FOURTH DIVISION
August 18, 2016

No. 1-15-1584

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GK DEVELOPMENT, INC., an Illinois Corporation, and COLLEGE SQUARE MALL DEVELOPMENT, LLC, a Delaware Limited Liability Company,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 14 CH 15065
IOWA MALLS FINANCING CORPORATION, a Delaware Corporation, COLLEGE SQUARE MALL ASSOCIATES, LLC, a Delaware Limited Liability Company, and CHICAGO TITLE AND TRUST COMPANY, an Illinois Corporation, as escrowee,	)	Honorable Neil H. Cohen,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* A dismissal for mootness by the trial court is the equivalent of a dismissal for want of jurisdiction; therefore, when the appellate court's judgment effectively

made Buyer's claims no longer moot, Buyer was not barred on grounds of *res judicata* from refiling the dismissed claims.

¶ 2 This is the third appeal arising out of the sale of several shopping malls by Iowa Malls Financing Corporation and College Square Mall Associates, LLC (collectively, Seller) to GK Development, Inc. and College Square Mall Development, LLC (collectively, Buyer). In the contract for sale, the parties agreed to withhold $4.3 million (the Holdback) from the Seller's proceeds as liquidated damages in the event of any breach of the contract by the Seller. Buyer subsequently claimed that Seller breached certain provisions of the contract and, accordingly, Buyer filed a lawsuit against Seller, 06 CH 3427, bringing claims for declaratory judgment and specific performance and seeking a turnover to Buyer of the entire $4.3 million Holdback. Seller filed a countersuit against Buyer, 06 CH 3586, bringing claims for declaratory judgment and unjust enrichment alleging that the Holdback was an unenforceable penalty clause. These cases were consolidated in the circuit court of Cook County. Buyer later filed a separate suit against Seller for breach of contract regarding contract provisions concerning a parking lot, which sought $530,294.86 in damages from the Holdback. The parking lot case and the liquidated damages cases were heard by the same judge in a simultaneous trial.

¶ 3 After a trial, the circuit court entered a judgment finding Buyer was entitled to the entire Holdback due to Seller’s breach. The court then dismissed Buyer's parking lot case as moot because under the contract, any damages from the parking lot claims would have been deducted from the Holdback funds and the court had already awarded Buyer the entire Holdback. Therefore there was no longer a genuine dispute between the parties with regard to the parking lot claims since Buyer had been awarded the entire Holdback.

¶ 4 On appeal, we reversed the trial court's judgment granting Buyer the entire Holdback after determining that $4.3 million in liquidated damages functioned as an unenforceable penalty

clause. We remanded the action to the trial court to determine actual damages as a result of Seller's breach. We also remanded Seller's claim to attorney fees and costs.

¶ 5 While the case was on remand, Buyer refiled the parking lot case it had against Seller, which the trial court had previously dismissed as moot. The refiled parking lot case was transferred to the trial court judge handling the remanded action. Seller sought dismissal of the parking lot case, and the trial court judge granted the dismissal. Buyer appealed the trial court's ruling dismissing its parking lot claims and also filed a motion to stay the proceedings in the remanded action until the parking lot claims were resolved on appeal. The trial court granted the stay, and we affirmed that stay in the second appeal in this matter.

¶ 6 In this third appeal, we are asked to determine whether the trial court erred in granting Seller's motion to dismiss Buyer's parking lot claims. For the reasons that follow, we vacate the trial court's order dismissing Buyer's parking lot claims and remand the matter to the trial court for further proceedings.

¶ 7 Background

¶ 8 In the first appeal in this case, Seller appealed the trial court's ruling that Buyer was entitled to the entire $4.3 million Holdback from Seller's proceeds. In the notice of appeal, Seller indicated that it was appealing the trial court's ruling relating to the Holdback in the consolidated cases. Seller's notice of appeal listed the parking lot case as a “related” case and further asked the appellate court to reverse the trial court's dismissal of that case as moot. Buyer separately appealed the trial court's ruling, but only with respect to the trial court judge's denial of postjudgment interest.

¶ 9 On December 19, 2013, we issued an opinion finding that the $4.3 million liquidated damages provision was an unenforceable penalty clause. In doing so, we remanded the matter to

the trial court with instructions that stated: "Upon remand, the trial court is directed to afford Buyer an opportunity to prove actual damages it suffered as a result of the 91-day delay, deduct such damages from the escrow to be awarded to Buyer, and order the release of the remaining funds to Seller. Seller's claim concerning attorney fees is also remanded to the trial court with instructions to decide the issue of breach by Buyer, including the issue of attorney fees and costs." The parties did not present any argument in their briefs relating to the parking lot claims in the first appeal and, accordingly, we did not address the parking lot claims in our opinion.

¶ 10 Following our remand, Buyer refiled its parking lot claims in a lawsuit seeking declaration that they had satisfied their contractual obligations with regard to the parking lot and were thus entitled to $530,294.86 from the Holdback, plus interest, fees, and costs. Buyer also sought specific performance, seeking the same amount from the Holdback. On Buyer's motion, the parking lot case was transferred to the same docket where the remanded action was being heard, where it was considered a "related" case but was not consolidated with the remanded action.

¶ 11 The trial court judge hearing the remanded action and the related new parking lot action directed the parties to submit briefs on whether he had jurisdiction to consider Buyer's parking lot claims in the remanded action. Following briefing, the trial court found that the parking lot claims were not part of the case on remand and anticipated that Seller would file a motion to dismiss the parking lot claims.

¶ 12 Seller filed an amended motion to dismiss Buyer's parking lot claims arguing that those claims did not sound in equity. Seller also argued that the remanded action was limited to the scope of the instructions given by the appellate court upon remand, and that the parking lot

claims fell outside that scope. Seller further argued that Buyer's claims were barred by the rule of waiver, doctrine of *laches*, the rule against claim-splitting, and the law-of-the-case.

¶ 13 Buyer responded by arguing that their claims in the parking lot case, which included specific performance, were equitable and of the type regularly used in real estate cases where an escrowee is holding disputed funds. Buyer argued that dividing the claims between two different courts would be an inefficient use of judicial resources. Buyer further argued that our remand did not preclude the trial court from addressing its parking lot claims in the remanded action because those parking lots claims were not addressed in the prior appeal and were not at issue on appeal. Specifically, Buyer argued that it could not have appealed the trial court's order on the issue of the parking lot claims because Buyer was not prejudiced by the trial court's order since Buyer was awarded the entire $4.3 million Holdback, which would have included the funds at issue in the parking lot claims. Buyer also argued that it could not waive issues on appeal that it legally could not pursue on appeal in the first place, that the doctrine of *laches* and rule against claim-splitting did not apply in this case, and there was no applicable law-of-the-case because the merits of Buyer's parking lot claims were never decided.

¶ 14 On May 15, 2015, the trial court judge issued an order granting Seller's motion to dismiss pursuant to section 2-619(a)(1) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(1) (West 2012)) with prejudice. The court found that because Seller's notice of appeal in the prior appeal referenced the parking lot action as being "related," Seller "specifically sought reversal of the dismissal" of Buyer's parking lot claims and, accordingly, Buyer's dismissed parking lot claims were "properly before the appellate court on Seller's appeal." Upon issuing our remand order, which reversed the trial court's ruling that Buyer was entitled to the entire Holdback, the trial court judge stated that Buyer should have raised their parking lot claims in an

Illinois Supreme Court Rule 367 petition for rehearing, which Buyer did not do. The trial court judge further found that his jurisdiction was limited by our remand instructions. As such, because the remand order instructed the trial court to determine Buyer's actual damages and Seller's right to attorney fees and costs, the trial court judge reasoned that it could not decide other issues, including Buyer's parking lot claims.

¶ 15 On June 1, 2015, Buyer filed a notice of appeal challenging the trial court's ruling dismissing their parking lot claims with prejudice. Upon filing its appeal, Buyer also filed a motion to stay the proceedings in the remanded action pending the disposition of the appeal on Buyer's parking lot claims. After the trial court granted the stay, Seller filed an appeal on that issue, and we have since upheld the stay of those claims pending this third appeal. In this appeal, we must determine whether the trial court erred when it dismissed Buyer's parking lot claims based on a lack of subject matter jurisdiction resulting from our remand mandate in the first appeal. For the reasons that follow, we vacate the trial court's order dismissing the parking lot claims and remand for further proceedings.

¶ 16 Analysis

¶ 17 Buyer argues that the trial court erred in dismissing its parking lot claims based on a lack of subject matter jurisdiction because: (1) Buyer could not have appealed the parking lot claims in the first appeal because those claims had been dismissed as moot by the trial court and, therefore, there was never a ruling on the merits with respect to those claims; (2) Buyer could not have appealed the parking lot claims in the first appeal because Buyer was the prevailing party in the trial court and was not prejudicially effected by the trial court's ruling; and (3) the trial court judge's rationale that it was precluded from ruling on issues outside the appellate court's remand

mandate is misplaced where the appellate court never had jurisdiction over the parking lot claims in the first appeal and, accordingly, never ruled on the parking lot claims in the first appeal.

¶ 18 Seller, in turn, argues that the trial court properly dismissed the parking lot claims based on a lack of jurisdiction because: (1) the appellate court's mandate on remand was specific and did not include any mention of the parking lot claims; therefore, the trial court could not rule on the parking lot claims as those claims fell outside the court's remand mandate; and (2) Buyer's parking lot claims were forfeited where it failed to raise the parking lot claims as an alternative argument in the first appeal or in a petition for rehearing following the appellate court's ruling in the first appeal. Additionally, Seller argues that Buyer's parking lot claims we properly dismissed because allowing the trial court to address those claims would be prohibited by the rule against claim splitting, the rule-of-the-case doctrine and the doctrine of *laches*. Seller also argues that Buyer's parking lot claims fail to state claims for equitable relief where it only seeks money damages thereby stripping the court of jurisdiction over those claims.

¶ 19 Our standard of review on a motion to dismiss under section 2-619 of the Code is *de novo. Krilich v. American National Bank & Trust Co. of Chicago,* 334 Ill. App. 3d 563, 569 (2002).

¶ 20 In our prior Rule 23 Order, we found that when Buyer refiled the parking lots claims in case number 14 CH 15065, the trial court properly dismissed that case because it was barred by *res judicata*. *Downing v. Chicago Transit Authority,* 162 Ill. 2d 70, 73-74 (1994) (*Res judicata* applies when the following three requirements are met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies.). The basis for our decision that Buyer's parking lot claims were barred by *res judicata* was that "[t]he trial court's *sua sponte* dismissal of

the parking lot case as moot, as opposed to for a lack of jurisdiction, improper venue, or failure to join an indispensable party, amounted to an involuntary dismissal of those claims. Ill. S. Ct. R. 273 (eff. Jan. 1, 2016) ('[A]n involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.')". On rehearing, however, we have reconsidered this finding as well as the parties' arguments on rehearing and find that a dismissal for mootness is in essence a dismissal for want of jurisdiction, which cannot be a final judgment on the merits.

¶ 21 With the exception of the circuit court's power to review administrative action, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution, which extends the circuit court's jurisdiction to all "justiciable matters." Ill. Const.1970, art. VI, § 9; *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002). "Generally, a 'justiciable matter' is a controversy appropriate for review by the court, in that it is definite and concrete, *as opposed to hypothetical or moot*, touching upon the legal relations of parties having adverse legal interests." (Emphasis added.) *Id*. at 335.

¶ 22 The mootness doctrine stems from the concern that parties to a resolved dispute lack a sufficient personal stake in the outcome to assure the adversarial relationship that " ' "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult * * * questions." ' " *In re A Minor*, 127 Ill. 2d 247, 255 (1989) (quoting *People ex rel. Black v. Dukes*, 96 Ill. 2d 273, 276-77 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))). "The existence of a real dispute is not a mere technicality but, rather, is a prerequisite to the exercise of this court's jurisdiction." *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 291 (2005).

¶ 23 Here, the trial court dismissed Buyer's parking lot claims as moot, which sought damages from the Holdback, because it had already awarded the entire Holdback to Buyer. In other

words, because Buyer had "secured what [it] basically sought" (*People ex rel. Newdelman v. Weaver*, 50 Ill. 2d 237, 241 (1972)) there was no longer "a real dispute" (*In re Marriage of Peters-Farrell*, 216 Ill. 2d at 291), thereby requiring the trial court to dismiss the parking lot claims as moot. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) ("If an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot.") (Internal quotation marks omitted.). This dismissal as moot was jurisdictional and, therefore, did not amount to a final judgment on the merits and, accordingly, did not fall within Illinois Supreme Court Rule 273. See Ill. S. Ct. R. 273 (eff. Jan. 1, 2016) ("[A]n involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits."). As appropriately explained by the Seventh Circuit Court of Appeals:

> "[S]ince a dismissal for mootness is a dismissal for lack of jurisdiction, and a court that has no jurisdiction cannot enter a judgment with preclusive effect in subsequent litigation except on the issue of jurisdiction itself, see *Stewart Securities Corp. v. Guaranty Trust Co.*, 597 F. 2d 240 (10th Cir.1979), it is circular to argue that a judgment is not moot because it may have preclusive effect, when it can have preclusive effect only if it is not moot. That determination must rest on more than the truism that a final judgment can collaterally estop parties (and sometimes nonparties) in future litigation." *Commodity Futures Trading Commission v.*

Board of Trade of City of Chicago, 701 F. 2d 653, 656 (7th Cir. 1983).

As such, because the trial court's dismissal of Buyer's parking lot claims as moot was not a final judgment on the merits, and was not barred on grounds of *res judicata* or claim splitting, Buyer was free to refile those claims so long as they were not otherwise barred.

¶ 24 In the first appeal, our instructions on remand required the trial court to conduct a hearing to determine Buyer's actual damages as a consequence of Seller's breach, deduct damages from Seller's holdback, and return the balance of the Holdback to Seller. The trial court on remand did not entertain Buyer's refiled parking lot claims based in part on directions of our remand. We believe the trial court faithfully obeyed our directions when it did not consider the parking lot claims. However, when we issued our opinion in the first appeal, we did not take into account that our ruling reversing the trial court's original judgment had the effect of making the parking lot claims no longer moot. We note that the parties did not mention this change in circumstances before the appellate court or apparently in our supreme court when Seller filed a petition for leave to appeal. However, Buyer should not be left totally without a remedy if it has a meritorious claim under the contract. Buyer would have no remedy if the Holdback funds are dispersed before having the opportunity to be heard on the merits of its parking lot claims. We correct this oversight in this order. We believe that justice requires that Buyer be allowed to present its parking lot claims along with the other pending claims and any damages that are to be paid from the Holdback as provided under the contract. Therefore, on remand the trial court is directed to conduct a hearing on the parking lot claims prior to distribution of the Holdback along with the other pending claims. Any damages or costs or fees provided under the contract on the parking lot claims are to be paid from the Holdback. See Ill. S. Ct. R. 366(a)(5) (eff. Feb.

1, 1994) ("In all appeals the reviewing court may, in its discretion, and on such terms as it deems just, *** (5) enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require.").

¶ 25 CONCLUSION

¶ 26 For the reasons above, we vacate the order dismissing Buyer's parking lot claims and remand this case for further proceedings in compliance with this order

¶ 27 Order vacated; cause remanded.