants' arguments on this issue are not without some persuasive effect. This court has sanctioned the dismissal of a complaint pursuant to section 2-619(a)(3) based upon a pending appeal, where there is a danger of inconsistent results from duplicative suits. See *Schnitzer v. O'Connor*, 274 Ill. App. 3d 314, 323 (1995) (citing cases.)

¶ 27 However, the issue has now become moot. As a general rule, courts "do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected

regardless of how those issues are decided." *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009); *Behl v. Duffin*, 406 Ill. App. 3d 1084, 1089 (2010). After the circuit court entered its order of May 20, 2015, dismissing this case for lack of jurisdiction, this court entered an order on July 16, 2015, dismissing E & E's appeal of Edelheit I for lack of jurisdiction. Even if we were to agree that the proper course in the instant case would have been to stay or dismiss the action under section 2-619(a)(3) until this court issued a decision in Edelheit I, there is no longer any basis for such relief. Once this court dismissed Edelheit I, there was no longer any action pending "between the same parties for the same cause." Accordingly, there is no basis to require a dismissal of this case pursuant to section 2-619(a)(3).

¶ 28 For the foregoing reasons, we reverse the judgment of the circuit court which dismissed E & E's complaint for lack of jurisdiction under section 2-619(a)(1), and remand this case for further proceedings consistent with this order. We need not reach E & E's remaining arguments on appeal.

¶ 29 Reversed and remanded.