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ILLINOIS LAW MANUAL

CHAPTER X
SETTLEMENTS & Rreleases

E. DISMISSAL WITHOUT PREJUDICE

"Dismissal without prejudice" indicates that the suit is dismissed without a decision on the merits and is not conclusive of the parties' rights. SDS Partners, Inc. v. Cramer, 305 Ill. App. 3d 893 (4th Dist. 1999). All dismissals, other than for lack of jurisdiction, improper venue, or failure to join an indispensable party, operate as an adjudication on the merits unless the order or statute specifies otherwise. Ill. S. Ct. Rule 273. Therefore, the dismissal of a complaint for failure to state a cause of action is an adjudication upon the merits. River Park, Inc. v. City of Highland Park, 184 Ill. 2d 290 (1998); Benley v. Glenn Shipley Enterprises, Inc., 248 Ill. App. 3d 647 (4th Dist. 1993). The dismissal of a complaint for lack of subject matter jurisdiction is not a decision on the merits of that complaint. Nowak v. St. Rita High School, 197 Ill. 2d 381 (2001).

For example, Section 5/13-217 of the Illinois Code of Civil Procedure provides that, if an action is dismissed for want of prosecution, the plaintiff may commence a new action within one year or within the remaining period of limitation, whichever is greater. 735 ILCS 5/13-217. Section 13-217 is a savings statute designed to facilitate disposition of litigation on the merits and to avoid its frustration upon grounds unrelated to the merits. S.C. Vaughan Oil Co. v. Caldwell Troutt and Alexander, 181 Ill. 2d 489 (1998).

A dismissal for want of prosecution is not a final and appealable judgment on the merits because, pursuant to Section 5/13-217, plaintiffs have an absolute right to re-file the action against the same party and to re-allege the same cause of action. Id. Since a dismissal for want of prosecution is by its nature without prejudice, and not a bar to a subsequent suit on the same issues, the trial court does not have the authority to dismiss a
case for want of prosecution with prejudice. Twardowski v. Holiday Hospitality Franchising, 321 Ill. App. 3d 509 (1st Dist. 2001). However, once the time period for refiling has expired under 735 ILCS 5/13-217, the litigation is terminated and the dismissal for want of prosecution constitutes a final judgment because the order absolutely fixes the rights of the parties. S.C. Vaughan Oil Co., 181 Ill. 2d at 502.

Another statute which provides for dismissal without prejudice is 735 ILCS 5/2-1009, which provides in pertinent part:

> **Voluntary Dismissal.**
>
> (a) The plaintiff may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part

thereof as to any defendant, without prejudice, by order filed in the cause.

(b) The court may hear and decide a motion that has been filed prior to a motion filed under subsection (a) of this Section when that prior filed motion, if favorably ruled on by the court, could result in a final disposition of the cause.

(c) After trial or hearing begins, the plaintiff may dismiss, only upon terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof.

(d) A dismissal under subsection (a) of this Section does not dismiss a pending counterclaim or third party complaint.

(e) Counterclaimants and third-party plaintiffs may dismiss upon the same terms and conditions as plaintiffs.

The plaintiff's right to a voluntary dismissal without prejudice before trial is absolute. Winn v. Mitsubishi Motor Mfg. of America, 308 Ill. App. 3d 1054 (4th Dist. 1999). If the plaintiff strictly complies with the requirements of the statute, the trial judge does not have the discretion to deny plaintiff's motion. Vaughn v. Northwestern Memorial Hosp., 210 Ill. App. 3d 253 (1st Dist. 1991). Whether or not a trial has begun is a legal question. Kahle v. John Deere Co., 104 Ill. 2d 302 (1984); Saddle Signs, Inc. v. Adrian, 272 Ill. App. 3d 132 (3rd Dist. 1995). Arbitration hearings do not constitute trials or hearings within the meaning of the voluntary dismissal statute. Lewis ex rel. Lewis v. Collinsville Unit No. 10 School Dist., 311 Ill. App. 3d 1021 (5th Dist. 2000). However, a plaintiff cannot avoid the filing of a rejection of an arbitration award and payment of the fee as required by Supreme Court Rule 93(a) by simply moving for a voluntary dismissal. George v. Ospalik, 299 Ill. App. 3d 888 (3rd Dist. 1998). If Section 2-1009 of the Code of Civil Procedure conflicts with a Supreme Court Rule, the Supreme Court Rule would control. Arnett v. Young, 269 Ill. App. 3d 858 (1st Dist. 1995). A counterclaim brought between co-defendants can also bar a plaintiff from obtaining a voluntary dismissal. Heck v. Central Illinois Light Co., 152 Ill. 2d 401 (1992).

Once a lawsuit has been voluntarily dismissed without prejudice, the plaintiff may re-file the lawsuit within one year of the voluntary dismissal, or within the remaining period of limitation, whichever is the greater. 735 ILCS 5/13-217. However, only one re-filing of a cause of action is permitted after the first suit is voluntarily dismissed without prejudice, even where the statute of limitations has not yet expired. Hendricks v. Victory Memorial Hosp., 324 Ill. App. 3d 564 (2nd Dist. 2001); Flesner v. Youngs Development Co., 145 Ill. 2d 252 (1991). For instance, if a plaintiff voluntarily dismisses his state court suit without prejudice to file his cause of action in Federal Court, any later attempt to re-file in state court will be denied if the case is dismissed by the Federal Court. Timberlake v. Illini Hosp., 175 Ill. 2d 159 (1997). The re-

filing in Federal Court constitutes the one permitted re-filing. Id.

While a party has a right to voluntarily dismiss a suit before trial or hearing, if there is a potentially dispositive motion on file before plaintiff's motion to voluntarily dismiss, the court may hear the dispositive motion first. Morrison v. Wagner, 191 Ill. 2d 162, (2000); Gibellina v. Handley, 127 Ill. 2d 122 (1989). The trial court has the discretion to hear and rule upon a potentially dispositive motion before hearing a plaintiff's motion to voluntarily dismiss. Mizell v. Passo, 147 Ill. 2d 420 (1992). It is within the trial court's discretion to determine what motions are dispositive. The Appellate Court will not tamper with that discretion unless the trial court has abused its discretion. Hough v. Howington, 254 Ill. App. 3d 452 (1st Dist. 1993).

The Rule 103(b) motion, regarding a plaintiff's lack of diligence in obtaining service of process upon a defendant, is the only motion which the trial court is required to hear before the plaintiff's motion to voluntarily dismiss an action. Brady v. Joos, 273 Ill. App. 3d 793 (1st Dist. 1994).