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FIRST DIVISION
February 2, 2015

No. 1-14-1377
2015 IL App (1st) 141377-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SHIRLEY GORSKI,)	
)	Appeal from the
Plaintiff-Appellant,)	Circuit Court of
)	Cook County.
v.)	No. 13 CH 14963
)	
IRENE SERGO,)	Honorable
)	Neil Cohen,
Defendant-Appellee.)	Judge Presiding.
)	

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

Held: Trial court did not err in finding identity of causes of action between probate action and instant action, and holding that this action was barred by the doctrine of *res judicata*.

¶ 1 Plaintiff Shirley Gorski appeals from the dismissal of her complaint with prejudice pursuant to section 2-619(a)(4) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619(a)(4) (West 2012)). Gorski filed a complaint against defendant Irene Sergo to compel a record of defendant's actions in her capacity as agent for her husband, decedent Emil Sergo, under certain powers of attorney pursuant to section 2-10 of the Illinois Power of Attorney Act

(the Act) (755 ILCS 45/2-10 (West 2012)), which allows a court, if it finds that the principal lacks the capacity to control or revoke the agency, to review the agent's conduct. The trial court granted defendant's motion to dismiss, finding that Gorski's action was barred by a prior judgment. Specifically, the court found that Gorski's complaint was barred by a June 20, 2012, final judgment entered in a separate proceeding in the Probate Division (probate action). Gorski now appeals, contending the trial court erred in dismissing her complaint with prejudice based on *res judicata* where the probate action did not involve the same cause of action. For the following reasons, we affirm.

¶ 2

I. BACKGROUND

¶ 3 On June 18, 2013, Gorski filed a complaint pursuant to section 2-10 of the Act against defendant "to compel record of actions by purported agent of Emil T. Sergio." In her complaint, Gorski, the daughter of decedent Emil, alleged that Emil was 87 years old and living at Sunrise Senior Living. She alleged that Emil suffered a "debilitating stroke" in February 2011 and "has been incapacitated ever since." Gorski stated that on or about April 9, 2008, Emil executed a power or attorney for property and a power of attorney for health care (collectively "powers of attorney"), both of which "purport to appoint [defendant] as Emil's agent effective upon execution." Gorski noted that defendant had been acting as agent for Emil pursuant to the powers of attorney since at least February 2011.

¶ 4 Gorski alleged that the powers of attorney were invalid "due to lack of capacity and undue influence at the time of their execution." However, regardless of the validity of the powers of attorney, Gorski noted that defendant had been acting as an agent, and thus was subject to the requirements of the Act (755 ILCS 45/1-1, *et seq.* (West 2012)). Specifically, Gorski noted that section 2-7(c) of the Act requires an agent acting pursuant to a power of

attorney to keep a record of all receipts, disbursements, and significant actions taken under the agency and to provide a copy of this record when requested to do so by a court under section 2-10 of the Act. 755 ILCS 45/2-7(c) (West 2012). Section 2-10 of the Act provides that upon petition by an interested person, and a finding by the court that the principal lacks either the capacity to control or the capacity to revoke the agency, the court may construe a power of attorney, review the agent's conduct, and grant appropriate relief, including compensatory damages. 755 ILCS 45/2-10 (West 2012).

¶ 5 Gorski claimed that as an heir of Emil, she was an interested party and therefore requested the court to order defendant to account to the court for all actions, including but not limited to all receipts and all disbursements taken by her as agent for Emil since April 9, 2008. Gorski asked that to the extent the accounting provided by defendant revealed that defendant had not been acting in Emil's best interest, the court take any and all actions necessary to remove defendant as agent and hold her liable for losses suffered by Emil.

¶ 6 Defendant filed a motion to involuntarily dismiss Gorski's complaint pursuant to section 2-619(a)(4) of the Code, alleging that this matter had already been litigated and decided in the probate action. Attached to the motion was the June 20, 2012, order from the probate action, which stated that the court found that the powers of attorney executed by Emil on April 9, 2008, substantially conformed to the tenets of the powers of the Act and were valid. The court also found that there was no breach of duty by the agent under the Act.

¶ 7 Also attached to defendant's motion to dismiss was the petition to vacate powers of attorney that had been filed by Gorski in the probate action. In that petition, Gorski alleged that it was her belief that Emil was suffering from dementia. She further alleged that under the powers of attorney executed April 9, 2008, Emil had appointed his wife, defendant, but that there

were no witness signatures on the document, thereby making the appointment invalid. Gorski also alleged that upon information and belief, on December 28, 2011, defendant suffered a stroke and was taken to the hospital where she underwent an operation. Gorski alleged that defendant was in the hospital for two weeks, but did not tell Emil that she was in the hospital.

Additionally, Gorski alleged that instead of returning home to the residence she shared with Emil upon her discharge from the hospital, defendant left the residence for two weeks and did not inform Gorski that she would not be taking care of Emil during that time. Gorski alleged that it was not until February 2012 that she was informed that defendant had moved Emil to Sunrise Senior Living and that he would be residing there from then on. Gorski alleged that upon defendant's incapacity, Gorski became Emil's attorney-in-fact under the powers of attorney appointment.

¶ 8 Also attached to defendant's motion to involuntarily dismiss the complaint was a copy of her motion to dismiss Gorski's petition to vacate the powers of attorney in the probate action. In that motion, defendant argued that she had been caring for Emil since he suffered a stroke on February 6, 2011, and that even if the powers of attorney were invalid, defendant was the lawful spouse of Emil and therefore can make healthcare decisions on behalf of her husband.

¶ 9 On October 8, 2013, Gorski responded to defendant's motion to involuntarily dismiss her complaint. Gorski alleged that none of the findings in the probate action were in any way determinative or preclusive of the issues in this case, which were whether Emil was incapacitated and whether defendant was required to account for her actions as agent. Additionally, Gorski argued that the doctrine of *res judicata* did not apply because there were now new and additional facts involved, namely, that the action sought an accounting of all actions taken by defendant as

Emil's agent, including all actions taken since June 20, 2012, the date of the probate action judgment.

¶ 10 In her reply, defendant stated that the court specifically found the powers of attorney to be valid, and that the any complaint regarding their invalidity was barred by *res judicata*.

Defendant contended that there were no new facts because *res judicata* extends not only to what was decided in a previous action, but also to what could have been decided, and the issue of accounting could have been decided in the probate action.

¶ 11 On November 13, 2013, the trial court entered a memorandum opinion and order on defendant's motion to involuntarily dismiss Gorski's complaint pursuant to section 2-619(a)(4) of the Code. The court noted that Gorski "implies that the Powers of Attorney suffer from some defect, but fails to actually allege this." The court stated that "[defendant] had been acting as Emil's agent under the powers of attorney since February 2011," and that Gorski "does not allege any wrongdoing on [defendant's] part in connection with the Powers of Attorney." The court noted that Gorski had previously filed the probate action attacking "the validity of [defendant's] agency under the Powers of Attorney at issue in this case," and that the probate action order specifically found that the powers of attorney were valid and that there were no breaches of duty by defendant as agent while acting under the powers of attorney. Accordingly, the trial court found that all the requirements for *res judicata* were met because the parties were the same, the causes of action were the same, and Gorski's "claim could have been decided [in] the probate action." Gorski's complaint was dismissed with prejudice.

¶ 12 Gorski filed a motion to reconsider, alleging that she was not attempting to invalidate the powers of attorney in this case, as she was in the probate action, but rather that she was requesting an accounting by defendant based on her status as agent for Emil. Gorski contended

that she could not have requested an accounting at the time of her probate action because that would have been inconsistent with her claim that the powers of attorney were invalid.

Additionally, Gorski alleged that there were new facts in this case, since defendant had continued to act as Emil's agent since June 20, 2012, the time of the probate action judgment.

¶ 13 The trial court denied Gorski's motion to reconsider and Gorski now appeals.

¶ 14 II. ANALYSIS

¶ 15 On appeal, Gorski contends that the trial court improperly dismissed her complaint with prejudice pursuant to section 2-619(a)(4) of the Code because the probate action and this action did not have identity of cause of action. A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters to defeat the claim. *527 S. Clinton, LLC v. Westloop Equities, LLC*, 403 Ill. App. 3d 42, 48 (2010). Such a motion should be granted if, after construing the pleadings and supporting documents in a light most favorable to the nonmoving party, the court finds that no set of facts can be proved upon which relief can be granted. *Id.* at 48-49. We review a circuit court's ruling on a motion to dismiss pursuant to section 2-619 *de novo*. *Id.* at 49.

¶ 16 Section 2-619(a)(4) provides that a defendant may file a motion for dismissal of an action if that cause of action is barred by a prior judgment. 735 ILCS 5/2-619(a)(4) (West 2012). Both parties agree that section 2-619(a)(4) is essentially a codification of the doctrine of *res judicata*. *Res judicata* works to prevent repetitious lawsuits over previously decided matters. Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). The bar extends to what was actually decided in the first action, as well as those matters that could have been decided in

the first action. *Id.* There are three fundamental elements necessary for the application of the doctrine of *res judicata*: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) identity of parties; and (3) identity of cause of action. *Id.*

¶ 17 In the case at bar, the parties do not dispute that there was a final judgment on the merits rendered by a court of competent jurisdiction and that there is an identity of parties. The parties disagree, however, as to whether there is an identity of cause of action. Gorski contends that there is no identity of cause of action because the issues and relief sought in this case differ from the probate action. Gorski claims that while she sought to establish guardianship of Emil and invalidate the powers of attorney in the probate action, in this action she seeks to compel an accounting from defendant as Emil's agent. Defendant responds that there is an identity of cause of action because Gorski continues to seek to invalidate the powers of attorney in this action, and even if Gorski is only seeking an accounting in this action, she could have done so in the probate action.

¶ 18 In determining whether there is identity of cause of action, Illinois uses the “transactional test,” which was adopted in *River Park, Inc.* *Id.* at 310. The “transactional test” provides that the assertion of different kinds of theories of relief still constitutes a single cause of action if a single group of operative facts gives rise to the assertion of relief. *Id.* at 311. The transactional test allows claims to be considered part of the same cause of action “even if there is not a substantial overlap of evidence, so long as they arise from the same transaction.” *Id.* What constitutes a “transaction” should be “determined pragmatically,” and a court should give [] weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit

conforms to the parties' expectations." *Id.* at 312 (quoting Restatement (Second) of Judgments § 24 (1982)).

¶ 19 In the instant action, Gorski filed a complaint pursuant to section 2-10 of the Act, which states that upon petition by any interested person, and a finding by the court that the principal lacks either the capacity to control or the capacity to revoke the agency, the court may construe a power of attorney, review the agent's conduct, and grant appropriate relief. Accordingly, a prerequisite to a complaint brought pursuant to section 2-10 of the Act is that the court makes a finding that the principal lacked the capacity control or revoke the agency. Gorski argued in the probate action that the powers of attorney should be vacated because Emil was suffering from dementia and that defendant breached her duty as agent to Emil when she suffered a stroke and was not properly able to care for Emil. The court in the probate action specifically found that the powers of attorney were valid, and that there was no breach of duty by defendant as the agent. We find that because the causes of action in the probate action and in the case at bar arose from a single group of operative facts, namely, Emil's incapacitation and defendant's role as Emil's agent under the powers of attorney, the trial court did not err in finding an identity of cause of action.

¶ 20 Gorski nevertheless argues that it would have been inconsistent in the probate action to argue both that defendant was not a valid agent of Emil's, and to seek an accounting of defendant's actions as Emil's agent. We disagree. Gorski absolutely could have sought an accounting as an alternative theory of recovery if the powers of attorney were found to be valid in the probate action. See *Corcoran-Hakala v. Dowd*, 362 Ill. App. 3d 523, 527 (2005) (all of the arguments raised in the current litigation could have been raised in the earlier proceeding, and thus are barred by *res judicata*).

¶ 21 Gorski maintains that even if this court finds that her argument in the instant case could have been made in the probate action, there are new facts that have arisen since the judgment of the probate action, and therefore she should be allowed to seek an accounting of defendant's actions since that time. Specifically, Gorski contends that it is appropriate to seek an accounting of defendant's actions since the judgment of the probate action. This argument has been rejected by this court, stating that "[t]he passage of time is only one of the *River Park, Inc.* factors used to determine whether a group of facts constitutes a transaction," and *res judicata* can apply to conduct that occurs after the order in the first litigation has been entered. See *Lane v. Kalcheim*, 394 Ill. App. 3d 324 (2009) (the fact that events underlying the causes of action in the two litigations occurred at different times is not sufficient to find that they did not arise out of the same set of operative facts); *Doe v. Gleicher*, 393 Ill. App. 3d 31, 38 (2009) (*res judicata* applied to conduct that occurred after the order in the first litigation had been entered). Consequently, we find that the trial court did not err in finding an identity of cause of action and holding that the instant action was barred by the doctrine of *res judicata*.

¶ 22 Moreover, pursuant to section 2-7 of the Act, upon the principal's death, an agent is mandated to provide a copy of the "record of all receipts, disbursements, and significant actions taken under the authority of the agency" when requested to do so by the personal representative or successors in interest of the principal's estate. 755 ILCS 45/2-7 (West 2012). Accordingly, Gorski was not without recourse with respect to the accounting issue, as this section provided her with a means of pursuing an accounting from defendant upon Emil's death.

¶ 23 III. CONCLUSION

¶ 24 For the foregoing reasons, we affirm the judgment of the Circuit Court of Cook County.

¶ 25 Affirmed.