2016 IL App (1st) 151557-U

No. 1-15-1557

Fifth Division
March 31, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ROLLIN J. SOSKIN AND ASSOCIATES, LTD.,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant and Cross-Appellee,	)	No. 14 M2 002721
v.	)	The Honorable
RUDOLPH V. BITOY, ANNETTE BITOY, EDWARD BITOY, and CYNTHIA BITOY	)	Roger G. Fein, Judge Presiding.
Defendants-Appellees and Cross-Appellants.	)	

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's judgment is affirmed where (1) *res judicata* bars plaintiff's breach of contract claim because the claim falls within the transactional test guidelines the transactional test and the trial court awarded plaintiff all reasonable fees related to the transaction, and (2) plaintiff's conduct is not sanctionable.

¶ 2 The instant appeal arises from a dispute between plaintiff Rollin J. Soskin and Associates, Ltd., an Illinois law firm, and defendants over attorney fees allegedly owed plaintiff for its work in a probate matter. Defendants Rudolph and Edward Bitoy are heirs of

the probate estate of their deceased brother and they, along with additional defendants Annette and Cynthia Bitoy, entered into a retainer agreement with plaintiff for legal services for the purpose of handling the estate.

¶ 3 Plaintiff was required to file fee petitions with the probate court to have its attorney fees and costs approved for payment by the estate. The probate court awarded some, but not all, of the attorney fees and costs sought by plaintiff. Plaintiff then claimed that pursuant to the retainer agreement, defendants remained jointly and severally liable for the full payment of plaintiff's fees.

¶ 4 When defendants did not make any further payments, plaintiff brought a breach of contract action in the trial court to recover attorney fees and costs based on the retainer agreement. The trial court granted defendants' motion to dismiss plaintiff's complaint and denied defendants' motion for sanctions, dismissing plaintiff's complaint under the doctrine of *res judicata*, finding that the probate court's ruling on plaintiff's fee petitions bound plaintiff in the subsequent breach of contract action.

¶ 5 Plaintiff appeals the trial court's order granting defendants' motion to dismiss, arguing that the requirements for *res judicata* were not satisfied and application of *res judicata* to the facts here would result in an injustice. Defendants cross-appeal, and appeal the trial court's order denying their motion for sanctions. For the reasons that follow, we affirm the trial court's orders granting defendants' motion to dismiss and denying defendants' motion for sanctions.

¶ 6 BACKGROUND

¶ 7 I. Probate Proceedings

¶ 8 On November 4, 2004, the estate of Earl Eugene Bitoy, deceased, was filed as case number 04 P 6984 in the probate division of the Cook County circuit court.[1] The probate court appointed Rudolph Bitoy, Edward Bitoy, and Alvero Bitoy, brothers of the decedent, to serve as co-administrators of the estate. The court's order also provided that if the co-administrators could not work together, they would be removed and the court would appoint another administrator.

¶ 9 On April 12, 2005, Alvero filed a petition to have Rudolph and Edward removed as co-administrators and to have a special administrator appointed, citing the inability of the co-administrators to cooperate. After a mediation conference, the probate court denied Alvero's petition to remove the co-administrators and ordered the co-administrators to act by majority rule.

¶ 10 On August 19, 2005, Alvero filed a second petition to have Rudolph and Edward removed as co-administrators. On October 5, 2005, Edward and Rudolph filed an emergency petition to remove Alvero as co-administrator, based on his unilateral actions as to certain real estate and bank accounts in the estate. On January 11, 2006, the court removed Alvero as co-administrator. After Edward later resigned as co-administrator, the court ordered Rudolph to continue as sole administrator of the estate.

[1] The record does not contain documents pertaining to the probate court proceedings. However, the record does contain this court's opinion, *In re Estate of Bitoy*, 395 Ill. App. 3d 262 (2009), which summarizes the relevant procedural history. The facts concerning the probate case are taken from our previous opinion.

¶ 11 II. Retainer Agreement

¶ 12 On November 19, 2004, shortly after the decedent's death, Rudolph and Edward had engaged the plaintiff law firm to represent them in connection with the estate. Rudolph and Edward, along with their wives Annette Bitoy and Cynthia Bitoy,[2] entered into a retainer agreement with plaintiff for legal services for the purpose of handling the "[a]ffairs of Earl Eugene Bitoy, deceased and such other or further matters as may be necessary or requested from time to time, in connection therewith, or otherwise." The retainer agreement was attached to the complaint at issue in the instant appeal.

¶ 13 Defendants each initialed paragraph 5 of the agreement, which provides, in pertinent part:

> "Sometimes an insurer or another party to a transaction agrees to pay a Client's legal fees, or a court may order the Client's adversary to pay all or a part of the Client's legal fees and costs. In every case, the Client remains primarily liable to the Firm for payment of all fees and costs."

¶ 14 Additionally, defendants each initialed paragraph 10 of the agreement, which provides, in pertinent part:

> "In the event that the matter(s) to be performed by the Firm on behalf of the Client include *** performing services for *** an estate *** the Client *** hereby agrees to be jointly and severally responsible for and hereby personally guarantees the prompt payment of the full amount of any invoices submitted to such *** entity."

[2] For purposes of the retainer agreement, defendants are collectively referred to as "Client."

Paragraph 10 further provides:

> "In the event that the matter(s) to be performed by Firm on behalf of the Client include estate planning or other coordinated family matters, each family member of Client agrees to be jointly and severally responsible for and hereby personally guarantees the prompt payment of the full amount of any invoices submitted for such matters."

Paragraph 10 also acknowledges that defendants had been advised "to consult independent counsel regarding this provision if you deem it appropriate."

¶ 15 Plaintiff's complaint alleges that from November 11, 2004, through March 29, 2007, plaintiff provided services and expended costs totaling $345,959.37. Rudolph and Edward received, approved, and paid all plaintiff's invoices from the December 20, 2004, invoice through the January 23, 2006, invoice with funds from the estate. According to plaintiff's complaint, the estate was then converted from unsupervised to supervised administration and, as a result, plaintiff was required to file petitions to have its fees and costs approved for payment by the estate.[3] This included the fees and costs previously approved and paid by Rudolph and Edward from the estate.

[3] The record does not contain documents pertaining to the estate's conversion from unsupervised to supervised administration. Our previous opinion, however, confirms that sometime prior to February 9, 2006, plaintiff was ordered to submit fee petitions for the probate court's approval. *In re Estate of Bitoy*, 395 Ill. App. 3d at 266.

¶ 16 III. Fee Petition Proceedings

¶ 17 On February 9, 2006, plaintiff filed a fee petition with the probate court for services rendered from November 10, 2004, through January 20, 2006 (the first petition). Plaintiff sought fees in the amount of $252,084.75 and costs in the amount of $3,838.09, for a total of $255,922.84.

¶ 18 According to our previous opinion,[4] on April 28, 2006, the probate court found that the fee petition did not fully comply with the requirements of *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978 (1987). Although *Kaiser* was not a probate case, the probate court found that it applied to fee petitions in a probate estate. The probate court noted that some entries in the fee petition were "non-descriptive," some entries aggregated individual time to arrive at the billed time for a specific date, and some billed costs were normal overhead expenses. The probate court granted plaintiff's fee petition in the amount of $178,225.16, $77,697.68 less than plaintiff had sought.

¶ 19 According to our previous opinion,[5] on May 24, 2006, plaintiff filed a motion to reconsider the probate court's April 28, 2006, ruling on fees and costs. While plaintiff maintained that the *Kaiser* standard was incorrectly applied to the fee petition, it submitted additional detail and documentation that it asserted brought the fee petition in compliance

[4] The record does not contain documents pertaining to the probate court's April 28, 2006, order.

[5] The record does not contain documents pertaining to plaintiff's May 24, 2006, motion to reconsider the probate court's April 28, 2006, ruling or the probate court's October 31, 2006, ruling on the motion.

with *Kaiser*. On October 31, 2006, the probate court granted plaintiff's motion for reconsideration.[6]

¶ 20 On April 27, 2007, plaintiff filed another fee petition with the probate court for services rendered from January 21, 2006, through March 25, 2007 (the second petition). Plaintiff sought fees in the amount of $88,513.75 and costs in the amount of $1,522.78, for a total of $90,036.53. In sum, plaintiff sought $345,959.37 for its work involving the estate.

¶ 21 According to our previous opinion,[7] on September 6, 2007, the probate court held a hearing on plaintiff's first and second petitions for attorney fees and costs. At the hearing, the court sustained the objection to the introduction of the retainer agreement signed by defendants.

¶ 22 On October 15, 2007, the probate court granted plaintiff's first fee petition in the amount of $185,278.61, $70,644.23 less than plaintiff sought. The court found that although plaintiff submitted additional detail and documentation, the fee petition still did not fully comply with the *Kaiser* requirements. The court also granted plaintiff's second fee petition in the amount of $55,727.18, $34,309.35 less than plaintiff sought. The court noted that the second fee petition also failed to fully comply with the *Kaiser* requirements. Additionally, the court noted that some of the entries in the second fee petition concerned matters that "hardly benefited the estate." In sum, the probate court awarded a total of $241,005.79, $104,953.58 less than plaintiff sought.

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[6] The record is unclear as to whether the probate court continued the matter or set it for a new hearing at this time. However, as discussed below, on September 6, 2007, the probate court held a hearing on plaintiff's fee petitions and on October 15, 2007, the probate court granted plaintiff's fee petitions.

[7] The record does not contain documents pertaining to the probate court's September 6, 2007, hearing.

¶ 23 According to our previous opinion,[8] on November 14, 2007, plaintiff filed a notice of appeal from the probate court's October 15, 2007, ruling on fees and costs to this court. On September 30, 2009, this court affirmed the probate court's judgment, but remanded for clarification over an issue relating to the allowance of fees incurred in dealing with pleadings filed by Alvero Bitoy, a (former) co-administrator of the estate. On remand, plaintiff sought additional fees in the amount of $46,098.75.

¶ 24 On March 12, 2010, the probate court awarded an additional $8,250 in fees for plaintiff's defense against Alvero's pleadings. Since Rudolph and Edward had already paid plaintiff's invoices, the court determined that Rudolph and Edward had overpaid and ordered plaintiff to return $6,667.05 to the estate. Ultimately, the probate court awarded a total of $249,255.79, $96,703.58 less than plaintiff sought.

¶ 25 IV. Breach of Contract Claim

¶ 26 Following the fee petition proceedings, plaintiff demanded that defendants pay the billed but unpaid balance of $96,703.58. Plaintiff asserted that pursuant to the retainer agreement, defendants remained jointly and severally liable for the full payment of plaintiff's fees, regardless of the probate court's ruling on the fee petitions. Defendants did not make any further payments.

¶ 27 On November 18, 2014, plaintiff filed a two-count complaint against defendants for breach of contract, which is the complaint at issue in the instant appeal. Count I seeks the billed but unpaid balance of $96,703.58, plus interest and collection costs. Count II seeks an

[8] The record does not contain documents pertaining to plaintiff's November 14, 2007, notice of appeal from the probate court's October 15, 2007, ruling.

unspecified amount for time spent assisting defendants' new counsel and attempting to collect fees, and costs and fees associated with litigating the disallowance of plaintiff's previous fees.

¶ 28 In response to plaintiff's complaint, on December 30, 2014, Edward and Cynthia Bitoy filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). Edward and Cynthia argued that plaintiff's claims for both billed and unbilled fees (counts I and II) should be dismissed under section 2-619(a)(4) of the Code (735 ILCS 5/2-619(a)(4) (West 2012)) because they were barred by the doctrine of *res judicata*. Edward and Cynthia also argued that plaintiff's claim for unbilled fees (count II) should be dismissed under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) because plaintiff failed to state a cause of action upon which relief can be granted. Furthermore, Edward and Cynthia filed a motion for Rule 137 sanctions, arguing that plaintiff's attempt to extract fees that had already been adjudicated and rejected was sanctionable because it was not supported by law and was filed for the improper purpose of harassing defendants. On February 6, 2015, Rudolph and Annette Bitoy moved to adopt Edward and Cynthia's motion to dismiss and motion for Rule 137 sanctions.

¶ 29 On April 23, 2015, the trial court granted defendants' motion to dismiss and denied their motion for Rule 137 sanctions. The court dismissed both counts of the complaint with prejudice under section 2-619(a)(4) of the Code. The court also dismissed count II under section 2-615 of the Code, without prejudice. The court based its dismissal under section 2-619(a)(4) of the Code on the doctrine of *res judicata*, holding that the probate court's ruling on plaintiff's fee petitions bound plaintiff in the subsequent breach of contract action. The court based its dismissal under section 2-615 of the Code on the finding that count II did not

allege sufficient facts to support an award of fees, holding that count II failed to allege any facts as to what time and expenses, or the amount thereof, were sought.

¶ 30 On May 21, 2015, plaintiff filed a notice of appeal to this court, appealing the April 23, 2015, order granting defendants' motion to dismiss. On May 27, 2015, defendants filed a notice of cross-appeal to this court, appealing the April 23, 2015, order denying defendants' motion for Rule 137 sanctions. This appeal follows.

¶ 31 ANALYSIS

¶ 32 On appeal, plaintiff argues that the trial court erred in granting defendants' motion to dismiss because the requirements for *res judicata* were not satisfied and application of *res judicata* to the facts here would result in an injustice. In their cross-appeal, defendants claim that the trial court erred in denying their motion for Rule 137 sanctions, arguing that plaintiff's attempt to extract fees that had already been adjudicated and rejected was sanctionable because it was not supported by law and was filed for the improper purpose of harassing defendants. We consider each argument in turn.

¶ 33 I. Breach of Contract

¶ 34 A. *Standard of Review*

¶ 35 In the case at bar, the trial court granted defendants' motion to dismiss under section 2-619.1 of the Code. "A motion under section 2–619.1 of the Code allows a party to combine a section 2–615 motion to dismiss based upon a plaintiff's substantially insufficient pleadings with a section 2–619 motion to dismiss based upon certain defects or defenses." (Internal quotation marks omitted.) *Schloss v. Jumper*, 2014 IL App (4th) 121086, ¶ 15. A section 2–615 motion to dismiss attacks the legal sufficiency of the plaintiff's claims by asserting that the claims fail to state a cause of action upon which relief can be granted. *Zahl v. Krupa*, 365

Ill. App. 3d 653, 657-58 (2006). In contrast, a section 2–619 motion to dismiss "admits the legal sufficiency of the claims but raises defects, defenses, or other affirmative matter, appearing on the face of the complaint or established by external submissions, that defeat the action." *Zahl*, 365 Ill. App. 3d at 657-58. We review the trial court's dismissal of a complaint under section 2-619.1 of the Code *de novo*. *Schloss*, 2014 IL App (4th) 121086, ¶ 15. We accept all well-pleaded facts as true and draw all reasonable inferences in the light most favorable to the plaintiff. *Zahl*, 365 Ill. App. 3d at 658. We grant a motion to dismiss under section 2-619.1 of the Code only where no set of facts can be proved that would entitle the plaintiff to relief. See *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 274 (2004).

¶ 36 B. *Section 2-619(a)(4) Motion to Dismiss*

¶ 37 We first address the trial court's dismissal of counts I and II of plaintiff's complaint under section 2-619(a)(4) of the Code. The court based its dismissal under section 2-619(a)(4) of the Code on the doctrine of *res judicata*, holding that the probate court's ruling on plaintiff's fee petitions bound plaintiff in the subsequent breach of contract action.

¶ 38 The doctrine of *res judicata* provides that "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 causes of 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 that suit." *River Park, Inc.*, 184 Ill. 2d at 302. *Res judicata* applies when: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of causes of action, and (3) there is an identity of the parties or their privies. *River Park, Inc.*, 184 Ill. 2d at 302. The parties do not

dispute that the first element of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction, was satisfied when the probate court entered a final judgment on plaintiff's fee petitions. Thus, we need only to consider whether the remaining elements of *res judicata*, identity of causes of action and identity of the parties or their privies, have been satisfied.

¶ 39 1. Identity of the Causes of Action

¶ 40 Illinois adheres to the "transactional test" to determine whether causes of action are the same for the purposes of *res judicata*. *River Park, Inc.*, 184 Ill. 2d at 311. Under the transactional test, "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park, Inc.*, 184 Ill. 2d at 311. *Res judicata* extends not only to matters that were litigated, but also to matters that could have been litigated. *River Park, Inc.*, 184 Ill. 2d at 302. In the case at bar, plaintiff represented defendants only in connection with the estate of Earl Eugene Bitoy. Plaintiff's fee petitions before the probate court and current breach of contract claim both therefore arise from the same group of operative facts, the legal services rendered and costs incurred by plaintiff relating to the estate. Count I of plaintiff's complaint is seeking the exact amount of fees that was denied by the probate court, $96,703.58. Count II of plaintiff's complaint seeks an unspecified amount for time spent attempting to collect its claimed fees and fees and costs for assisting defendants' new counsel for the estate. Plaintiff did not include these fees and costs in its fee

petitions before the probate court.[9] Accordingly, under the transactional test plaintiff's breach of contract claim is the same cause of action as its fee petitions before the probate court for purposes of *res judicata*.

¶ 41 Plaintiff nevertheless contends that its breach of contract claim is a separate cause of action from its fee petitions before the probate court for purposes of *res judicata* because the heightened scrutiny of fees applied by the probate court in considering plaintiff's fee petitions does not apply to actions for fees sought from an attorney's own client pursuant to a written contract. The probate court found that a fee petition requesting payment from an estate is governed by the guidelines set forth in *Kaiser v. MEPC American Properties, Inc.*, 164 Ill. App. 3d 978 (1987). *Kaiser* requires "the petitioner to present detailed records maintained during the course of the litigation containing facts and computations up-on which the charges are predicated." *Kaiser*, 164 Ill. App. 3d at 984. On appeal, this court affirmed the probate court's decision to apply the *Kaiser* standard to plaintiff's fee petitions. *In re Estate of Bitoy*, 395 Ill. App. 3d 262, 276 (2009).

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[9] At oral argument, plaintiff's counsel asserted that plaintiff could not have included the fees and costs alleged in count II of its complaint in its fee petitions before the probate court because following the remand hearing, the court "made it very clear" that it would not entertain any additional fee petitions for plaintiff's fees and costs. However, plaintiff failed to develop this claim in its brief, and therefore forfeited the claim and we cannot consider it. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued [in the appellant's brief] are waived and shall not be raised in the reply brief, *in oral argument*, or on petition for rehearing." (Emphasis added.)); see also *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010) (holding that an issue "merely listed or included in a vague allegation of error is not 'argued'" and does not satisfy Supreme Court Rule 341(h)); *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2010) (holding that a reviewing court is "entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented" (internal quotation marks omitted)). Additionally, this argument was not developed before the trial court and this court will not consider this type of an issue for the first time on appeal. See *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 ("Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal.").

¶ 42 Plaintiff argues that, unlike the heightened scrutiny applied to plaintiff's fee petitions before the probate court, in a breach of contract action an attorney seeking to recover fees from his own client is not required to present detailed contemporaneous time records in order to sustain its burden of proof in establishing that the fees are reasonable. See *Wildman, Harrold, Allen & Dixon v. Gaylord*, 317 Ill. App. 3d 590, 598 (2000). We agree with this statement; however, the supreme court has held that "the same evidence test is not determinative of identity of cause of action." *River Park, Inc.*, 184 Ill. 2d at 311. "Unlike the same evidence test, *** the transactional test permits 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." *River Park, Inc.*, 184 Ill. 2d at 311. Thus, it is of no consequence that plaintiff's breach of contract action would require less stringent evidence than was required for its fee petitions before the probate court; it is sufficient for purposes of *res judicata* that the claims arise from a single group of operative facts under the transactional test.

¶ 43 Finally, plaintiff contends that its breach of contract claim is a separate cause of action from its fee petitions before the probate court for purposes of *res judicata* because the probate court only granted fees that "benefitted the estate," and did not award plaintiff all reasonable fees owed for its services.[10] Therefore, plaintiff contends, it is justified in seeking

[10] At oral argument, plaintiff's counsel argued that the probate court excluded fees attributable to "infighting" because the services plaintiff provided did not benefit the estate, although those fees would be recoverable in a breach of contract action. See *In re Estate of Bitoy*, 395 Ill. App. 3d at 281 ("[T]he petitioner has failed to establish that the time spent in raising objections to the other fee petitions, in and of itself, was in the interest of or resulted in a benefit to the estate in this case."). However, on remand from our first opinion, plaintiff was awarded some fees for its work concerning pleadings filed by Alvero Bitoy, the former co-administrator. Additionally, the probate court's October 15, 2007, order indicates that the lack of a benefit to the estate was only

the fees denied by the probate court from defendants pursuant to a breach of contract claim. We do not find this argument persuasive. To support its claim, plaintiff first relies on the fact that the probate court did not use the word "reasonable" in its orders concerning plaintiff's fee petitions. Plaintiff then points to the fact that the probate court declined to consider the retainer agreement in considering plaintiff's fee petitions. Finally, plaintiff relies on case law to establish that the fees denied by the probate court are recoverable from defendants in a breach of contract claim. We address each argument in turn.

¶ 44 First, plaintiff relies on the fact that the probate court did not use the word "reasonable" in its orders concerning plaintiff's fee petitions as evidence that the court only granted fees that benefitted the estate, and did not award plaintiff all reasonable fees owed for its services. We find plaintiff's reliance on this technicality unpersuasive. Section 27-2(a) of the Probate Act of 1975 (the Probate Act) provides that "[t]he attorney for a representative is entitled to reasonable compensation for his services." 755 ILCS 5/27-2(a) (West 2006). A probate court may consider several factors in determining the reasonableness of fees, including: "good faith, diligence and reasonable prudence used by the attorneys; time expended; the size of the estate; the work that was done; the skills and qualifications of counsel; the novelty and complexity of the issues confronted; and the benefits conferred on the client by the legal services rendered." *In re Estate of Halas*, 159 Ill. App. 3d 818, 832 (1987). In our previous opinion, we looked to section 27-2(a) of the Probate Act to determine the appropriate amount

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one of the court's reasons for excluding those fees; additionally, certain fees lacked individual time records, time expended on certain tasks appeared excessive, and some tasks appeared entirely unnecessary. Therefore, the record indicates that the fees were disallowed for reasons other than the "infighting" plaintiff points to.

of fees to award plaintiff. *In re Estate of Bitoy*, 395 Ill. App. 3d at 276-77. Furthermore, in the probate court's orders concerning plaintiff's fee petitions, the court relied heavily on factors of reasonableness, including the fact that plaintiff's time entries were "entirely non-descriptive," some of the entries "did not add up to the time charged," and plaintiff billed "services for which there is no individual time record." Thus, despite plaintiff's arguments to the contrary, the probate court awarded plaintiff all reasonable fees for its services pursuant to the Probate Act. The absence of the word "reasonable" from the probate court's orders is a mere technicality that is of little consequence.

¶ 45 Next, plaintiff points to the fact that the probate court declined to consider the retainer agreement as evidence that the court did not award plaintiff all reasonable fees owed for its services, thereby demonstrating that the probate proceedings and the breach of contract action are not identical. Plaintiff asserts that it is necessary to consider the retainer agreement to determine the reasonableness of its fees and where the probate court had discretion in considering the agreement in the fee petition proceedings, the trial court is required to consider the agreement in a breach of contract action. Therefore, plaintiff asserts, the probate proceedings and the breach of contract action are separate causes of action for purposes of *res judicata*. Again, we do not find this argument persuasive. Rule 1.5 of the Illinois Rules of Professional Conduct (eff. Jan. 1, 2010) (Rule 1.5) governs retainer agreements for attorney fees, and courts apply this rule in considering the enforceability of such agreements. See *Richards v. SSM Health Care, Inc.*, 311 Ill. App. 3d 560, 564 (2000) ("Contracts between lawyers that violate Rule 1.5 are against public policy and cannot be enforced."); see also *In re Vrdolyak*, 137 Ill. 2d 407, 422 (1990) (holding that the Illinois Code of Professional Responsibility is binding and has the force of law); *Maxit, Inc. v. Van*

Cleve, 376 Ill. App. 3d 50, 58 (2007) (holding that "a contractual provision that violates public policy as expressed in statutory law is unenforceable and void"). Rule 1.5 provides that "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount of expenses" and contains the following nonexclusive list of factors relevant to a determination of reasonableness:

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
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> (6) the nature and length of the professional relationship with the client;
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> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent." Ill. S. Ct. Rules of Prof. Res., Rule 1.5(a) (eff. Jan. 1, 2010).

Courts use Rule 1.5 in determining whether attorney fees are reasonable. See *In re Estate of Andernovics*, 197 Ill. 2d 500, 513 (2001) (holding that no exact formula exists in determining a proper attorney fee award; while each factor enumerated in Rule 1.5 is relevant, no single factor is conclusive or dispositive). Several of the factors relevant in determining the reasonableness of attorney fees under Rule 1.5 are also relevant in determining the

reasonableness of attorney fees pursuant to the Probate Act. See *In re Estate of Halas*, *supra* ¶ 44. Given the purpose of both Rule 1.5 and the Probate Act is to prevent the charging and collection of excessive legal fees, we cannot find that it was necessary for the probate court, acting pursuant to the Probate Act, to consider the retainer agreement in determining the reasonableness of plaintiff's fees. See *In re Estate of Bitoy*, 395 Ill. App. 3d at 277.

¶ 46 Finally, plaintiff relies on the fact that "there is no provision in the Probate Act requiring that the executor's attorney's fees and costs be exclusively paid from the estate" to establish that the fees denied by the probate court are recoverable from defendants in a breach of contract action. *In re Estate of Elias*, 408 Ill. App. 3d 301, 323 (2011). Case law indicates that "[t]here is long-standing precedent in Illinois for applying the doctrine of equitable contribution to apportion the payment of attorney fees in probate cases where appropriate." *In re Estate of Elias*, 408 Ill. App. 3d at 324; see *Jackman v. North*, 398 Ill. 90 (1947) (holding that where guardians *ad litem* were appointed for minors who were parties in a will contest, an order assessing half of the fees of the guardians *ad litem* against an unsuccessful contestant and the remaining half against the testatrix' estate was not an abuse of discretion). For instance, in *In re Estate of Elias*, the testator's daughter fraudulently obtained funds and personal property from the testator's brokerage account while acting as the testator's power of attorney. *In re Estate of Elias*, 408 Ill. App. 3d at 314. The trial court granted the executor of the testator's estate fees and costs, but ordered them to be paid by the estate. *In re Estate of Elias*, 408 Ill. App. 3d at 314. This court reversed the portion of the order assessing all fees and costs against the estate only and remanded with an order that the fees and costs incurred to recover the fraudulently transferred funds and property be assessed against the testator's daughter. *In re Estate of Elias*, 408 Ill. App. 3d at 327.

¶ 47 In *Elias*, the trial court determined the amount of fees and costs that were owed to the executor, and then apportioned the payments to the appropriate parties. Here, the probate court determined the amount of fees and costs that were owed to plaintiff and ordered all of them to be paid by the estate. Plaintiff is not contending that it would be more appropriate for defendants to pay a portion of the fees assessed to the estate. Rather, plaintiff is seeking additional compensation from defendants beyond what the probate court found reasonable, a scenario this court did not consider in *Elias*.

¶ 48 Furthermore, plaintiff relies on *Wildman, Harrold, Allen & Dixon v. Gaylord* for the similar proposition that "if a trial court denies a petition seeking fees pursuant to a 'fee-shifting' clause, the successful litigant's attorney is still entitled to payment from his own client." *Wildman, Harrold, Allen & Dixon*, 317 Ill. App. 3d at 506. We find that plaintiff's reliance is misplaced. In the case at bar, the probate court awarded plaintiff $249,255.79, which accounted for most of the fees in its petitions. Plaintiff is now seeking additional compensation from defendants beyond what the probate court found reasonable. Contrary to plaintiff's assertion, there was not a "shortfall" in the fees awarded by the probate court that would entitle plaintiff to additional compensation. Accordingly, we find that plaintiff is not justified in seeking the fees denied by the probate court from defendants pursuant to a breach of contract claim. In conclusion, we find that because plaintiff's breach of contract claim falls within the transactional test guidelines the transactional test and plaintiff has already been awarded all reasonable fees related to the transaction, there is an identity of the causes of action for purposes of *res judicata*.

¶ 49 2. Identity of the Parties

¶ 50 The first two elements of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction and identities of the causes of action, have been satisfied. We now consider whether the final element of *res judicata*, identity of the parties or their privies, has been established to preclude plaintiff's breach of contract claim. Plaintiff was the original petitioner for the fee petitions before the probate court and is the plaintiff in the breach of contract action. Two of the defendants in the breach of contract action, Edward Bitoy and Rudolph Bitoy, were representatives of the estate. Plaintiff contends that their wives, defendants Cynthia Bitoy and Annette Bitoy, are excluded as privies because they are not direct beneficiaries of the estate. We do not find this argument persuasive.

¶ 51 "Privity is said to exist between parties who adequately represent the same legal interests." (Internal quotation marks omitted.) *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 296 (1992). For purposes of *res judicata*, "[i]t is the identity of interest that controls in determining privity, not the nominal identity of the parties." *People ex rel. Burris*, 151 Ill. 2d at 296. Plaintiff relies on *Lang v. Metzger*, a 1903 case, to establish that privity requires a successive relationship to the same rights of property. *Lang v. Metzger*, 206 Ill. 475, 490 (1903). However, "there is no generally prevailing definition of 'privity' that the court can apply to all cases; rather, determining privity requires careful consideration of the circumstances of each case." *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 190 (2010).

¶ 52 In the case at bar, the record demonstrates that Cynthia and Annette were in privity with the estate, which was the party involved with the fee petitions before the probate court. As explained above, both the fee petition proceedings before the probate court and the instant

appeal center around the reasonableness of the fees plaintiff charged for its representation of the estate. Both the estate and defendants in the instant case had the same interest: only paying the attorney fees that were reasonable. Cynthia and Annette's interests were therefore adequately represented through the estate's challenges to the reasonableness of plaintiff's fees. Furthermore, it is unlikely that Cynthia and Annette would have signed the retainer agreement engaging plaintiff to handle the estate if they were strangers to the estate. Because of the shared legal interests with respect to the reasonableness of the attorney fees concerning the estate, we find that privity exists between defendants and the estate.

¶ 53 3. Defendants' Liability on the Guarantee

¶ 54 Finally, plaintiff asserts that *res judicata* is not applicable to the case at bar because the retainer agreement sought to expand defendants' personal liability such that they each jointly and severally guaranteed payment in the event that payment by the estate fell short. We do not find this argument persuasive. Defendants' personal guarantee cannot expose them to any further liability than the liability underlying the guarantee. See *JPMorgan Chase Bank, N.A. v. East-West Logistics, L.L.C.*, 2014 IL App (1st) 121111, ¶ 83 ("In general, the liability of a guarantor is limited by that of the debtor and if no recovery could be had against the debtor, the guarantor would be absolved of liability."). In the case at bar, the probate court's orders concerning plaintiff's fee petitions established the amount of underlying fees owed to plaintiff, and payment of those fees by the estate absolved defendants of any further liability. Furthermore, we have already rejected plaintiff's argument that there was a shortfall in the fees awarded by the probate court to be paid by the estate that would entitle plaintiff to additional compensation. Thus, we find that defendants have no further liability on the guarantee and *res judicata* remains applicable to the case at bar.

¶ 55 4. Application of *Res Judicata* to the Facts

¶ 56 In summary, as noted, the doctrine of *res judicata* provides that "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 causes of action." *River Park, Inc.*, 184 Ill. 2d at 302. *Res judicata* applies when: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of causes of action, and (3) there is an identity of the parties or their privies. *River Park, Inc.*, 184 Ill. 2d at 302. In the case at bar, the first element of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction, was satisfied when the probate court entered a final judgment on plaintiff's fee petitions. The second element of *res judicata*, an identity of the causes of action, is satisfied because plaintiff's breach of contract claim falls within the transactional test guidelines the transactional test and plaintiff has already been awarded all reasonable fees related to the transaction. Finally, the third element of *res judicata*, an identity of the parties or their privies, is satisfied because defendants represent the same legal interests as the estate.

¶ 57 Since all elements of *res judicata* are satisfied and defendants have no further liability on the guarantee, we find that plaintiff's breach of contract claim is barred. However, as a final matter, principles of equity and fairness guide the application of *res judicata*, so it is necessary to consider whether application of *res judicata* to the facts here would result in an injustice. See *Borcherding v. Anderson Remodeling Co.*, 253 Ill. App. 3d 655, 662 (1993). Plaintiff asserts that applying *res judicata* to the facts here would "deny plaintiff fees and costs ordinarily recoverable in a breach of contract action, without a trier of fact ever hearing evidence and determining the amount of fees, if any, which are owed under the [retainer

agreement]."[11] In fact, plaintiff had an opportunity to present evidence to the probate court of the legal services it rendered and the costs it incurred relating to the estate in the fee petition proceedings and the court awarded plaintiff all reasonable fees owed for its services. Thus, we find that plaintiff suffers no injustice by barring its breach of contract claim under *res judicata*. Accordingly, we affirm the trial court's dismissal of counts I and II of plaintiff's complaint under section 2-619(a)(4) of the Code on the doctrine of *res judicata*, and find that the probate court's ruling on plaintiff's fee petitions bind plaintiff in its subsequent breach of contract action. As a result, there is no need to consider the trial court's dismissal of count II of plaintiff's complaint under section 2-615 of the Code and so we decline to do so here.

¶ 58 II. Rule 137 Sanctions

¶ 59 In their cross-appeal, defendants claim that the trial court erred in denying their motion for sanctions, arguing that plaintiff's attempt to extract fees that had already been adjudicated and rejected was sanctionable because it was not supported by law and was filed for the improper purpose of harassing defendants.

[11] At oral argument, plaintiff's counsel urged this court to consider the purpose of a retainer agreement if there are circumstances under which it will not be enforced. The supreme court has held that the "guiding principle" of any retainer agreement "should be the protection of the client's interests," rather than the interests of the attorney. *Dowling v. Chicago Options Associates, Inc.*, 226 Ill. 2d 277, 292 (2007). In the case at bar, plaintiff required an advanced payment of fees at the time it was engaged to represent defendants in the probate matter, and the retainer agreement was necessary to protect those funds. We again note that plaintiff is only entitled to reasonable fees, even in the presence of a retainer agreement; the probate court determined those reasonable fees and in our previous opinion we affirmed the reasonableness of the fees it awarded. See *In re Estate of Bitoy*, 395 Ill. App. 3d at 262.

¶ 60 A. *Standard of Review*

¶ 61 In the case at bar, the trial court denied defendants' motion for sanctions under Illinois Supreme Court Rule 137 (eff. July 1, 2013) (Rule 137). A trial court's decision to deny Rule 137 sanctions "is entitled to great weight on appeal and will not be disturbed on review absent an abuse of discretion." *Benson v. Stafford*, 407 Ill. App. 3d 902, 928-29 (2010). "Abuse of discretion occurs when no reasonable person could take the view adopted by the trial court." *In re Estate of Hanley*, 2013 IL App (3d) 110264, ¶ 78. When reviewing the trial court's denial of Rule 137 sanctions, we primarily consider "whether the trial court's decision was informed, based on valid reasoning, and follows logically from the facts." *In re Estate of Hanley*, 2013 IL App (3d) 110264, ¶ 78.

¶ 62 B. *Illinois Supreme Court Rule 137*

¶ 63 Defendants assert that plaintiff's breach of contract claim was not supported by law and was filed for the improper purpose of harassing defendants, and therefore the trial court abused its discretion when it failed to find that the claim violated Rule 137. Rule 137 provides in pertinent part:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *** If a pleading, motion, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative,

> may impose upon the person who signed it, a represented party, or both, an appropriate sanction." Ill. S. Ct. R. 137 (eff. July 1, 2010).

The purpose of Rule 137 is to prevent the filing of vexatious or harassing claims that are not supported by law or fact. *In re Estate of Hanley*, 2013 IL App (3d) 110264, ¶ 79. "A court may impose Rule 137 sanctions when a party asserts a legal proposition contrary to established precedent." *Mohica v. Cvejin*, 2013 IL App (1st) 111695, ¶ 51. However, "[a] court should not impose sanctions on a party who presents objectively reasonable arguments for his position, regardless of whether the arguments are deemed to be unpersuasive or incorrect." *Polsky v. BDO Seidman*, 293 Ill. App. 3d 414, 428 (1997). Contrary to plaintiff's assertions, "[a] subjective, good faith belief that the case is well grounded in fact or law is insufficient to meet the burden of Rule 137." *Baker v. Daniel S. Berger, Ltd.*, 323 Ill. App. 3d 956, 966 (2001); see *Schneider v. Schneider*, 408 Ill. App. 3d 192 (2011) ("A party's honest belief that his case was well grounded in law and fact is not enough to avoid Rule 137 sanctions."); *Dunn v. Patterson*, 395 Ill. App. 3d 914 (2009) ("In a determination of whether to impose sanctions, it is not sufficient that the party honestly believed his or her case was well grounded in fact or law."); see also *Benson*, 407 Ill. App. 3d 902 ("In order to avoid sanctions, parties must present objectively reasonable arguments for their view."). Rather, a court must use an objective standard to determine whether a party's conduct "was reasonable under the circumstances as they existed at the time of filing." *Sanchez v. City of Chicago*, 352 Ill. App. 3d 1015, 1020 (2004).

¶ 64 Defendants assert that the trial court erred in denying Rule 137 sanctions because established precedent clearly indicated that plaintiff's breach of contract claim was not supported by law at the time plaintiff filed it. Defendants cite two cases that they claim

clearly informed plaintiff that *res judicata* would apply to plaintiff's breach of contract claim, *Purmal v. Robert N. Wadington & Associates*, 354 Ill. App. 3d 715 (2004), and *Corcoran-Hakala v. Dowd*, 362 Ill. App. 3d 523 (2005). In *Purmal*, the law firm representing the plaintiff in the underlying lawsuit petitioned the court for attorney fees pursuant to a contingency agreement. *Purmal*, 354 Ill. App. 3d at 718. The court found that an enforceable contingency agreement existed and awarded the law firm one-third of the settlement monies. *Purmal*, 354 Ill. App. 3d at 718. After that decision was affirmed on appeal, the plaintiff filed a separate complaint against the law firm alleging, among other things, malpractice and fraud. *Purmal*, 354 Ill. App. 3d at 718-19. The law firm filed a cross-complaint for breach of contract based on the contingency agreement and the plaintiff's failure to pay the attorney fees. *Purmal*, 354 Ill. App. 3d at 719-20. The court held that the plaintiff's claims and the law firm's cross-claim for breach of contract were barred by *res judicata*. *Purmal*, 354 Ill. App. 3d at 730-31.

¶ 65 Similarly, in *Corcoran-Hakala*, the law firm representing the plaintiff in the underlying lawsuit waived its fee but the referring attorney still wanted his percentage of the agreed-upon contingency fee. *Corcoran-Hakala*, 362 Ill. App. 3d at 524. The referring attorney litigated his right to the referral fee and won. *Corcoran-Hakala*, 362 Ill. App. 3d at 524-25. After that decision was affirmed on appeal, the plaintiff filed a separate complaint against the successful attorney claiming, among other things, that the agreement was procured by fraud and seeking to recover the amount she had paid pursuant to the agreement. *Corcoran-Hakala*, 362 Ill. App. 3d at 525. Again, the court held that the plaintiff's claims were barred by *res judicata*. *Corcoran-Hakala*, 362 Ill. App. 3d at 531.

¶ 66 Defendants assert that because the probate court had already ruled on plaintiff's fee petitions when plaintiff filed its breach of contract complaint, the precedent established by *Purmal* and *Corcoran-Hakala* clearly indicated that the claim was barred by *res judicata*. Plaintiff argues, and we agree, that *Purmal* and *Corcoran-Hakala* are so factually distinct from the facts here as to provide no notice to plaintiff that *res judicata* would apply to its breach of contract claim. Unlike the case at bar, the amount of fees were not at issue in *Purmal* or *Corcoran-Hakala*. Rather, the plaintiffs in *Purmal* and *Corcoran-Hakala* were attempting to relitigate whether any fees should have been awarded at all. Thus, while we agree with defendants that plaintiff's good faith belief in its breach of contract claim alone is not enough to avoid Rule 137 sanctions, we find that a reasonable person could find that plaintiff's arguments were objectively reasonable, albeit unpersuasive and incorrect. Furthermore, defendants do not cite to any evidence to support their claim that plaintiff engaged in harassment when it filed its breach of contract claim. Accordingly, we find the trial court did not err in denying defendants' motion for Rule 137 sanctions.

¶ 67 C. *Illinois Supreme Court Rule 375*

¶ 68 In addition to asserting that plaintiff's breach of contract claim was not supported by law, defendants further assert that there is no legal or factual basis to support plaintiff's appeal. Therefore, defendants claim, this court should impose sanctions pursuant to Illinois Supreme Court Rule 375 (eff. Feb. 1, 1994) (Rule 375). Rule 375 provides in pertinent part:

> "If, after consideration of an appeal or other action pursued in a reviewing court, it is determined that the appeal or other action itself is frivolous, or that an appeal or other action was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,

> or the manner of prosecuting or defending the appeal or other action is for such purpose, an appropriate sanction may be imposed upon any party or the attorney or attorneys of the party or parties. An appeal or other action will be deemed frivolous where it is not reasonably well grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. An appeal or other action will be deemed to have been taken or prosecuted for an improper purpose where the primary purpose of the appeal or other action is to delay, harass, or cause needless expense." Ill. S. Ct. R. 375 (eff. Feb. 1, 1994).

"Rule 375 provides sanctions for frivolous appeals that are not taken in good faith." *McNally v. Bredemann*, 2015 IL App (1st) 134048, ¶ 24. "A reviewing court applies an objective standard to determine whether an appeal is frivolous, i.e., if it would not have been brought in good faith by a reasonable, prudent attorney." *McNally*, 2015 IL App (1st) 134048, ¶ 24.

¶ 69 In the case at bar, defendants cite to two cases to support their claim that Rule 375 sanctions are appropriate. First, defendants cite to *Singer v. Brookman* for the proposition that Rule 375 sanctions are appropriate where a litigant recklessly files an appeal after a trial court dismisses his complaint pursuant to *res judicata*. We do not find that *Singer* is applicable to the case at bar. In *Singer*, a divorced father filed an action seeking accounting of money given to his ex-wife for the benefit of their sons. *Singer*, 217 Ill. App. 3d at 874. After that accounting was complete, the sons brought a complaint seeking their own accounting of the same funds, arguing that *res judicata* did not apply because there was not an identity of parties between the father and the sons. *Singer*, 217 Ill. App. 3d at 875-76. The argument that the father and the sons were separate parties for purposes of *res judicata*

was so objectively unreasonable that the trial court granted Rule 137 sanctions. *Singer*, 217 Ill. App. 3d at 875. On appeal, the reviewing court granted Rule 375 sanctions, finding that the appeal was "just as mean-spirited and vindictive as the case below." *Singer*, 217 Ill. App. 3d at 880.

¶ 70 *Singer* involved neither fee petitions nor a breach of contract claim, and therefore is entirely factually distinct from the case at bar. Defendants do not point out any similarities between plaintiff's claims and the sons' objectively unreasonable claim in *Singer* that led to the imposition of sanctions, and defendants point to no evidence that plaintiff's appeal was "mean-spirited" or "vindictive." Accordingly, we do not find that *Singer* is applicable to the facts here.

¶ 71 Next, defendants cite to *Thompson v. Buncik*, 2011 IL App (2d) 100589, as evidence that no reasonable, prudent attorney in plaintiff's position would have filed the instant appeal. In *Thompson*, the sanctioned attorney did not provide the court with a record on which to review the issue, and did not cite to any authority in support of his claims. *Thompson*, 2011 IL App (2d) 100589, ¶ 21. Indeed, the court in *Thompson* noted that the sanctioned attorney's approach had "absolutely no foundation in the law." *Thompson*, 2011 IL App (2d) 100589, ¶ 21. Defendants fail to demonstrate any similarities between the sanctioned attorney's conduct in *Thompson* and plaintiff's conduct here that would make the court's finding in *Thompson* applicable to the case at bar. Accordingly, we are not persuaded that Rule 375 sanctions are appropriate and so we decline to impose sanctions here.

¶ 72 CONCLUSION

¶ 73 We affirm the trial court's orders granting defendants' motion to dismiss and denying defendants' motion for sanctions.

¶ 74 Affirmed.