

2013 IL App (2d) 130028-U
No. 2-13-0028
Order filed March 12, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> ESTATE OF AUDREY A. BABER, An Alleged Disabled Person)	Appeal from the Circuit Court of Kane County.
)	
)	No. 09-P-581
)	
)	Honorable
(Robert D. Baber, Petitioner-Appellant v. Audrey A. Baber, Respondent-Appellee).)	Joseph M. Grady, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

Held: The trial court considered the proper factors and did not abuse its discretion in denying petitioner's emergency motion to stay the proceeding due to a purported duplicate action also pending in North Carolina.

¶ 1 Petitioner, Robert D. Baber, filed an emergency motion to stay proceedings pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 2012)), alleging that there was a similar action purportedly involving the same parties and subject matter currently pending in North Carolina. The circuit court of Kane County denied petitioner's motion, and petitioner appeals pursuant to Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010) (interlocutory

appeal as of right), contending that the trial court abused its discretion in denying the stay and failed to correctly apply the appropriate factors in rendering judgment. We affirm.

¶ 2 The current matter stems from a guardianship case filed by petitioner. In that action, the trial court determined that respondent needed a limited guardian of her estate and reserved certain rights to respondent, including the right to initiate, continue, and oversee litigation on her own behalf, and refused petitioner's request to appoint a plenary guardian for respondent. During the pendency of the guardianship action, respondent filed a counterclaim against petitioner alleging misdealings with the Roy L. Baber (respondent's husband) Trust, including breach of fiduciary duty. The counterclaim further sought rulings affecting the trust. Petitioner moved to dismiss the counterclaim, contending that the trial court had no jurisdiction over him as trustee of the trust or over the trust itself as both the trust and trustee resided in North Carolina. On October 26, 2010, the trial court granted petitioner's motion to dismiss without prejudice, allowing respondent to refile her counterclaim against petitioner, individually.

¶ 3 On May 10, 2011, respondent, in her capacity of trust beneficiary, filed an amended counterclaim against respondent, seeking reimbursement to the trust of monies alleged to have been improperly spent in Illinois litigating the guardianship action. Petitioner moved to dismiss the amended counterclaim; the trial court denied the motion; and this court denied petitioner leave to appeal the trial court's ruling.

¶ 4 On June 25, 2012, respondent filed a second amended counterclaim, this time adding a surcharge action. On September 18, 2012, Stephen Baber (respondent's son and petitioner's brother) filed an action in North Carolina alleging breach of fiduciary duties, and seeking the imposition of a constructive trust and surcharge against petitioner, and naming both petitioner and respondent as

parties defendant. Thereafter, on October 2, 2012, petitioner filed the emergency motion to stay proceedings. Petitioner alleged that the same parties were litigating the same action in North Carolina about improper disbursements from the trust. The trial court denied petitioner's motion to stay, and petitioner timely appeals.

¶ 5 On appeal, petitioner argues that the trial court erred in denying his emergency motion for stay by using the wrong standard to consider it and by ignoring or wrongly applying the factors to be considered in ruling on a motion to stay pursuant to section 2-619(a)(3) of the Code. We begin with the standards by which such a motion is judged as well as the standard of review on appeal.

¶ 6 Section 2-619(a)(3) allows a defendant to dismiss or stay an action if another pending action involving the same parties and the same cause exists. 735 ILCS 5/2-619(a)(3) (West 2012); *May v. SmithKline Beecham Clinical Laboratories, Inc.*, 304 Ill. App. 3d 242, 246 (1999). In general, a court considering such a motion must weigh the prejudice resulting to the nonmoving party against the public policy against duplicative litigation. *May*, 304 Ill. App. 3d at 246.

¶ 7 The determination of the motion is within the trial court's sound discretion, and, absent an abuse of that discretion, the trial court's decision will not be disturbed on review. *Id.* An abuse of discretion occurs not when the reviewing court disagrees with the trial court's decision, but when the reviewing court finds that the trial court acted arbitrarily or finds that, in light of all the circumstances, the trial court exceeded the bounds of reason and ignored the relevant principles of law resulting in substantial prejudice. *Id.*

¶ 8 Finally, the party seeking a stay or dismissal under section 2-619(a)(3) bears the burden of proving the existence of adequate justification for the stay or dismissal. *Id.* The party seeking the stay must demonstrate, by clear and convincing evidence, that the justification for the stay outweighs

the potential harm accruing to the party against whom the stay is sought; in other words, the party seeking the stay must “ ‘ “make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay [sought] will work damage to someone else.” ’ ’ ” *Id.* at 246-47, quoting *Zurich Insurance Co. v. Raymark Industries, Inc.*, 213 Ill. App. 3d 591, 595 (1991), quoting *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936). However, the simple fact that another action is pending in another jurisdiction does not automatically entitle the moving party to a stay; the legislature did not intend that a motion pursuant to section 2-619(a)(3) would always prevent two separate actions concerning the same subject matter from proceeding at the same time. *Id.* at 247.

¶ 9 With these principles in mind, we turn to the specific factors applicable to a section 2-619(a)(3) motion to stay or dismiss. First and foremost, both the current action and the other pending action must involve the same parties and the same cause. With regard to the same parties, they need not be identical; the same parties requirement is met if the interests of the litigants are sufficiently similar. *Id.* Likewise, the same cause requirement does not mean the same cause of action or identical legal theories; rather, it “means that the relief sought is requested on the same set of facts.” *Id.*

¶ 10 After the threshold inquiry of same parties, same cause, the court next considers four more factors: comity; the prevention of multiplicity, vexation, or harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum. *Id.* at 248. The four factors are not comprehensive and exclusive; a court is free to consider additional factors that bear on its discretion. *Id.* Having set forth the factors that are to be applied in this case, we consider them in light of the circumstances presented in the record.

¶ 11 Regarding the threshold inquiry of same parties and same cause, we are not convinced that petitioner has satisfied his burden. Petitioner asserts without analysis that both of these factors are met. For example, petitioner contends that the same parties are involved in both the Illinois and North Carolina actions without actually mentioning that, in Illinois, respondent stands as a party plaintiff in her counterclaim while in North Carolina respondent stands as a party defendant along with petitioner while Stephen Baber is the party plaintiff. Thus, Stephen Baber is ostensibly seeking redress against respondent in the North Carolina action and petitioner fails to offer any analysis to explain how respondent can have the same interests as Stephen Baber in the North Carolina action as she has in the Illinois action. We note that the appellant has the burden of persuasion on appeal regarding its claims of error. *Yamnitz v. William J. Diestelhorst Co., Inc.*, 251 Ill. App. 3d 244, 250 (1993). Here, petitioner is the appellant, and his failure to explain how the apparent contradiction caused by respondent's place in each action's caption can be resolved. This is damaging to petitioner's case, though not fatal. A look at the complaints shows that, in the Illinois action, the party plaintiff seeks the return of funds disbursed from the Roy L. Baber Trust; in the North Carolina action, the party plaintiff also seeks the return of funds disbursed from the Roy L. Baber Trust and neither makes allegations nor seeks relief against respondent. Thus, in the North Carolina action, respondent's place in the caption as a party defendant is essentially meaningless.

¶ 12 We note that petitioner properly invokes the rule that the parties need not be identical, but they must have sufficiently similar interests in the two causes. *May*, 304 Ill. App. 3d at 247. Nevertheless, petitioner does not explain how there is a sufficient identity between respondent's interests in the Illinois case and Stephen Baber's interests in the North Carolina case (beyond the fact that each is a party plaintiff in his or her respective action against petitioner) to justify his conclusion

that the same parties are involved. Again, the simple consideration of the burden of persuasion on appeal indicates that petitioner has damaged his case by failing to offer an explanation on this point. See *Yamnitz*, 251 Ill. App. 3d at 250 (where neither party supports an argument with authority, that failure is more harmful to the appellant's position owing to the burden of persuasion on appeal being on appellant).

¶ 13 In point of fact, petitioner's argument regarding the same party requirement consists of the following four sentences devoid of any citation to the record:

“[Respondent] is the beneficiary of the Roy L. Baber Trust, and Stephen Baber is a residuary beneficiary. Both have brought actions against [petitioner] for disbursements made from the Roy L. Baber Trust, a North Carolina Trust. Their interests are substantially similar. Both [respondent] and Stephen Baber seek return of funds to the Roy L. Baber trust that they claim were improperly disbursed by [petitioner].”

Petitioner concludes: “Because [respondent] and Stephen Baber have substantially similar interests in their claims against [petitioner], the ‘same party’ requirement is satisfied.” We generously characterize petitioner's argument as, “Look, see?” The Illinois and North Carolina actions are scantily described in the conclusory fourth sentence of petitioner's argument. We would be justified to hold this argument to be violative of Supreme Court Rule 341(h)(7) (eff. July 1, 2008) (argument on appeal “shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on”) due to the dire paucity of any “reasons therefor” petitioner's contention on this point. We do not resolve this matter on that foundation, however, because, in spite of petitioner's minimalist efforts, we discern at least a colorable claim that the same parties requirement is satisfied.

¶ 14 While our review of cases suggest that the same parties requirement is usually fulfilled by having at least some of the same parties occupying the same roles across the two actions (see, *e.g.*, *Van Der Hooning v. Board of Trustees of University of Illinois*, 2012 IL App 111531, ¶ 27 (literally same parties in both actions); *Performance Network Solutions, Inc. v. Cyberklix US, Inc.*, 2012 IL App (1st) 110137, ¶ 30 (same parties not disputed, but defendant’s chief executive officer added for the Illinois action and not listed in the Canadian action)), here, respondent is the party plaintiff in the Illinois action and functionally absent from the North Carolina action. Likewise, Stephen Baber is the party plaintiff in the North Carolina action and is not involved in the Illinois action. Our research has not uncovered another case in which the parties plaintiff in the two cases were not either identical or else a privy to each other across the two cases. It would have been extremely helpful to petitioner’s contention to have included some sort of analysis that substantiated how two disparate and independent parties, albeit with a common characteristic (here, that both were a beneficiary of the Roy L. Baber Trust), could be the “same parties” for purposes of a section 2-619(a)(3) motion to stay. Instead, petitioner effectively argued, “Look, see?”

¶ 15 And we do see. The intersecting interest of the beneficiaries is to preserve the corpus of the trust against needless or improper disbursement. Both were seeking to recover from petitioner monies he “improperly disbursed” from the trust. By the barest margin, petitioner has shown the existence of a colorable claim that the parties are the same in the Illinois and North Carolina actions even though neither party plaintiff is truly a party to the other action, because the party plaintiff in each action is a beneficiary seeking to preserve the substance of the trust.

¶ 16 In similar fashion, petitioner is equally conclusory regarding the same cause element of the threshold inquiry. Petitioner asserts with no explanation or analysis that the Illinois and North

Carolina actions are the same cause because they concern the reimbursement of funds to the Roy L. Baber Trust for disbursements made by petitioner. Looking at the complaints in both actions, we agree that, very broadly, both concern themselves with restoring funds to the Roy L. Baber Trust that petitioner disbursed. However, we note, and petitioner does not mention, that the North Carolina action specifically and expressly states that it is not overlapping in any way with respondent's Illinois action. This allegation, if true, would seem to suggest that there is no identity of causes of action between the Illinois and North Carolina actions because the North Carolina action would cover facts exclusive of the Illinois action, and the Illinois action would cover facts exclusive of the North Carolina action, despite their otherwise categorical similarity. However, it is also possible that this allegation in Stephen Baber's North Carolina complaint is as illusory as respondent's placement in the caption of that action as a party defendant. Nevertheless, we note that respondent simply offers no explanation or analysis to support his conclusory contention that the actions are the same or sufficiently the same to get beyond the threshold inquiry.

¶ 17 Effectively, then, petitioner tries to repeat the "Look, see?" argument for the same cause requirement. As we can see, petitioner expends a full five sentences to make his same-cause argument:

"Both [respondent] and Stephen Baber have filed claims against [petitioner] for sums purportedly disbursed out of the North Carolina Trust. Each lawsuit seeks recoupment for sums of money purportedly disbursed out of the Roy L. Baber Trust for litigation expenses. Due to the duplicative causes of action, [petitioner] has been forced to concurrently defend himself in multiple jurisdictions for the same actions. Regardless of whether the legal theories differ, the same cause requirement is satisfied because the relief sought in both

lawsuits is request on the same set of facts. Further evincing the duplicative nature of the two actions, the pleadings in each action contain a ‘surcharge action’ against [petitioner].”

Petitioner concludes, “The ‘same cause’ requirement is satisfied in this case.”

¶ 18 Our emphasis on the number of sentences in petitioner’s argument is not meant to suggest that, if petitioner had only included another sentence, or another 10 sentences, his analysis would have passed muster. We are not saying that a longer analysis is necessarily a better analysis. By quoting petitioner’s actual analysis and pointing out its anemic quality, we hope to illustrate what we believe to be an analysis that is wholly insufficient. In the same-parties analysis, we effectively let it pass because, although it could have been resolved by forfeiting it under Rule 341(h)(7), we could see the obvious congruence of the interests of plaintiff-beneficiaries in each action.

¶ 19 The same style of cursory and conclusory argument in petitioner’s same-cause analysis, however, cannot pass. In this issue, the parties intended and alleged that the North Carolina action was not concerning itself with any of the episodes alleged in the Illinois action. The effect of this express dissociation is to separate the facts on which each action is based. Because there is no congruence between the specific facts of each action, the same cause element cannot be fulfilled because none of the allegations in the North Carolina case can be about the same thing that is alleged in the Illinois case. Petitioner’s thought that the unifying principle is the fact that both suits concern disbursements from the same trust overlooks the allegation that the specific conduct alleged in each case does not overlap. Without overlap, the two cases are separate and not the same. Petitioner completely ignores this point in his brief five-sentence analysis. Without some explanation of how the two actions can be the same if their facts are alleged not to overlap (other than the general background, like the trust and the allegation that money was disbursed from the trust by petitioner,

even though the disbursements challenged are not the same), petitioner's argument remains unconvincing.

¶ 20 Because petitioner offers neither explanation nor analysis to support his position, he has failed to carry his burden of persuasion on appeal of demonstrating that the trial court's decision was an abuse of discretion. See *Yamnitz*, 251 Ill. App. 3d at 250 (burden of persuasion on appeal is on the appellant). While petitioner's conclusory argument regarding the same-parties element is at least colorable, his conclusory argument about the same-cause element does not fare as well. Like the same parties, the same cause element presents a fairly low standard: to be deemed the same cause, the actions need only arise out of substantially the same set of facts. See, e.g., *Performance Network Solutions*, 2012 IL App (1st) 110137, ¶ 31 (crucial inquiry is whether both actions arose from the same transaction or occurrence, not whether they involve the same legal theories, issues, burdens of proof, or relief sought; in this case, both suits based on the parties' contract); *Village of Bensenville v. City of Chicago*, 389 Ill. App. 3d 446, 480 (2009) (same cause met where both actions were eminent domain proceedings seeking to acquire the plaintiffs' properties); *Estate of Hoch v. Hoch*, 382 Ill. App. 3d 866, 869-70 (2008) (both causes centered on the validity of the decedent's will and the distribution of the decedent's estate). That low standard is not met here because, while both actions relate to the North Carolina trust and disbursements from it, by their allegations each case deals with different acts. Accordingly, we hold that petitioner has failed to demonstrate that the Illinois and North Carolina actions are the same cause for purposes obtaining a stay under section 2-619(a)(3).

¶ 21 In addition to the substantive issue that each action, the Illinois and the North Carolina, does not have sufficient factual overlap, we find that petitioner's argument fails procedurally. Rule

341(h)(7) requires each appellate contention to be supported by argument, pertinent authority, and citation to the record. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 149 (appellate contention forfeited under Supreme Court Rule where the appellant failed to provide a sufficient analysis). Petitioner's argument has none of these requisites. Accordingly, we alternately determine that the argument on the same-cause element is insufficient to pass muster under Rule 341. Without the ability to demonstrate the same-cause element, petitioner cannot pass the threshold inquiry to requesting a stay under section 2-619(a)(3).

¶ 22 Notwithstanding our determination that petitioner did not satisfy the threshold requirements of demonstrating that the same parties and same cause are involved in the Illinois and North Carolina actions, we assume, for the sake of argument, that he has successfully passed the threshold inquiry of same parties and same cause and move on to consider the remaining four nonexclusive factors. First there is comity. "Comity means giving respect to the laws and judicial decisions of other jurisdiction out of deference." *May*, 304 Ill. App. 3d at 248. Petitioner asserts that comity should cause us to defer to the North Carolina action. Petitioner argues that North Carolina has a greater interest in the issues because petitioner remains a resident of North Carolina, respondent was a resident of North Carolina and the actions concern a North Carolina trust. While that may be true, we note that Illinois has significant interests in this case as well: respondent currently resides in Illinois, the guardianship aspect of this case was initiated and adjudicated in Illinois, and, at least as exclusively alleged in the Illinois action, petitioner's misfeasance and improper disbursements from the Roy L. Baber Trust occurred in or were directed toward Illinois. Further, the Illinois action was filed first and significant progress has been made in the action. Given that the matter also has a

legitimate and weighty relation to Illinois, the balance on this factor is fairly even, but tilts slightly in favor of respondent.

¶ 23 The next factor is the prevention of multiplicity, vexation, and harassment. First, nothing in the record suggests that either case was brought for a vexatious purpose or to harass petitioner, and petitioner does not raise such an argument. Regarding multiplicity, petitioner emphasizes that he is being forced to defend himself in two jurisdictions over allegations about disbursements made from a North Carolina trust. Petitioner also argues that respondent is already a “litigant” in the North Carolina action and can pursue her rights against petitioner there, especially since her rights will also be adjudicated in North Carolina. We disagree.

¶ 24 Obviously, because of the similar nature of both actions, their continuation fosters multiplicity. However, because petitioner does not contend that there was any improper or vexatious reason attached to the initiation of respondent’s counterclaim, the factor, at most slightly favors petitioner. *Whittmanhart Inc. v. CA, Inc.*, 402 Ill. App. 3d 848, 855 (2010). However, the balance shifts the other way when the hardship and vexation to respondent is considered. Petitioner initiated the action in Illinois. Now, because Stephen Baber has initiated suit against both petitioner and respondent in North Carolina, petitioner wants to stay his Illinois action. The effect of a stay would burden his aged mother, requiring her to travel to North Carolina. Thus, she would face the rigors of traveling while petitioner, who is undoubtedly more easily able to travel, would not have to. We further note that, despite the fact that Stephen Baber may have interests sufficiently aligned with respondent’s to pass the same person argument (at least for purposes of argument), respondent did not initiate the North Carolina case and, in view of the fact that none of the allegations in the North Carolina case are directed at respondent, does not currently actually participate in that case. Thus,

giving proper weight to the vexation and harassment accruing to respondent if the Illinois action is stayed, we conclude that the balance actually favors respondent.

¶25 Next, we consider the likelihood of complete relief being available in the foreign jurisdiction. As noted, only the claims against petitioner as an individual are proceeding in Illinois. The claims against petitioner as a fiduciary and an individual are proceeding in North Carolina. It appears, then, that full relief may be possible in North Carolina, and that obtaining the same relief in Illinois may be problematic. We note, however, that the allegations of the North Carolina action specifically exclude any acts alleged in the Illinois action. Further, to attain complete relief would require amendment of the North Carolina action, so the chance of complete relief in the North Carolina action remains, right now, speculative. See *Quantum Chemical Corp. v. Hartford Steam Boiler Inspection & Insurance Co.*, 246 Ill. App. 3d 557, 562 (1993) (complete relief was too speculative where the plaintiff had to amend its action so as to assert the full claims in the foreign jurisdiction). Petitioner contends that both cases are in the pleading stages. We disagree to an extent with this point; the Illinois case has been extensively litigated, as has respondent's counterclaim in the Illinois case. We believe the substantial expenditure of personal and judicial resources in Illinois accord the Illinois case a much greater weight than the North Carolina case. The balance on this factor is pretty even to favoring petitioner slightly.

¶26 The final enumerated factor to consider is the preclusive effect of a judgment in the foreign jurisdiction. We do not believe that a judgment in North Carolina would be *res judicata* for the Illinois action and vice versa. *Res judicata* requires (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties or their privies. *Cooney v. Rossiter*, 2012 IL 113227, ¶ 18. Here, at least the third element is

problematic. In the Illinois action, respondent is the party plaintiff; in the North Carolina action, she is a party defendant along with petitioner, and the party plaintiff in the North Carolina action is Stephen Baber. Petitioner suggests that Stephen Baber is a proxy for respondent's interests but points to nothing specific in the record to support his contention. Further, there is no evidence in the record or suggested by petitioner to show that Stephen Baber is in privity with respondent. Indeed, while Stephen Baber's status as residuary beneficiary may result in sufficiently aligned interests with respondent to satisfy the same-parties element, his personal interests as residuary beneficiary are antagonistic to respondent's as beneficiary because in order for him to benefit, she must use up as little of the trust's corpus as possible, while her interests are to use the trust up, if necessary, to maintain her standard of living until she passes away. It is therefore difficult to see how the parties can be deemed identical in both actions for purposes of *res judicata*. Additionally, we note that the North Carolina action carves out of itself any overlap with the Illinois action. This would also appear to disturb the identity of the actions for purposes of *res judicata*. As a result, the balance on this factor favors respondent.

¶27 Weighing the four enumerated factors shows that they tend to favor respondent and allowing this case to proceed. We also note, however, that the four enumerated factors are not meant to be comprehensive and exclusive. A court may consider other relevant factors. *May*, 304 Ill. App. 3d at 248.

¶28 Here, the trial court also considered the factor of which party initiated the action. In this case, petitioner initiated the original guardianship action that eventually spawned respondent's counterclaim. Using an analysis that sounded in equity or unclean hands, the trial court concluded that it would not be fair to allow petitioner to initiate this action and then to obtain a stay to allow

him to forum shop the matter into the North Carolina forum. To us, this seems a valid and well considered reason in support of the trial court's ruling strongly favoring respondent.

¶ 29 Petitioner views the trial court's reasoning on this point as giving improper weight to the jurisdiction in which the matter was first filed. We disagree. A full reading of the trial court's reasoning shows that it was not employing a first-to-file standard, but was speaking to considerations of equity and fairness. We reject petitioner's contention.

¶ 30 Petitioner further argues that *May* makes it clear that first-to-file is not outcome determinative. We agree. See *id.* at 248 ("the time of filing actions is not determinative as to a motion to stay"). Nevertheless, the time of filing is also not forbidden from consideration and our reading of the trial court's reasoning shows that its inquiry as to which party initiated the case was based on equity rather than who was first to file. Accordingly, we reject petitioner's contention on this point as well.

¶ 31 To sum up, then, we have considered petitioner's contentions on appeal in light of the threshold inquiry and enumerated factors and other relevant factors a court is required to review when determining a 2-619(a)(3) motion to stay or dismiss the action. At the same time, we have also considered petitioner's arguments regarding the trial court's judgment. Our consideration has resulted in the conclusion that the trial court did not abuse its discretion in denying petitioner's emergency motion for a stay. Accordingly, for the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 32 Affirmed.