IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Gilbert Zoghlin and Cari Zoghlin,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	No. 13 L 10925
Swedish Covenant Hospital,	)	
Jerrel Boyer, M.D., and Amedisys, Inc.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The code of civil procedure authorizes only one re-filing of a previously dismissed lawsuit. In this case, the plaintiff initiated and then voluntarily dismissed a parallel lawsuit before filing a voluntary dismissal in this lawsuit. Given the statutory limitation on re-filing, the plaintiff's motion to vacate the second voluntary dismissal and re-file for a second time must be denied.[1]

Facts

On October 2, 2013, the Zoghlins filed a complaint in this case. The complaint brought one negligence count and one loss-of-society count each against Swedish Covenant Hospital (SCH) and Doctors Jerrel Boyer and Stephen Grohman. The complaint also brought one negligence count against Amedisys, Inc. The Zoghlins' attorney, William Barr, filed the complaint.

On January 24, 2014, Grohman presented a motion to dismiss the complaint. This court's order entered and continued the motion

[1] To be clear, attempting to re-file a complaint for a second time is equivalent to filing a complaint for a third time. Illinois courts, including this court, use the former "re-filing" nomenclature.

to a March 13, 2014 case management conference. The order further granted the Zoghlins leave to file an amended pleading on or before March 7, 2014. Barr drafted this order.

On March 3, 2014, the Zoghlins filed their first-amended complaint. This pleading brought one negligence count and one loss-of-society count each against SCH and Boyer only. The first-amended complaint did not include any causes of action against Grohman or Amedisys. Barr filed the first-amended complaint.

At the March 13, 2014, case management conference, the Zoghlins brought an oral motion "to voluntarily non-suit without costs and prejudice Defendants, Grohmann [sic] & Amedysis [sic]" although neither had been named in the first-amended complaint. This court granted the Zoghlins' motion and ordered that the case be "voluntarily dismissed without costs and without prejudice to pltfs' right to refile as to Defendants, Grohmann [sic] and Amedisys [sic] only with the cause to continue as to the remaining Defendants, Swedish Covenant & Boyer. It is further ordered that Defendants Grohmann [sic] & Amedysis [sic] shall be removed from the caption." Barr drafted the order.

On August 11, 2014, the Zoghlins filed a complaint in a new lawsuit – 14 L 8405. This case was randomly assigned to Judge Janet A. Brosnahan. The case caption named SCH, Boyer, and Amedisys. The causes of action did not, however, match the caption. Count one sounded in negligence against Amedisys; however, the prayer for relief was directed against SCH. Count two was for loss of society and was directed against SCH; however, the prayer for relief was directed against Amedisys. The complaint did not contain a cause of action against Boyer. Barr filed this complaint.

On August 26, 2014, Amedisys filed before Judge Brosnahan a motion to dismiss the 14 L 8405 lawsuit. Amedisys based its motion on code of civil procedure section 5/2-619(a)(3). 735 ILCS 5/2-619(a)(3). That provision authorizes a circuit court to dismiss a lawsuit if "there is another action pending between the same parties for the same cause."

On September 3, 2014, Judge Brosnahan considered Amedisys's motion to dismiss. The court granted the motion and dismissed 14 L 8405 with prejudice. The order also provided that, "Defendant, Amedisys Inc. [sic] appearance fee paid in 14 L 8405 to be applied to appearance in 13 L 10925 case should plaintiff amend the 13 L 10925 case to add Amedisys Inc." Counsel for Amedisys prepared the order.

On September 24, 2014, the Zoghlins filed a motion for leave to file a second-amended complaint. That complaint re-named Amedisys as a defendant. On October 14, 2014, Judge Larry Axelrood, sitting in this court's place, heard the Zoghlins' motion and granted it. On November 12, 2014, the Zoghlins filed their second-amended complaint naming SCH, Boyer, and Amedisys. The complaint brought one negligence count and one loss-of-society count each against SCH, Boyer, and Amedisys. Barr filed the amended pleading.

On February 24, 2016, the parties appeared before Judge Marcia Maras on the trial setting call. Judge Maras assigned the 13 L 10925 case a trial date of March 1, 2017. Judge Maras returned the case to Calendar H for a case management conference to be held on March 18, 2016.

At the March 18, 2016 case management conference, this court ordered that the parties return on April 1, 2016 with deposition dates for the remaining Rule 213(f)(2) witnesses. On April 1, 2016, the court entered an order explicitly stating that, "Additional counsel for plaintiff to appear." Counsel for Amedisys drafted the order.

At the next case management conference held on April 11, 2016 case management conference, the law firm of Kralovec, Jambois & Schwartz (KJS) presented this court with a motion for leave to file for substitution of counsel on the Zoghlins' behalf. This court granted KJS the substitution replacing Barr as the Zoghlins' counsel.

This court held subsequent case management conferences on May 9 and June 13, 2016. At the July 5, 2016 case management

conference, the court ordered KJS to disclose the Zoghlins' trial-ready Rule 213(f)(1) and (f)(2) witnesses on or before July 19, 2016. At the August 2, 2016 case management conference, this court extended the deadline to August 9, 2016. On September 1, 2016, this court, once again, indulged KJS and gave the Zoghlins' attorneys until September 8, 2016 to disclose their trial-ready Rule 213(f)(1) and (f)(2) witnesses. The order indicated that no more extensions would be granted. This court ordered the next case management conference to take place on September 16, 2016.

At the next case management conference on September 16, 2016, no KJS attorney appeared. This court entered an order requiring all parties to appear at the next case management conference scheduled for September 28, 2016.

By September 28, 2016, KJS still had not disclosed the Zoghlins' trial-ready Rule 213(f)(1) and (f)(2) witnesses. This court, for a reason not contained in the order, gave the Zoghlins until October 5, 2016 to disclose the witnesses that should have been disclosed nearly two-and-one-half months earlier. This court ordered the parties to return on October 12, 2016.

On October 12, 2016, KJS attorneys, once again, failed to appear; consequently, this court dismissed 13 L 10925 for want of prosecution. On October 19, 2016, KJS filed a motion to vacate the dismissal. On October 26, 2016, this court granted the motion and closed Rule 213(f)(1) and (f)(2) discovery. The order inconsistently provides that KJS had until November 2, 2016 to identify the Zoghlins' primary-care physician and until November 9, 2016 to disclose their still as-yet unnamed Rule 213(f)(1) and (f)(2) witnesses. The order scheduled the next case management conference for November 2, 2016.

On October 28, 2016, the KJS firm served on the defendants a motion for a voluntary dismissal that was to be presented to this court on November 2, 2016. In their reply brief to their current motion, the Zoghlins suggest that between the receipt of service and the presentment date, counsel for Amedisys "could have brought the

erroneous language of the Motion to Plaintiffs [sic] attention or advised Plaintiffs of the prior voluntary dismissal. Plaintiffs were never informed nor, through reasonable diligence and good faith were ever on notice of any prior dismissal prior to the voluntary dismissal of this case." Reply Br. at 3.

On November 2, 2016, KJS presented this court with an order to dismiss 13 L 10925 "in its entirety without prejudice, and without costs until and unless the claim is refiled, and with leave to refile pursuant to 735 ILCS 5/20-1009 an 735 ILCS 5/13-217 (costs to paid with refiling.)" This court entered the order.

On November 8, 2016, KJS filed a motion to vacate the November 2 voluntary dismissal of 13 L 10925. Amedisys objected to the motion and filed a response brief. In addition, this court ordered Barr to appear at a case management conference to explain how he had transferred the case file to KJS. Barr explained that he gave KJS the entire paper file, but neglected to provide them with various orders, including the one that voluntarily dismissed 14 L 8405, that he had previously stored electronically. The Zoghlins then filed a reply brief.

Analysis

The Zoghlins' argument in support of their motion to vacate the November 2, 2016 voluntary dismissal in this case is based on the Supreme Court's decision in *Hawes v. Luhr Bros.*, 212 Ill. 2d 93 (2004). There, the court considered the scope and application of code of civil procedure section 2-1203(a). That section provides, in part, that:

> In all cases tried without a jury, any party may, within 30 days after the entry of the judgment or within any further time the court may allow within the 30 days or any extensions thereof, file a motion for a rehearing, or a retrial, or modification of the judgment or to vacate the judgment or for other relief.

735 ILCS 5/2-1203(a).

Section 2-1203(a) is a savings provision of sorts in that it saves a circuit court from permitting an order made in error to become final. *See Philip Morris USA, Inc. v. Byron*, 226 Ill. 2d 416, 423 (2007), *citing* cases. The section authorizes a court to reconsider and correct a prior order based on a variety of circumstances, such as a change in the law, *see Carlton at the Lake, Inc. v. Barber*, 2014 IL App (1st) 131334-U,[2] facts not previously available to the parties or the court, *see In re Marriage of Wolff*, 355 Ill. App. 3d 403 (2d Dist. 2005), or to acknowledge actions taken by other courts, *see Federal Kemper Life Assurance Co. v. Eichwedel*, 266 Ill. App. 3d 88 (1st Dist. 1994). Whether to grant or deny a motion to reconsider is within the sound discretion of the trial court. *See In re Marriage of Potter*, 88 Ill. App. 3d 606 (1st Dist. 1980).

In *Hawes*, the question was whether a circuit court order granting the plaintiff a voluntary dismissal without explicit language reserving the plaintiff's right to reinstate the case constituted a judgment within the meaning of section 2-1203(a). *Id.* at 98. The court looked to the statute's plain language and recognized that, "section 2-1203(a) extends to any party, *without qualification*, the right to file a motion to vacate a judgment within 30 days of its entry." *Id.* at 105 (emphasis in original). Since an order granting a voluntary dismissal is a final judgment pursuant to Supreme Court Rule 272, *id.* at 106, *citing Swisher v. Duffy*, 117 Ill. 2d 376, 379-80 (1987), the circuit court that had entered the voluntary dismissal also had the jurisdiction to vacate the order pursuant to section 2-1203(a). *Id.*

The facts in *Hawes* are substantially different from those in this case if only because the plaintiffs in each instance brought their motions to vacate at procedurally different times. In *Hawes*, the court found that the plaintiff had the right within 30 days to vacate

[2] This court does not cite to this unpublished order for its substantive ruling, but because it is one of the very few instances in which a change in the law has supported a motion to reconsider.

an order of voluntary dismissal and re-file the case. In other words, *Hawes* authorized the plaintiff's first re-filing of the case following the plaintiff's first voluntary dismissal. That is an unremarkable proposition and not the factual scenario here.

In this case, Judge Brosnahan on September 3, 2014 entered an order of voluntary dismissal of the Zoghlins' later-filed parallel case – 14 L 8405 – in which Amedisys had been named as a defendant. The Zoghlins then continued to litigate their original case – 13 L 10925 – in which Amedisys was named as a defendant. On November 2, 2016, the Zoghlins voluntarily dismissed 13 L 10925 and now seek to vacate that second dismissal order and re-file their complaint, once again. This distinct set of facts does not implicate the Zoghlins' right to vacate a dismissal order under section 2-1203(a) and re-file a complaint. Rather, those facts trigger application of the limitation known as the "one re-filing rule" contained in code of civil procedure section 13-217.

Section 13-217 provides, in part, that:

> 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 . . . the action is voluntarily dismissed by the plaintiff, . . . 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 the action is voluntarily dismissed by the plaintiff. . . .

735 ILCS 5/13-217. The Supreme Court has explained that "section 13-217 expressly permits one, and only one, refiling of a claim even if the statute of limitations has not expired." *Flesner v. Youngs Dev. Co.*, 145 Ill. 2d 252, 254 (1991). In other words, unlike section 2-1203(a), section 13-217 does not confer any discretion on a circuit court when considering a plaintiff's right to re-file for a second time.

The law is also plain that impermissible re-filings are not limited to the same lawsuit. In *Flesner*, for example, the plaintiffs filed their first complaint in federal district court. *Id.* at 253. After that court dismissed the case for lack of subject matter jurisdiction, the plaintiffs re-filed their lawsuit in Illinois state court. *Id.* Later, the plaintiffs filed and the circuit court granted their motion for a voluntary dismissal. *Id.* at 253-54. Nearly one year later, the plaintiffs filed a third complaint (or re-filed the second complaint), which presented the same allegations and charged the same claims as the previous two. *Id.* at 254. The Supreme Court held in no uncertain terms that section 13-217 strictly prohibited such a re-filing. *Id.*

The Zoghlins, Barr, and KJS have explained how the inadvertent second voluntary dismissal came to be. As Barr informed this court, he transferred the entire paper file to KJS, but failed to provide several orders that he had stored electronically. The KJS attorneys argue that, without those orders, the attorneys had no idea that 14 L 8405 had previously been voluntarily dismissed. KJS also noted that it acted very quickly to vacate the second voluntary dismissal, lending credence to their explanation that the second dismissal had been an oversight.

Even a perfectly reasonable explanation does not alter a statutory proscription absent a court's discretion. In short, the one re-filing rule of section 13-217 applies regardless of the reasonableness of the excuse. This must be the result because excusing such an omission would erode an attorney's sworn duty to represent a client zealously. KJS had the 13 L 10925 file for nearly seven months before its attorneys filed what they did not know was a second voluntary dismissal. Seven months is certainly sufficient time to have reviewed the paper file and realized that orders were missing. Such orders could have been obtained from Barr, the circuit court's electronic docket, or even opposing counsel. KJS provides no explanation as to why its attorneys did not take such steps. KJS also seeks to shift its duty of reviewing its file to the defendants. The Zoghlins argue in their reply brief that opposing counsel failed to return a KJS attorney's telephone call and voice-mail message that it

was going to file a voluntary dismissal, plainly inferring that the defendants had a duty to inform KJS that Barr had previously filed a voluntary dismissal in the 14 L 8405 lawsuit. Even if such contacts were made, the defendants had no duty to provide information that the KJS attorneys should have known independently.

Finally, it should be noted that Amedisys's current objection to the Zoghlins' most recent re-filing could have been made far earlier in this litigation. As noted above, on March 13, 2014, the Zoghlins voluntarily dismissed Grohman and Amedisys in the 13 L 10925 lawsuit. On September 3, 2014, Judge Brosnahan dismissed with prejudice the 14 L 8405 lawsuit in which Amedisys had also been named. That dismissal made the November 12, 2014 filing of the Zoghlins' second-amended complaint naming Amedisys as a defendant an impermissible second re-filing in violation of section 13-217. Amedisys could have, therefore, brought its motion to dismiss based on section 13-217 immediately after the November 12, 2014 dismissal. That Amedisys brings its motion at this juncture is permissible as this court is unaware of any case holding that a party can waive its right to enforce the one re-filing rule.

Conclusion

For the reasons presented above, it is ordered that:

1. the Zoghlins' motion to vacate this court's November 2, 2016 voluntary dismissal is granted in part and denied in part;
2. the Zoghlins' motion is denied as to Amedisys, which is dismissed from 13 L 10925 with prejudice;
3. this case continues as to SCH and Boyer; and
4. this court expressly finds, pursuant to Illinois Supreme Court Rule 304(a), that there is no just reason for delaying either the enforcement or appeal of this order.

Judge John H. Ehrlich

FEB 01 2017

Circuit Court 2075

John H. Ehrlich, Circuit Court Judge