

No. 2—10—0476  
Order filed March 9, 2011

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  
SECOND DISTRICT

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NANCY OLSON SWENSON,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09—CH—1625
	)	
BRUCE W. OLSON,	)	Honorable
	)	Ronald L. Pirrello,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE HUDSON delivered the judgment of the court.  
Justices Hutchinson and Burke concurred in the judgment.

ORDER

*Held:* Plaintiff's claim was barred by the doctrine of *res judicata*.

Plaintiff, Nancy Olson Swenson, appeals the judgment of the circuit court of Winnebago County dismissing her complaint with prejudice pursuant to section 2—619 of the Civil Practice Law. 735 ILCS 5/2—619 (West 2010). The trial court determined plaintiff's claim was barred by the doctrine of *res judicata*. We agree; therefore we affirm.

BACKGROUND

Siblings Nancy Olson Swenson and Bruce W. Olson (defendant) were in dispute concerning the administration of the estate of their mother, Lillian I. Olson. Plaintiff filed the complaint in the instant case, seeking to rescind a trust and letters of direction authored by her mother. Plaintiff alleged that they were the product of undue influence, that her mother lacked capacity to execute them, and that they were result of tortious interference by her brother. Defendant moved to dismiss, citing *res judicata*, as this is not the first controversy between the parties. See 735 ILCS 5/2—619 (West 2010). Previously, plaintiff, had filed a complaint against defendant. In it, she sought an accounting for a trust established by her mother Lillian. Plaintiff stipulated and agreed to dismiss that suit with prejudice on August 4, 2009. She instituted the present case two months later. The court granted defendant's motion to dismiss, finding that the proofs in the second suit would have sustained an action for an accounting in the earlier suit and that the dismissal with prejudice in the first action was a ruling on the merits. We set forth what follows to aid in an understanding of this appeal.

Fred C. Olson, the parties' father, died in 1988. His will created a trust naming Bruce Olson and Swenson beneficiaries, naming Bruce Olson as trustee of the residuary estate. As trustee, Bruce Olson had a fiduciary relationship with the beneficiaries of the trust. Lillian I. Olson suffered from depression after her husband's death, and Bruce Olson helped handle her affairs in the years after. Plaintiff alleges that this was a fiduciary relationship as well. Lillian I. Olson created a trust in March 2000 naming Bruce Olson trustee; this trust was amended in September of 2003. The property transferred into the Lillian I. Olson Trust included items plaintiff expected to receive through the trust created by her father. Lillian also forgave certain debts defendant owed to the trust in consideration of his acting as her care giver.

In the first suit, plaintiff, the beneficiary sought an accounting from the trustee, defendant. An accounting is an action to compel a defendant to account for and pay over money owed to the plaintiff but held by the defendant. Black's Law Dictionary 21 (8th ed. 2004). In wills and estates, an account is a brief financial statement of how an executor or administrator has performed the official duties of collecting the estate's assets and paying those who are entitled. Black's Law Dictionary 18 (8th ed. 2004). By requesting an accounting, plaintiff asked for money she believed was owed to her as a beneficiary of the trust established by her father, of which defendant was trustee, as well as the trust created by her mother, of which she was also a beneficiary. Plaintiff voluntarily dismissed this suit with prejudice.

Plaintiff's second lawsuit alleges undue influence, lack of capacity, and tortious interference. These counts take issue with the validity of the trust created by Lillian I. Olson and other documents, and with the actions of defendant himself as fiduciary of his mother Lillian I. Olson. The assets of the trust created by plaintiff's mother include assets transferred from the trust created by plaintiff's father, of which plaintiff was a beneficiary. The suit seeks to recover money from defendant by dissolving the trust and transferring to plaintiff money she believes would rightfully be hers, if not for the actions of her brother. She requests punitive damages as well.

Plaintiff contends that the causes of action in the second suit are distinct from the cause of action in the first suit and therefore *res judicata* does not apply. Defendant responds that plaintiff did not challenge the validity of the estate planning documents in the original action for accounting under 760 ILCS 5/11, though it could have. Because *res judicata* applies to matters that could have been litigated in the first action as well as those that actually were litigated, this action attacking the

integrity of the documents should have been brought in the original suit and is therefore barred by *res judicata*, defendant reasons.

Before turning to the merits of this appeal, we remind plaintiff that briefs submitted to this court must conform to the requirements of Supreme Court Rules 341. Rule 341 incorporates Supreme Court Rule 6. Rule 6 requires pinpoint citation of cases. This means parties must cite the page of the volume where the pertinent information comes from, not just the page on which the case begins. Plaintiff failed to comply with Supreme Court Rule 6. Having called attention to this omission, we trust that it will not be repeated.

#### ANALYSIS

Before this court, plaintiff contends that the causes of action in the second suit are distinct from the cause of action in the first suit and therefore *res judicata* does not apply. Defendant responds that plaintiff did not challenge the validity of the estate planning documents in the original action for accounting, though it could have. Defendant argues that since *res judicata* applies to matters that could have been litigated in the first action as well as those that actually were litigated, this action attacking the integrity of the documents should have been brought in the original suit and is therefore barred by *res judicata*. The trial court agreed with defendant and dismissed plaintiff's complaint. See 735 ILCS 5/2—619 (West 2010).

The standard of review on a motion to dismiss under 2—619 is *de novo*. *Toombs v. City of Champaign*, 245 Ill. App. 3d 580, 583 (1993). All allegations in the complaint and all reasonable inferences that can be drawn from those allegations are taken in the light most favorable to the non-moving party. *Saxon Mortgage Inc. v. United Financial Mortgage Corp.*, 312 Ill. App. 3d 1098, 1104 (2000). A trial court decision on a motion to dismiss is not given deference because the

process does not involve fact-finding or determining credibility of witnesses. *Toombs*, 245 Ill. App. 3d at 583. Dismissal may be affirmed on any basis in the record. *Golf v. Henderson*, 376 Ill. App. 3d 271, 275 (2007).

The purpose of *res judicata* is to ensure all issues arising out of the same set of operative facts are litigated in one case and to prevent parties from having to re-litigate what is, in essence, the same case. *River Park Inc. v. City of Highland Park*, 184 Ill. 2d 290, 319 (1998). A final judgment on the merits by a court with proper jurisdiction therefore bars subsequent suits between the same parties involving the same cause of action. *River Park*, 184 Ill. 2d at 302, citing *Rein v. David A. Noyes, Inc.*, 172 Ill. 2d 325, 334-35 (1996). This bar extends beyond issues actually decided to those issues that could have been decided, as well. *River Park*, 184 Ill. 2d at 302. Three elements must be met for a subsequent action to be barred: (1) an identity of parties, (2) a final judgment on the merits, and (3) an identity of causes of action. *River Park*, 184 Ill. 2d at 302.

In the case before us, it is undisputed that there is an identity of parties. While plaintiff argues in her reply brief that a dismissal “with prejudice” does not constitute a judgment on the merits, Illinois case law holds to the contrary. A voluntary dismissal “with prejudice” is an adjudication on the merits. *Knodle v. Jeffrey*, 189 Ill. App. 3d 877, 885-86 (1989); see also *Village of Arlington Heights v. American National Bank & Trust Co. of Chicago*, 72 Ill. App. 3d 744, 746 (1979), quoting *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541, 543 (1916), (“If a plaintiff by his voluntary and deliberate act secures the dismissal of his suit, he must be held to have anticipated the effect and necessary results of this action, and should not be restored to the position and the rights which he voluntarily abandoned.”) Having determined that an identity of parties and an

adjudication on the merits both are present, we now turn to the question of whether there is an identity of causes of action.

To determine if there is an identity of causes of action for *res judicata* purposes, Illinois courts use the transactional test, which was adopted by the Supreme Court in *River Park Inc. v. City of Highland Park*, 184 Ill. 2d 290, 310 (1998). Until *River Park*, some courts also used the same evidence test to determine if there was an identity of causes of action. *River Park*, 184 Ill. 2d at 307-08. The same evidence test bars a second suit if the evidence needed to sustain the second action would have sustained the first action, or if the same facts were essential to maintain both actions. *River Park*, 184 Ill. 2d at 307. The definition of a cause of action is narrower under the same evidence test because a cause of action is tied to the theories of relief asserted by the plaintiff. *River Park*, 184 Ill. 2d at 309. The result is that different claims arising out of one set of facts could be considered independent causes of action because the evidence needed to support each claim differs. *River Park*, 184 Ill. 2d at 309. The transactional test is broader and only requires that the first and subsequent suit arise from same operative facts. *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 332 (2009). Though both tests often led to the same conclusion, there was confusion in the lower courts as to which test should be used, and judges often applied both tests. *River Park*, 184 Ill. 2d at 307-10. We note that the parties invoke case law applying the same evidence test.

\_\_\_\_\_ *River Park* was the first case to give the Supreme Court the opportunity to decide whether courts should apply the narrower same evidence test or the broader transactional test. *River Park*, 184 Ill. 2d at 308. At this opportunity, the Supreme Court explicitly rejected the same evidence test in favor of the transactional test. *River Park*, 184 Ill. 2d at 311. The essential showing for purposes of *res judicata* under the transactional test is that the claims arise from a common core of operative

facts. *River Park*, 184 Ill. 2d at 311. Using the transactional test, claims may be considered part of the same cause of action even if there is no substantial overlap in the evidence. *Lane*, 394 Ill. App. 3d at 332; *River Park*, 184 Ill. 2d at 311. Separate claims will be considered the same cause of action under the transactional test if they arise from a single group of operative facts, regardless of whether different theories of relief are asserted. *Lane*, 394 Ill. App. 3d at 332. What constitutes a single transaction should be determined pragmatically, and courts should consider whether the facts are related in time, space, origin, or motivation. *Lane*, 394 Ill. App. 3d at 332. Courts should also consider whether the facts form a convenient trial unit and whether treating them as a one unit conforms with the parties expectations. *Lane*, 394 Ill. App. 3d at 332.

Applying the transactional test to this case leads to the conclusion that an identity of causes of action exists. While the theories of relief asserted by plaintiff in this case differ from the initial accounting action, both suits are based on Olson's role as a fiduciary. The first suit seeks to hold Olson accountable as trustee for moneys owed to Swenson. The second suit asserts that the trust itself was invalid. The underlying transaction in both suits was the creation of the trust. Olson's role as trustee at issue in the first suit and the validity of the trust in this suit both arise from the creation of the trust. Treating the creation of the trust and its administration as a single transaction is consistent with the rule above. The facts dealing with the administration of the trust and the facts regarding the trust's validity are, in this case, related in time, origin, and motivation (see *Lane*, 394 Ill. App. 3d at 332), and they form a convenient trial unit. Because both suits arise from a single transaction, we find that an identity of causes of action exists.

Furthermore, *res judicata* applies to all matters that could have been litigated in a previous action, not only to those that were. *People ex rel. Burriss v. Progressive Land Developers, Inc.*, 151

Ill. 2d 285, 294 (1992). It therefore is of no consequence that the precise issues of the present suit were not decided in the first suit. Plaintiff's argument that the information necessary to file the second suit was not acquired until after the first suit was brought is equally unpersuasive because, though the information was not acquired, it could have been. Plaintiff's final argument is based on the "same evidence test," which, as noted above, is not the proper inquiry.

#### CONCLUSION

In light of the foregoing, the trial court's decision to dismiss plaintiff's complaint was proper. We therefore affirm its judgment.

Affirmed.