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FIFTH DIVISION
February 2, 2018

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALLAN MIGDAL,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 10 P 003200
)	
RAYNA MIGDAL JOSEPH, Individually, and as)	
Executrix and Trustee of the Estate of Earl Migdal, and)	
MITCHELL JOSEPH,)	The Honorable
)	Mary Ellen Coghlan,
Defendants-Appellees.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

ORDER

¶1 *HELD:* The circuit court did not err in dismissing plaintiff's section 2-1401 petition for relief from judgment where the petition was barred by the doctrine of *res judicata*.

¶2 Plaintiff, Allan Migdal, appeals the denial of his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). Plaintiff contends his petition was not barred by the doctrine of *res judicata* and sufficiently established the requisite elements for relief from the underlying judgment dismissing his second

amended petition to invalidate his father's will and trusts in favor of defendants, Rayna Migdal Joseph, individually and as executrix and trustee of the Estate of Earl Migdal, and Mitchell Joseph. Based on the following, we affirm.

¶3

FACTS

¶4 Plaintiff appears before this court a second time to contest the will and trusts of his father, Earl, from which he was disinherited. The challenged instruments included Earl's last will and testament, which was executed on January 29, 2009, and was proved and admitted to the record and probate on June 8, 2010, as well as two trusts, namely, the Earl Migdal Revocable Trust agreement, dated December 18, 2003, restated on December 27, 2005, and amended on June 11, 2008, and the Earl Migdal Revocable Living Trust agreement, dated October 28, 1998, restated on April 15, 2004, and amended on April 27, 2010.

¶5 Plaintiff's first pleading to set aside Earl's will and trusts was filed in December 2010. Plaintiff alleged Earl's will and trusts were not based on his own desires, but instead resulted from the undue influence of Rayna, plaintiff's sister, and Mitchell, Rayna's husband. Plaintiff's initial pleading was dismissed for failure to state a sufficient claim upon which relief could be granted.

¶6 Plaintiff filed an amended petition to contest Earl's will and trusts in June 2011. The amended petition also was dismissed for failure to state a sufficient claim for relief. In February 2012, plaintiff filed a motion to reconsider the dismissal of his amended petition. The circuit court denied plaintiff's motion to reconsider on May 30, 2012, which plaintiff appealed. Plaintiff, however, voluntarily withdrew his appeal.

¶7 On December 3, 2012, plaintiff filed a motion for leave to file a second amended petition, which was granted over defendants' objection. In August 2013, plaintiff filed his second

amended petition to contest Earl's will and trusts based on undue influence. On October 23, 2013, the circuit court yet again dismissed plaintiff's second amended petition, this time with prejudice, for failure to contain sufficient facts to state a claim of undue influence by Rayna and Mitchell. In so doing, the circuit court stated:

“In this case, the petitioner has had three opportunities to plead facts sufficient to state a cause of action for undue influence. A review of the original petition, amended petition and second amended petition establishes that from the date on which the first petition was filed in December 2010, petitioner has been unable to plead anything other than ‘merely conclusional’ allegations.”

¶8 In response, on November 22, 2013, plaintiff filed a combined motion to reconsider the dismissal of his second amended petition and for leave to file a proposed third amended petition. Plaintiff additionally filed his proposed third amended petition. The circuit court entertained arguments on the motion to reconsider, stating that it was the only motion properly before the court. Plaintiff's counsel argued that the circuit court erred in failing to draw reasonable inferences from the facts pled in favor of plaintiff in the second amended petition, that there was new information regarding the legal sufficiency of Earl's will, and that, as demonstrated in his proposed third amended petition, there were sufficient facts upon which to state a claim for undue influence. The circuit court responded:

“Just so it's clear, it is the responsibility and obligation of the pleader to state facts essential to his cause of action. Well pled facts is a term that stands in contrast to conclusions. To the extent that the complaint offers conclusions unsupported by allegations of fact, the Court does not accept those conclusions as true.

A pleading which merely paraphrases the law without stating the facts is insufficient. The Court should not grant the motion unless it is clear from the factual allegations and the reasonably permissible inferences therefrom that no set of facts could be proved that would entitle the Plaintiff to recovery under the law.

Over the tortured history of this litigation and I think now we are now up to the fourth complaint that's been filed, I don't think that the pleader has met that burden, there has not been any well pled facts in any of these complaints.

Having said that, the issue before the Court today is whether there is a legal basis upon which the Court should grant a motion to reconsider. Given that the petitioner has not established that the Court has –that the movant has not pled new facts, new law or [a] misapplication of existing law, the motion is most respectfully denied.”

The circuit court entered a written order on the same date, denying plaintiff's motion to reconsider the second amended petition without addressing plaintiff's request for leave to file a third amended petition. Plaintiff appealed.

¶9 On appeal, we affirmed the dismissal of plaintiff's second amended petition for failure to state a sufficient claim of undue influence. *Migdal v. Joseph*, 2015 IL (1st) 141152-U. With regard to plaintiff's contention that the circuit court erred in refusing to grant him leave to file his proposed third amended petition where the affidavits attached to the pleading demonstrated that he could state a cause of action for undue influence, we found we lacked jurisdiction to consider the contention. *Id.* ¶ 35. More specifically, we explained:

“Although plaintiff's proposed third amended petition appears in the record on appeal, we do not have jurisdiction to review his contention related thereto. Our review of

the record reveals the circuit court essentially discarded that portion of plaintiff's 'combined' motion to reconsider the dismissal of his second amended petition and for leave to file a third amended petition upon which plaintiff bases his argument on appeal. The transcript from the hearing on March 19, 2014, makes clear that plaintiff's proposed third amended petition, which plaintiff filed without first obtaining leave, was not properly before the court." *Id.* ¶ 32.

¶10 On October 16, 2015, plaintiff filed his section 2-1401 petition for relief from judgment, the subject of which underlies the instant appeal, requesting relief from the circuit court's October 23, 2013, order dismissing his second amended petition to contest Earl's will and trusts. In his section 2-1401 petition, plaintiff alleged he had 38 pieces of new evidence upon which he could provide sufficient facts to state a cause of action for undue influence. Plaintiff attached an affidavit along with his proposed third amended petition to his section 2-1401 petition for relief. Defendants filed a section 2-619.1 combined motion to dismiss plaintiff's 2-1401 petition. The circuit court entertained arguments on the motion to dismiss. Then, on September 6, 2016, the circuit court denied plaintiff's section 2-1401 petition for relief from judgment, finding plaintiff failed to satisfy the requirements for such a petition and the petition was barred by the doctrine of *res judicata*. In so finding, the circuit court stated:

“petitioner in this case has not engaged in discovery, has done nothing to advance this litigation and offers no reasonable explanation for his seventeen month delay in seeking 2-1401 relief. The petition is full of conclusory allegations unsupported by facts. Allan has failed to establish that he acted diligently in obtaining his 'new evidence' or that he could not have discovered it earlier. In fact, his allegations, exhibits and affidavits confirm the opposite.”

With regard to the doctrine of *res judicata*, the circuit court stated:

“Allan’s proposed third amended petition is a subsequent action between the same parties involving the same claim, demand, or cause of action. Allan could have engaged in discovery and previously presented every allegation raised in the third amended petition. He claims that some of ‘the new material’ was ‘discovered on January 20, 2014[,] via discovery in Case No. 13 L 011209 in the Cook County Law Division..., that (he) was not aware of the existence of the (new material) until January 20, 2014[,] and had no reason to be aware of their existence prior to that time because these documents pertained to the construction of the condominiums at 1925 West Potomac Ave, ... and (he was not involved with this project) ...’

Everything alleged in the proposed Third Amended Petition concerns ‘matters that were (either) litigated or that could have been litigated.’ All of the counts in the proposed ‘Third Amended Petition’ seek the same relief, invalidation of decedent’s will and trusts. All of the allegations are related in ‘time, space, origin, or motivation ...’ (*Lane v. Kalcheim*, 394 Ill. App. 3d 324, 332 (2009)).”

This appeal followed.

¶11

ANALYSIS

¶12 Plaintiff contends the circuit court erred in denying his section 2-1401 petition for relief from judgment where he satisfied the requisite standards for filing a section 2-1401 petition, and the doctrine of *res judicata* did not bar his proposed third amended petition to contest the validity of Earl’s will and trusts.

¶13 The parties dispute the applicable standard of review. Plaintiff argues the denial of his petition should be reviewed *de novo*. Defendants, on the other hand, assert that plaintiff's petition presented a fact-based challenge that should be reviewed for an abuse of discretion.

¶14 “[A] section 2-1401 petition can present either a factual or legal challenge to a final judgment or order, and the nature of the challenge presented *** dictates the proper standard of review on appeal. When a section 2-1401 petition presents a fact-based challenge, it must allege facts to support the existence of a meritorious defense, due diligence in presenting this defense to the trial court, and due diligence in filing the section 2-1401 petition. The question of whether relief should be granted lies within the sound discretion of the circuit court and a reviewing court will reverse the circuit court's ruling on the petition only if it constitutes an abuse of discretion. On the other hand, when a section 2-1401 petition presents a purely legal challenge to a judgment, such as a claim that the earlier judgment was void, the standard of review is *de novo*.” (Internal quotation marks and citations omitted). *Stolfo v. Kindercare Learning Centers, Inc.*, 2016 IL App (1st) 142396, ¶ 22.

¶15 We first turn to whether plaintiff's petition was barred by the doctrine of *res judicata*, which is a legal question entitled to *de novo* review. See *Goodman v. Hanson*, 408 Ill. App. 3d 282, 292 (2011).

¶16 Where there has been a final judgment on the merits rendered by a court of competent jurisdiction, the doctrine of *res judicata* bars any subsequent actions between the same parties or their privies on the same cause of action. *Stolfo*, 2016 IL App (1st) 142396, ¶ 24. Critically, *res judicata* bars not only what was decided in the first action, but also whatever could have been decided in that action. *Id.* In order for the doctrine of *res judicata* to apply, there must be: (1) a final judgment on the merits by a court of competent jurisdiction; (2) the existence of an identity

of causes of action; and (3) the existence of the same parties or their privies. *Id.* Moreover, relevant to this appeal, “[i]ssues which could have been raised in a motion for rehearing or on direct appeal are *res judicata* and may not be relitigated in the section 2-1401 proceeding, which is a separate action and not a continuation of the earlier action.” *In re Marriage of Baumgartner*, 226 Ill. App. 3d 790, 794 (1992).

¶17 Plaintiff argues the circuit court erred in finding his petition was barred by the doctrine of *res judicata* because there was no identity to the causes of action. Plaintiff maintains that the claims in his proposed third amended petition to contest Earl’s will and trusts do not arise from the same common core of operative facts as his claims in his second amended petition to contest the same will and trusts. Instead, plaintiff alleges his second amended petition and his third amended petition differed in their factual and legal bases. Plaintiff insists the record did not contain the requisite evidence demonstrating that all of the claims included in his proposed third amended petition could have been raised previously in his second amended petition. According to plaintiff, the new evidence raised in support of his proposed third amended petition was learned after the second amended petition was filed, and, therefore, could not have been included in his prior petition. Plaintiff argues defendants did not submit affidavits to contradict his position, nor did the record contradict his position.

¶18 Defendants respond that *res judicata* prohibits the filing of plaintiff’s proposed third amended petition where the core operative facts are the same between the second amended petition and the proposed third amended petition, namely, contesting the validity of Earl’s will and trusts. Defendants additionally argue the facts asserted in plaintiff’s proposed third amended petition could have and should have been included in his November 22, 2013, motion to reconsider the dismissal of his second amended petition. Defendants insist plaintiff failed to

timely bring the “new” facts to the circuit court’s attention despite the ability to do so. According to defendants, because plaintiff pursued an appeal of the denial of his motion to reconsider instead of immediately filing a section 2-1401 petition, plaintiff was foreclosed from filing the belated section 2-1401 petition since it was established when he filed the motion to reconsider that plaintiff had new evidence, or should have had the purported evidence, upon which to state his claim.

¶19 Because there was no challenge to the sameness of the parties or there having been a final judgment on the merits, our *res judicata* analysis focuses on whether there was an existence of the same causes of action. To determine whether there is an identity to the causes of action for purposes of *res judicata*, our supreme court applies the “transactional test.” *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 332 (2009). 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. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998). The transaction test provides that claims are 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.* In assessing a “transaction,” 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 or business understandings or usage.” *Id.* at 312. “The rule in Illinois is that *res judicata* extends only to the facts and conditions as they were at the time a judgment was rendered. When new facts and conditions intervene before a second action, establishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same, and the former judgment cannot be pleaded as a bar in a subsequent action.”

Northern Illinois Medical Center v. Home State Bank of Crystal Lake, 136 Ill. App. 3d 129, 144 (1985).

¶20 Following our review of the record, we conclude plaintiff's proposed third amended petition was barred by the doctrine of *res judicata*. We find the claims alleged in the proposed third amended petition arose out of the same transaction as the claims alleged in plaintiff's second amended petition, namely, the validity and execution of Earl's will and trusts. Both petitions were related in time, space, origin, and motivation. See *River Park, Inc.*, 184 Ill. 2d at 312. More specifically, both petitions focused on the manipulation of Rayna and Mitchell and Earl's reliance on them, which resulted in their undue influence over the challenged instruments. To the extent the proposed third amended petition included additional facts not pled in the second amended petition, those additional facts were part of the same overall group of operational facts as those pled in the prior petition.

¶21 Moreover, as stated, when plaintiff filed his motion to reconsider on November 22, 2013, he also included, without leave of court, a proposed third amended petition to contest the validity of the will and trusts. The proposed third amended petition included allegations of impropriety supported by an affidavit authored by William Jacques. The affidavit was completed on November 12, 2013, and related to circumstances surrounding the execution of Earl's 2009 will. Despite knowing Jacques' attestations, plaintiff failed to include the relevant information in his motion to reconsider the dismissal of his second amended petition. Accordingly, plaintiff had knowledge of allegations of impropriety to support his challenges to the will and trusts at the time he filed his motion to reconsider, but failed to raise those allegations before the court. Instead, plaintiff waited until after he pursued the appeal of his motion to reconsider and then an additional 17 months before advising the circuit court that the Jacques affidavit existed.

¶22 Plaintiff insists that over 35 other pieces of evidence were gathered in support of his allegations and that he was unaware of the evidence when he filed his second amended petition. Even taking his allegations as true, the standard is not merely what plaintiff knew at the time of the prior judgment. The standard additionally includes claims that he should have or could have known. See *In re Marriage of Baumgartner*, 226 Ill. App. 3d at 794. As noted by the circuit court, plaintiff is an attorney, yet he did not engage in discovery to learn any of the additional information until after he filed his second amended petition and the motion to reconsider the dismissal thereof. The evidence was discoverable, as demonstrated by the fact that his brother, Ronald Migdal, relied on a great deal of the cited evidence in his amended citation to remove Rayna as the executor and trustee of Earl's will and trusts, and by the fact that plaintiff admittedly received a number of documents in response to a much belated discovery request. Moreover, according to plaintiff's own affidavit in support of his third amended petition, more than 10 other documents were known prior to the filing of his November 22, 2013, motion to reconsider the dismissal of his second amended petition. Accordingly, those claims could have been raised in plaintiff's motion to reconsider and, therefore, are barred by the doctrine of *res judicata*. Simply stated, plaintiff's attempt to split his claims by failing to raise them in his motion to reconsider prohibited him from raising those claims in his proposed third amended petition to contest Earl's will and trusts.

¶23 Because we have determined plaintiff's proposed third amended petition was barred by the doctrine of *res judicata*, we need not address whether he satisfied the requirements for the filing of his section 2-1401 petition where that petition was reliant on the substance of the proposed third amended petition. See *In re Marriage of Baumgartner*, 226 Ill. App. 3d at 794

(issues that could have been raised in a motion to reconsider cannot be relitigated in a section 2-1401 petition).

¶24

CONCLUSION

¶25 We affirm the judgment of the circuit court dismissing plaintiff's proposed third amended petition to contest the validity of Earl's will and trusts.

¶26 Affirmed.