2018 IL App (3d) 170291-U

Order filed February 22, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

CAROL SHAW, Executor of the Estate of Roy L. Green, Deceased,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Warren County, Illinois,
Petitioner-Appellee,	)	
v.	)	Appeal No. 3-17-0291 Circuit No. 06-P-35
JOHN BRETZ,	)	Honorable Heidi A. Benson, Judge, Presiding.
Objector-Appellant.	)	

JUSTICE WRIGHT delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted the executor's and co-trustees' motion to strike the objector's amended objections to the final report based on *res judicata*.

¶ 2 This case arises out of probate proceedings related to the administration of the estate and the trust of Roy L. Green, deceased. On April 24, 2015, the trial court entered an order approving and confirming the full and final settlement, and a second order approving accounts pertaining to both the estate and the trust for the period from the date of the decedent's death in 2006 through March 10, 2015. After the executor and co-trustees filed their final report, a trust beneficiary

filed amended objections to the final report, which challenged the same accounts previously approved by the court on April 24, 2015. The trial court issued a written order striking the trust beneficiary's objections to the final report based on *res judicata* principles. The objector, John Bretz, appeals. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 The decedent, Roy L. Green, a resident of Warren County, Illinois, died on July 22, 2006. At the time of his death, the decedent owned real and personal property in Warren County, Illinois valued in excess of $2 million. On August 7, 2006, the trial court entered an order admitting the will of Roy L. Green, dated November 22, 2004, to probate. The will named the decedent's friend, Carol Shaw, as his executor and bequeathed the majority of the decedent's estate to the Roy L. Green Revocable Trust, dated November 22, 2004. The trust named Carol Shaw and Stanley Jenks as co-trustees.

¶ 5 On February 5, 2007, two of the decedent's siblings contested the validity of the will. Subsequently, the court received an amended petition to contest the will and also set aside the trust. Thereafter, this simultaneous contest to both the will and trust resulted in years of litigation. However, in early 2015, the parties successfully engaged in mediation that produced a full and final settlement.

¶ 6 On March 23, 2015, the court received a joint motion of all parties to confirm and approve full and final settlement and notice of hearing for April 24, 2015. The joint motion contained a description of the agreement reached by all parties. The proof of service indicates the objector was given notice of the April 24, 2015, hearing.

¶ 7 On April 8, 2015, the executor's counsel sent correspondence to all interested parties, including the objector, John Bretz (the objector). The letter indicated that accounts for the time

period from the decedent's death in 2006 through March 10, 2015, had been provided to all interested parties, including the objector. Further, the letter indicated that the full and final settlement agreement, as well as the accounts for the relevant period, would be presented to the court for approval on April 24, 2015. The letter dated April 8, 2015 stated:

> "We will be requesting from the Judge at the time of the presentation of the Joint Motion for Settlement, approval on these accounts, but realize that should there be [an] objection, or should the court so determine, these accounting matters may be set at a different hearing date. We did want to make sure that full and complete accounting was given to each of you and that should you have any questions in the interim, those questions would be appropriately addressed. We note that a couple of questions were raised when we presented the data contained in the accounting for purpose of settlement. We believe each of the questions raised has been adequately addressed and answered."

¶ 8 On April 21, 2015, the current reports and accounts for the estate and the trust were filed for the period from the decedent's date of death in 2006 through March 10, 2015. On April 21, 2015, a proof of service was filed with the court indicating that all interested parties, including the objector, were served with a notice of hearing on the accounts by mail on April 13, 2015. In addition, the proof of service indicated that the above-referenced accounts were mailed to the beneficiaries on April 8, 2015, and on prior dates.

¶ 9 On April 24, 2015, counsel for the parties appeared before the court for the scheduled hearing. On that date, the court entered an order approving and confirming the full and final settlement as to the will and trust contests. The court also entered an order approving current accounts for the estate and the trust for the period from the decedent's date of death in 2006

through March 10, 2015. In the second order, the court found the court had jurisdiction over all interested parties because all interested parties were served with the accounting for the relevant period and had proper notice of the hearing. Further, the court found that "[a]ll items of receipt and disbursement are necessary and are reasonable and in proper form." The court indicated that "[n]o objections to any of the accountings have been raised by any beneficiary of either the Estate of Roy L. Green or the Roy L. Green Revocable Trust."

¶ 10 On April 30, 2015, a proof of service was filed indicating that on April 27, 2015, each of the trust beneficiaries, including the objector, were served by mail with a copy of the April 24, 2015, order approving and confirming the full and final settlement and approving the accounts. On May 1, 2015, counsel filed an appearance on behalf of the objector. However, the objector did not submit a motion to reconsider the April 24, 2015, order approving the accounts, and did not appeal the order.

¶ 11 The final report for the estate was filed on September 8, 2015. On October 1, 2015, the objector filed objections to the final report and a request for an audit and document production. On October 8, 2015, the executor and co-trustees filed a motion to strike the objections, and on October 30, 2015, filed an amended motion to strike. On November 12, 2015, the trial court granted the executor's and co-trustees' motion to strike and gave the objector 30 days to file amended objections. The court concluded that *res judicata* barred the objector from relitigating the accounts that were previously approved by the court on April 24, 2015. The court also held that the objector's bare allegations that there "may" be fraud, accident, or mistake were insufficient without alleging specific factual circumstances.

¶ 12 On December 11, 2015, the objector filed amended objections to the final report and a request for an audit and document production. The amended objections contained three counts:

objections to the proposed distribution contained in paragraph 36 of the report (count I), objections to executor, co-trustee, and attorney and expert fees before March 10, 2015, (count II), and perceived accounting errors by mistake or accident (count III). According to the objector's response to the motion to strike the amended objections, count I alleges a basis for discovery related to transactions occurring before March 10, 2015, in order to properly gauge the reasonableness of the requested fees and expenses incurred after March 10, 2015. The objector stated that count II addresses mistake or accident under the case law and statutes and count III addresses "certain specific questionable transactions," all of which occurred prior to March 10, 2015.

¶ 13 On January 7, 2016, the executor and co-trustees filed a motion to strike the amended objections to the final report. In the motion, the executor and co-trustees argued that the objector received full and complete accounts for the period from 2006 through March 10, 2015, for both the estate and trust, and was served with a notice of hearing on these accounts on April 13, 2015. The executor and co-trustees asserted that prior to the entry of the April 24, 2015, order approving the accounts, the objector did not raise any objection to the accounts. The executor and co-trustees argued that under section 24-2 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/24-2 (West 2016)), the accounts as approved are binding upon the objector. Therefore, the executor and co-trustees asked the court to strike the amended objections related to the accounts based on *res judicata* principles.

¶ 14 In the motion to strike, the executor and co-trustees also asserted that paragraphs 7 through 13 of count III of the objector's amended objections pertain to identical issues that were raised by counsel for one of the plaintiffs in the will and trust contests. Counsel for the executor responded to concerns regarding these specific transactions by e-mail on April 10, 2015. The

executor and co-trustees attached this email correspondence to the motion to strike the amended objections to show that the objector did not act with due diligence in pursuing his claims. The motion to strike did not specify whether the executor's and co-trustees' pending motion was based on section 2-615 or 2-619 of the Code of Civil Procedure (Code). See 735 ILCS 5/2-615 (West 2016); 735 ILCS 5/2-619 (West 2016). The objector did not request clarification or challenge the form of the motion in the trial court.

¶ 15 Following arguments on the matter, on June 6, 2016, the trial court entered an order granting the motion to strike all three counts of the amended objections to the final report with leave for the objector to amend count I to contest only the transactions occurring subsequent to March 10, 2015. The court referenced the motion to strike as a section 2-615 motion. The court stated, "[t]he Motion to Strike under Rule 2-615 properly addresses Count I which addresses discovery." Further, the court stated, "Counts II and III are subject to the Rule 2-615 Motion to Strike based on the cause of action being barred by a prior judgment." The court concluded that "[c]ounts II and III pertain to facts which were or could have been raised at the hearing on April 24, 2015, when the Order was presented and entered and are barred by *res judicata*."

¶ 16 On July 5, 2016, the objector filed a motion to reconsider the June 6, 2016, order. On April 12, 2017, the trial court issued a written order denying the objector's motion to reconsider the June 6, 2016, order, and approving the amended final report, as supplemented through March 10, 2017. On January 3, 2017, the trial judge signed an order, which was filed on January 4, 2017, granting a motion for protective order filed by the executor and allowing the objector to conduct discovery only as to transactions occurring subsequent to March 10, 2015.

¶ 17 On May 5, 2017, plaintiff filed a notice of appeal.

¶ 18 ANALYSIS

¶ 19 In this appeal, the objector argues the trial court erred by striking objector's amended objections to the final report based on *res judicata* because the April 24, 2015, court order approving the accounts for the period from 2006 through March 10, 2015, was not a final appealable order. Conversely, the executor and co-trustees contend the trial court correctly granted their motion to strike the amended objections based on *res judicata* because the April 24, 2015, court order approving the accounts for the relevant period was a final and appealable order.

¶ 20 In this case, the trial court mistakenly referred to the unlabeled motion to strike as being brought only under section 2-615. 735 ILCS 5/2-615 (West 2016). Clearly, the content of the motion, in part, addressed an affirmative matter, namely, by asserting the cause of action was barred by a prior judgment. Section 2-619(a)(4) of the Code, not section 2-615 of the Code, authorizes the dismissal of an action that is "barred by a prior judgment." 735 ILCS 5/2-619(a)(4) (West 2016). Although the court's order referred to the pleading as solely a section 2-615 motion, the court substantively and properly treated the appropriate portions of the motion as a section 2-619 motion. On this basis, we will also review the trial court's ruling at issue in this appeal as a decision to allow a section 2-619 request to strike based on an affirmative matter.

¶ 21 A motion to dismiss under section 2-619(a)(4) admits the legal sufficiency of the allegations, but asserts that *res judicata* defeats the claim presented. *Jaworski v. Skassa*, 2017 IL App (2d) 160466, ¶ 10. The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties on the same cause of action. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). The doctrine extends to not only what was actually decided in the original action, but also to

matters that could have been decided in the original suit. *Id*. at 334-35. The determination of whether a claim is barred by *res judicata* is a question of law, which we review *de novo*. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 43.

¶ 22 We begin by focusing on the applicable statute to determine whether *res judicata* applies in the case at bar. Section 24-2 of the Probate Act provides, in relevant part:

> "Notice of the hearing on any account of a representative of a decedent's estate shall be given as the court directs to unpaid creditors and to all other interested persons. If the account is approved by the court upon the hearing, in the absence of fraud, accident or mistake, the account as approved is binding upon all persons to whom the notice was given."

755 ILCS 5/24-2 (West 2016).

¶ 23 Here, it is undisputed that the objector was served with the accounts for the relevant period on April 8, 2015, and on prior dates. In the April 8, 2015, correspondence from the executor's counsel to the objector, the executor's counsel stated that the accounts would be presented for approval on April 24, 2015, and offered to answer any questions the objector had in the interim. The executor's counsel also offered to schedule the hearing on a different date in the event that any of the trust beneficiaries had any objections.

¶ 24 On April 21, 2015, the accounts for the relevant period were filed with the court. On that same date, a proof of service was filed indicating that on April 13, 2015, the objector was timely served by mail with a notice of hearing on the accounts for April 24, 2015. On that date, the court held a hearing on the matter as scheduled and entered an order approving the accounts. Neither the objector, nor any other beneficiary, raised any objections prior to the entry of the April 24, 2015, order approving the accounts. The objector did not request an extension of time

to file his objections to the accounting. On April 27, 2015, the objector was served with a copy of the April 24, 2015, order approving the accounts. No appeal of that order was taken.

¶ 25 We must determine whether the April 24, 2015, order was a final and appealable order under Illinois Supreme Court Rule 304(b)(1) for purposes of the application of *res judicata*. Ill. S. Ct. R. 304(b)(1) (eff. Mar. 8, 2016). Rule 304(b) provides, in part, as follows:

> "The following judgments and orders are appealable without the finding required for appeals under paragraph (a) of this rule:
>
> (1) A judgment or order entered in the administration of an estate, guardianship, or similar proceeding which finally determines a right or status of a party."

Id. The objector contends that "this matter really involves trust beneficiaries who will receive distributions" and that trust cases are not "similar proceedings" under Rule 304(b)(1).

¶ 26 The case law recognizes that a proceeding relating to the administration of a trust is a "similar proceeding" for purposes of Rule 304(b)(1) "if court involvement has occurred that makes the proceeding similar to the comprehensive court proceedings associated with the administration of an estate." *In re Estate of Russell*, 372 Ill. App. 3d 591, 593 (2007).

¶ 27 In the case at bar, the record shows this case began as a will contest initiated by the beneficiaries of the will. Once the will was admitted to probate and the pleadings were amended with leave of court to add a trust contest, the trial court became heavily involved in managing matters related to the trust that was intertwined with the estate. We conclude that the proceeding related to the will and trust in this case involves a "similar proceeding" for purposes of Rule 304(b)(1).

¶ 28 Next, we consider the statutory language at issue. Applying the plain language of section 24-2 of the Probate Act to these facts, we conclude that the April 24, 2015, court order approving the accounts for the period from 2006 through March 10, 2015, is binding against the objector, who had proper notice of the hearing on the accounts. See *Kanfer v. Busey Trust Co*., 2013 IL App (4th) 121144, ¶ 94. In *Kanfer*, the Fourth District Appellate Court held that "the approval of an account by the court is binding on all parties who had notice and is *res judicata*" for that period. *Id*. (quoting *In re Estate of Aschauer,* 188 Ill. App. 3d 63, 68 (1989)). Here, as in *Kanfer*, the objector had ample opportunity to raise his objections to the accounting before the court entered the April 24, 2015, order, but failed to do so. Thus, we hold that the April 24, 2015, order approving the accounts from 2006 to March 10, 2015, is a final and appealable order under Rule 304(b)(1).

¶ 29 We reject the objector's contention that the April 24, 2015, order approving the accounts up to March 10, 2015, was not a final appealable order based on case law that predates the enactment of the Probate Act of 1975 and specifically section 24-2 of the Probate Act (755 ILCS 5/24-2 (West 2016)), which went into effect on January 1, 1976. In particular, the objector relies on an Illinois Supreme Court decision issued in 1900, *Marshall v. Coleman*, 187 Ill. 556 (1900), to support his position that the accounts at issue could be revisited by the court at the time the court reviewed the final report. However, as we stated above, recent case law, decided after the enactment of section 24-2 of the Probate Act, provides that a court's approval of an account has a *res judicata* effect for those parties who received proper notice and forecloses the period covered by the account from further review. See *Kanfer*, 2013 IL App (4th) 121144, ¶ 94; *Matter of Estate of Brannan*, 210 Ill. App. 3d 563, 569-70 (1991); *Aschauer*, 188 Ill. App. 3d at 68; *In re Estate of Neisewander*, 130 Ill. App. 3d 1031, 1033 (1985).

¶ 30 The objector concedes that the Fourth District's decision in *Aschauer* "does seem to take the position that the law changed and that the Appellate Court could decide to decline to follow older cases." However, the objector maintains that *Aschauer* was wrongly decided and has never been adopted by the Illinois Supreme Court. Contrary to the objector's assertion, in *In re Estate of Funk*, the Illinois Supreme Court cited *Aschauer* approvingly. See *In re Estate of Funk*, 221 Ill. 2d 30, 99 (2006) (citing *Aschauer*, 188 Ill. App. 3d at 68). There, the supreme court held, under section 24-2 of the Probate Act, that a court's approval of a prior account, in the absence of fraud, accident or mistake, is binding on a party who received notice. See *In re Estate of Funk*, 221 Ill. 2d at 99. Thus, we conclude *res judicata* bars the objector from relitigating any claims pertaining to the accounts prior to March 10, 2015, that were previously decided or that could have been decided.

¶ 31 Next, we consider the objector's alternative position that even if this Court finds that the April 24, 2015, order is binding on the objector, then the order should be set aside by reason of mistake or accident. See 755 ILCS 5/24-2 (West 2016); *Commercial National Bank of Peoria v. Bruno*, 75 Ill. 2d 343, 351 (1979) (a circuit court is "empowered [under section 24-2 of the Probate Act] to set aside an order entered by reason of fraud, accident or mistake."). The objector contends that he raised sufficient allegations in counts II and III of his amended objections to show that "there were or may have been payments made by mistake or accident."

¶ 32 The requirement of section 24-2 of the Probate Act that "fraud, accident, or mistake" must be shown in order to obtain relief from a judgment is similar to the showing required by section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2016)), which allows a party to obtain relief from a judgment more than 30 days after entry of the judgment. *Matter of Estate of Moore*, 175 Ill. App. 3d 926, 928 (1988). Under section 2-1401, a party must affirmatively set forth

specific factual allegations showing, among other things, the existence of a meritorious claim or defense and due diligence in presenting the defense or claim to the circuit court in the original action. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986).

¶ 33 In this case, the objector failed to set forth facts in the amended objections establishing the objector exercised due diligence and could not have presented his challenge to the accounting prior to April 24, 2015. In fact, the executor and co-trustees point out that each of the specific "questionable" transactions that the objector identified in his amended objections as a basis to set aside the April 24, 2015 order, were raised by one of the plaintiffs in the will and trust contests weeks before the April 24, 2015, hearing. Hence, we observe the objector could have raised similar objections in a timely fashion prior to April 24, 2015. Yet, the objector has not provided any reason for not acting with due diligence with respect to these claims. Based on our review of counts II and III of the amended objections, it appears that all of the issues the objector complains of now either were addressed or could have been addressed prior to the court's approval of the accounts on April 24, 2015.

¶ 34 Finally, the objector generically asserts the trial court did not follow the proper procedure by treating the unlabeled motion to strike, in part, as a section 2-619 motion. See 735 ILCS 5/2-615 (West 2016); 735 ILCS 5/2-619 (West 2016). Again, we turn to well-established case law to resolve this issue. The case law provides that the failure to designate the statutory provision under which the motion was brought is not a proper basis for reversal unless prejudice resulted to the opposing party, in this case, the objector. See *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 21.

¶ 35 Here, the motion to strike meticulously addressed each paragraph of the objector's amended objections and argued that the majority of the allegations should be stricken based on

res judicata, an affirmative matter. The objector's response to the nondesignated motion to strike shows that the objector clearly understood this position and addressed the *res judicata* argument on the merits. We conclude that the objector was not prejudiced by the lack of a label and note that the objector failed to raise this defect in the trial court. Consequently, we will not consider this issue for the first time on appeal. *Downers Grove Associates v. Red Robin International, Inc.*, 151 Ill. App. 3d 310, 315 (1986).

¶ 36 For the foregoing reasons, we affirm the trial court's orders entered on June 6, 2016, and April 12, 2017.

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Warren County is affirmed.

¶ 39 Affirmed.