

No. 1-17-2607

**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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O’ROURKE, KATTEN & MOODY, an Illinois law partnership,	)	
	)	Appeal from the
Plaintiff and Counterdefendant-Appellee,	)	Circuit Court of Cook County.
	)	
v.	)	14 L 005983
	)	
SWEPORIS, LTD., a Delaware corporation, and	)	
GEORGE CLARKE, an individual,	)	Honorable John C. Griffin,
	)	Judge Presiding.
Defendants and Counterplaintiffs-	)	
Appellants.	)	

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendants’ counterclaim for negligence is not barred by *res judicata*. The remaining counterclaims were properly barred by *res judicata*. Affirmed in part; reversed in part; remanded for further proceedings.

¶ 2 This case was originally filed in 2007, by plaintiff law partnership O’Rourke, Katten & Moody (OKM) against defendants Sweports, Ltd. (Sweports), and George Clarke, Sweports’ majority shareholder, for attorney fees. During the pendency of the case, a shareholder suit was filed by minority shareholders, including two partners of OKM, Michael J. O’Rourke and

Michael C. Moody. See *Dore v. Sweports, Ltd.*, 2014 IL App (1st) 121980-U. The instant case was stayed by agreement in favor of completing the *Dore* case. Following completion of the *Dore* case, this case resumed, but when defendants attempted to file their counterclaims in response to OKM's third amended complaint, OKM filed a motion to dismiss based on *res judicata*, arguing that the counterclaims had already been raised and decided in *Dore*. The trial court ultimately dismissed defendants' counterclaims based on *res judicata* and defendants now appeal. For the following reasons, we reverse the trial court's dismissal of Sweports' counterclaim for negligence and remand for further proceedings on that counterclaim. We affirm the trial court's dismissal of the remaining counterclaims.

¶ 3

#### BACKGROUND

¶ 4 We have considered issues related to this case several times before. *Essex Insurance Co. v. Sweports, Ltd.*, 2011 IL App (1st) 103386-U, was a declaratory judgment action regarding an insurance company's duty to defend and indemnify the defendants. *UMF Corporation v. Dore*, 2013 IL App (1st) 122686-U, involved an attempt by a subsidiary of Sweports to sue the plaintiffs after Sweports' counterclaims against plaintiffs failed in *Dore v. Sweports, Ltd.*, 2014 IL App (1st) 121980-U. *Dore* was a case brought by shareholders against Sweports for breach of a promissory note and breach of contract. We have already explained the underlying facts of the dispute between the parties in these related cases, so we will only briefly summarize the relevant history here, and will only discuss these related cases as needed to aid in the resolution of the current case before us.

¶ 5 The suit in the instant case was initiated by OKM on June 7, 2007, for attorney fees it was allegedly owed for legal services it rendered to Sweports from late 2006 to early 2007. In its complaint, OKM alleged that in 2006, OKM and Sweports entered into a contract whereby OKM

was to provide legal services to Sweports in connection with Sweports' efforts to raise equity for Sweports' affiliate, the UMF Corporation (UMF). OKM agreed to accept 1.25% of Sweports' stock as payment for its claim for attorney fees. OKM alleged in its complaint that in April 2007, UMF sought to nullify OKM's stock interest in Sweports, issuing an informal action to declare that OKM was owed no fees for its legal services.

¶ 6 On or about June 23, 2007, Sweports issued an informal action that declared the 1.25% of Sweports stock that OKM owned was rescinded, and that it did not owe OKM any of the attorney fees sought. Following this informal action, two separate complaints were filed by four plaintiffs, including O'Rourke and Moody, both partners of OKM and shareholders of Sweports. The other two plaintiffs were John A. Dore and Andrew G. Chenelle. These complaints were consolidated into the *Dore* case. See *Dore v. Sweports, Ltd.*, 2014 IL App (1st) 121980-U. The plaintiffs in *Dore* alleged breach of contract, breach of fiduciary duty, and conversion on the part of Sweports based on the June 23, 2007, informal action.

¶ 7 OKM filed a second amended complaint in this case on September 24, 2008, and Sweports filed its counterclaims in January 2009 against OKM. Those counterclaims were for (1) breach of fiduciary duty, (2) negligence in providing legal services to Sweports in connection with certain transactions, and (3) fraud.

¶ 8 On February 25, 2010, Sweports filed third amended counterclaims in the *Dore* case, alleging in part that (1) O'Rourke and Moody were negligent as Sweports' attorneys, (2) O'Rourke breached his fiduciary duty to Sweports as counsel, (3) Moody breached his fiduciary duty to Sweports as counsel, and (4) that O'Rourke and Moody committed fraud.

¶ 9 The plaintiffs in *Dore* moved to dismiss the negligence counterclaim based on section 2-619(a)(3) of Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 2010)),

because one of the counterclaims in this case was for professional negligence against OKM. Section 2-619(a)(3) of the Code permits dismissal of an action where “there is another action pending between the same parties for the same cause.”

¶ 10 On June 24, 2010, the trial court in *Dore* granted the motion to dismiss the negligence claim (Count I) of Sweports’ counterclaims because of the pending counterclaim for negligence in this case. The court found that allegations against plaintiffs as attorneys, rather than shareholders or creditors, should be brought in the case at bar, not the *Dore* action. Specifically, the court noted that in both counterclaims, Sweports alleged that plaintiffs and Sandbox Industries, LLC, were involved in a conspiracy scheme to seize control of Sweports, Ltd., and sought money damages for “financing promises” it asserted were not kept by O’Rourke, Moody, Dore, and various others. The court therefore dismissed the counterclaim of negligence pursuant to section 2-619(a)(3) of the Code.

¶ 11 The remaining counterclaims in *Dore* were dismissed for failing to comply with section 2-606 of the Code. 735 ILCS 5/2-606 (West 2010) (“If a claim is or defense is founded upon a written instrument, a copy thereof \*\*\* must be attached as an exhibit or recited therein, unless the pleader attaches to the pleading an affidavit stating facts showing that that the instrument is not accessible”). They were also dismissed for failing to comply with section 2-603 of the Code (735 ILCS 5/2-603 (West 2010)), which states that all pleadings shall contain a plain and concise statement of the pleader’s cause of action, counterclaim, defense, or reply.

¶ 12 On July 6, 2010, Sweports filed a motion for leave to file its fourth amended counterclaims. On September 3, 2010, the trial court granted the motion and ordered that Sweports file its fourth amended counterclaims within seven days. According to the record, and as stated in our order in *Dore*, the fourth amended counterclaims were never re-filed. See *Dore v.*

*Sweports, Ltd.*, 2014 IL App (1st) 121980-U, ¶ 16 (“Sweports’ counterclaims were therefore not before the court, and the court did not err by not resolving them.”). Sweports attempted to re-file the counterclaims in December 2010, but the court denied leave to file based on Sweports’ failure to comply with the court’s order directing Sweports to file its fourth amended counterclaims by September 10, 2010.

¶ 13 Upon completion of the *Dore* case, OKM filed a third amended complaint in the case at bar. In response, on March 12, 2015, Sweports filed counterclaims for negligence, breach of fiduciary duty, and fraud. OKM moved to strike these counterclaims based on *res judicata* pursuant to section 2-619(a)(4) of the Code (735 ILCS 5/2-619(a)(4) (West 2014)). In support of its motion, OKM argued that the counterclaims were barred by *res judicata* because they were duplicative of the counterclaims filed in the *Dore* case and in *UMF Corp. v. Dore*, 2013 IL App (1st) 122686-U. OKM argued that these same counterclaims were dismissed in *Dore* on June 24, 2010, and that the complaint in *UMF Corp.* was dismissed pursuant to section 2-619(a)(3) of the Code because the same claims were pending in the *Dore* case.

¶ 14 The *UMF* case was initiated by UMF on January 6, 2012, against Dore, Chenelle, Moody, and O’Rourke, alleging breach of fiduciary duty, legal malpractice, conspiracy, and fraud. The trial court in *UMF* found that Sweports and UMF were the same party for purposes of section 2-619(a)(3) of the Code, and that the *UMF* action and the *Dore* action met the “same cause” requirement. Accordingly, the trial court in *UMF* dismissed UMF’s complaint based on the pending *Dore* case. This decision was affirmed on appeal. *UMF Corporation v. Dore*, 2013 IL App (1st) 122686-U.

¶ 15 On June 18, 2015, a hearing was held in this case on OKM’s motion to strike Sweports’ counterclaims based on *res judicata*. The trial court, at the conclusion of the hearing, stated that

“based on the unique set of circumstances in this [case], including three appeals and one case that went to trial and all of the arguments that counsel has made, I’m going to grant the motion to dismiss the counterclaims based on *res judicata*.” Sweports now appeals.

¶ 16

ARGUMENT

¶ 17 On appeal, the sole argument is whether the trial court properly dismissed Sweports’ counterclaims based on *res judicata*. Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). *Res judicata* applies when (1) a final judgment on the merits was rendered by a court of competent jurisdiction; (2) there is an identity of parties or their privies; and (3) there is an identity of causes of action. *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 389 (2010). If the three elements necessary to invoke *res judicata* are present, *res judicata* will bar not only every matter that was actually determined in the first suit, but also every matter that might have been raised and determined in that suit. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 471 (2008). *Res judicata* is an equitable doctrine that is designed to prevent a multiplicity of lawsuits between the same parties where the facts and issues are the same. *Murneigh v. Gainer*, 177 Ill. 2d 287, 299 (1997). “*Res judicata* promotes judicial economy by preventing repetitive litigation and protects parties from being forced to bear the unjust burden of relitigating essentially the same case.” *Arvia v. Madigan*, 209 Ill. 2d 520, 533 (2004). Equity dictates that the doctrine of *res judicata* will not be technically applied if to do so would create inequitable and unjust results. *Best Coin-Op, Inc. v. Paul F. Ilg Supply Co.*, 189 Ill. App. 3d 638, 650 (1989). *Res judicata* should not be applied by this court where it would be fundamentally unfair to do so.

*Nowak*, 197 Ill. 2d at 390. We apply a *de novo* standard of review to the issue of whether claims are barred by *res judicata*. *Dookeran v. City of Cook*, 2013 IL App (1st) 111095, ¶ 13.

¶ 18 Here, the trial court dismissed Sweports' counterclaims of negligence, breach of fiduciary duty, and fraud based on *res judicata*. The trial court specifically found that the counterclaims were barred because the same counterclaims had been raised and dismissed in *Dore*. However, the court in *Dore* dismissed Sweports' negligence counterclaim pursuant to section 2-619(3) of the Code because the same counterclaim was pending in the case at bar. A dismissal pursuant to section 2-619(a)(3) of the Code is not a final judgment on the merits. See *Illini Environmental, Inc. v. Environmental Protection Agency*, 2014 IL App (5th) 130244, ¶ 40 ("Dismissals pursuant to section 2-619(a)(3) are not final adjudications on the merits.") Moreover, it would be unfair to now find, as the trial court did, that the Sweports' counterclaim for negligence is barred by *res judicata* despite the fact that such cause of action has never been litigated and was prevented from being litigated in the other action precisely due to the pendency of the negligence counterclaim in this action. See *Nowak*, 197 Ill. 2d at 390 (*res judicata* should not be applied by this court where it would be fundamentally unfair to do so). Accordingly, we find that Sweports' counterclaim of negligence should not have been dismissed based on *res judicata*, and we remand for further proceedings on this counterclaim.

¶ 19 We find that the remaining counterclaims were properly dismissed based on *res judicata*. Under Supreme Court Rule 273, "[u]nless the order of dismissal or a statute of this State otherwise specifies, an 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." Ill. S. Ct. R. 273 (eff. April 1, 2019). In *Dore*, Sweports' remaining counterclaims were dismissed based on both sections 2-606 and 2-603 of the Code.

Because such dismissal was involuntary, it therefore operated as a final adjudication on the merits under Rule 273. See *Nowak*, 197 Ill. 2d at 389 (*res judicata* applies when a final judgment on the merits was rendered by a court of competent jurisdiction). Sweports failed to re-file those counterclaims within the time period allotted. See *Dore*, 2014 IL App (1st) 121980-U, ¶ 16.

¶ 20 There was also identity of parties between the counterclaims filed in *Dore* and those filed in this case. It is undisputed that Sweports was a party to both actions. In this case, the counterclaims for breach of fiduciary duty and fraud were against OKM as counsel for Sweports. In *Dore*, the counterclaims for breach of fiduciary duty and fraud were against both O'Rourke and Moody as counsel for Sweports. O'Rourke and Moody are partners of OKM, and therefore in privity with OKM. See *Purmal v. Robert N. Wadington and Associates*, 354 Ill. App. 3d 715, 722-23 (2004) (associate attorney was in privity with law firm for *res judicata* purposes). See also *Tebbens v. Levin & Conde*, 2018 IL App (1st) 170777, ¶ 26.

¶ 21 Finally, there was identity of cause of action between remaining counterclaims in this case and the counterclaims in *Dore* for breach of fiduciary duty and fraud. Here, Sweports contended in part in its breach of fiduciary duty claim against OKM that counsel provided legal services to Sweports beginning in July 2006, that counsel had assumed fiduciary duties, that counsel entered into certain financing agreements that were not in Sweports' best interest, and that as a proximate cause of counsel's breach of fiduciary duties, Sweports executed "Sandbox III" documentation diminishing Sweports' interest in UMF.

¶ 22 In Sweports' counterclaims for breach of fiduciary duty against O'Rourke and Moody in *Dore*, Sweports also contended in part that counsel provided Sweports with legal services beginning in July 2006, that counsel assumed fiduciary duties while acting as attorneys for Sweports, and that despite these fiduciary duties, they entered into certain financing agreements



and other business transactions that were against Sweports' best interests, and that as a result of counsel's breach of fiduciary duties, Sweports executed documents relating to "Sandbox III" and diminishing its interest in UMF.

¶ 23 The counterclaims for fraud in both *Dore* and in this case are nearly identical. Both counterclaims allege that the "Sandbox Master Scheme" was a fraudulent scheme, and that counsel knowingly joined the scheme and actively furthered the scheme through counsel's conspiracy with Sandbox. Both counterclaims state the same direct and proximate results of counsel joining this scheme. Accordingly, the remaining counterclaims in this case have identity of cause of action with the breach of fiduciary duty and fraud counterclaims in *Dore*. See *Lane v. Kalcheim*, 394 Ill. App. 3d 324, (2009) (separate claims are considered the same cause of action for *res judicata* purposes if they arise from a single group of operative facts, regardless of whether different theories of relief are asserted).

¶ 24 **CONCLUSION**

¶ 25 For the foregoing reasons, we affirm the trial court's dismissal of Sweports' counterclaims for breach of fiduciary duty and fraud. We reverse the trial court's dismissal of Sweports' counterclaim for negligence, and remand for further proceedings.

¶ 26 Affirmed in part and reversed in part.  
Cause remanded.