

2014 IL App (1st) 122450-U
No. 1-12-2450
Order Filed November 21, 2014

SIXTH DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

<i>In re</i> ESTATE OF SOPHIE LEE,)	Appeal from the Circuit Court
Decedent)	of Cook County.
)	
(Ronald Lee, Diana Lee and David Lee,)	
)	No. 2008 P 7995
Petitioners-Appellants,)	
)	
v.)	
)	Honorable
Cynthia O'Brien, Suzan Burnquist and)	Mary Ellen Coghlan,
Cyril Koscinski,)	Judge Presiding.
)	
Respondents-Appellees).)	

JUSTICE HALL delivered the judgment of the court.

Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The denial of the petitioners' motion for leave to file a second amended petition for a citation to recover assets was proper. Under the "transactional" test, the claims raised in the second amended petition and those raised in the amended petition to recover assets were the same cause of action. Therefore, the second amended petition was barred under the doctrine of *res judicata*.

¶ 2 The respondents, Ronald Lee (Ronald), Diana Lee (Diana) and David Lee (David) (or collectively, the petitioners), appeal from orders of the circuit court of Cook County denying their petition for leave to file a second amended petition for a citation to recover assets (the second amended petition) and their motion for reconsideration of the denial. On appeal, the petitioners contend as follows: (1) the second amended petition was not barred by *res judicata*; (2) the circuit court erred when it denied the petitioners leave to file the second amended petition; and (3) the circuit court erred when it ruled that the second amended petition did not state causes of action for breach of fiduciary duty and for undue influence.

¶ 3 Because we agree that *res judicata* barred the second amended petition, we do not reach the remaining issues raised by the petitioners. The pertinent facts are set forth below.

¶ 4 Sophie Lee (Sophie) died on July 28, 2008. She was preceded in death by her husband, Russel A. Lee. At the time of his death in April 2001, Russel was 87 years of age and Sophie was 89 years of age, and they had been married for 55 years. While Russel and Sophie had no children together, Russel had a son, Ronald, and two grandchildren, Diana and David. Sophie had no children but, as one of 11 siblings, she had numerous nieces and nephews. Respondents, Cynthia O'Brien (Cynthia) and Suzan Burnquist (Suzan), are Sophie's nieces; respondent Cyril Koscinski (Cyril), Suzan's brother, is Sophie's nephew (collectively the respondents).

¶ 5 In 2000, Russel and Sophie executed separate wills. Only Russel's 2000 will is contained in the record. Under Russel's 2000 will, his entire estate was left to Sophie. If Sophie died first, upon Russel's death, one-half of the estate was left to the petitioners and one-half of the estate was left to the respondents and other members of Sophie's family. Following Russel's death, Sophie executed two wills, one in 2001 and one in 2002. Under both the 2001 and 2002 wills, the provision for the equal division of the estate between the petitioners and Sophie's family remained unchanged. While Sophie's 2001 will named Leo Kaye, a non-family member, executor and Kevin O'Brien (Kevin), Cynthia's son, successor executor, the 2002 will named Kevin the executor and Cynthia the successor executor.

¶ 6 On December 19, 2008, Sophie's 2002 will was admitted to probate, and Kevin was appointed independent executor. On March 15, 2010, Ronald filed a motion for leave to file an appearance and a petition to terminate the independent administration of Sophie's estate. The circuit court granted the motion and ordered that the estate be supervised and that Kevin be appointed supervised executor. On June 16, 2010, Kevin filed the first and final account of the estate. After disbursements, there remained \$293,933.39 to be distributed to Sophie's heirs and legatees. On July 22, 2010, the petitioners filed their appearances and a response and objection to the first and final account, alleging that certain of Sophie's accounts had been placed in joint tenancy accounts with Cynthia, Suzan and Cyril. The petitioners alleged that the transfers had been made in an attempt to defeat the terms of Sophie's will requiring the equal distribution of the estate assets between the petitioners and Sophie's family.

¶ 7 On August 4, 2010, the petitioners were granted leave to file their petition to recover assets. The petition alleged that Cynthia, Suzan and Cyril had concealed or converted estate assets consisting of mutual funds and bank accounts in which Sophie's estate had legal or

equitable interests. On January 24, 2011, the circuit court granted the petitioners leave to file an amended petition. The amended petition alleged as follows: In 2000, Russel and Sophie executed mutual and reciprocal wills providing for the equal division of the survivor's estate between their respective families. In 2001, Sophie executed a new will maintaining the equal division of the estate between the two families. Previously, Sophie had divided her half of the estate in three shares. In her 2001 will, she divided her half into four shares, adding Cynthia as a principal legatee with a one-fourth share. Sophie's 2002 will retained the equal division of the estate between the families and the one-fourth share to Cynthia.

¶ 8 The amended petition further alleged that in 2004, Sophie opened a brokerage account and an Individual Retirement Account (IRA) with American Funds. The original amount invested was \$578,190 in the brokerage account and \$47,499 in the IRA. By July 2008, most of Sophie's assets were contained in the American Fund accounts: the brokerage account was valued at \$745,439 and the IRA was valued at \$44,795. While Sophie had named seven of her relatives as beneficiaries of the IRA account, she had not named any beneficiaries for the brokerage account. Sophie's American Fund financial planner, Roger Ensimer, advised her that she was required to name beneficiaries for the brokerage accounts. On March 14, 2008, Sophie amended the beneficiary designation of the brokerage account, naming the respondents and four other family members.

¶ 9 Based on these allegations, count I of the amended petition alleged an unjust enrichment claim against Cynthia, Suzan, Cyril and the other beneficiaries of the American Fund brokerage account. Count II alleged a claim against Suzan for diverting the funds from two accounts of Sophie's at Parkway Bank away from the estate by placing her name on the accounts as a joint tenant with Sophie. Both counts sought the imposition of a constructive

trust on the assets and the return of those assets to the estate. The exhibits attached to the amended petition included Russel's 2000 will and Sophie's 2001 and 2002 wills.

¶ 10 The respondents moved to dismiss the amended petition. As to the claim in count I of unjust enrichment based on the existence of mutual and reciprocal wills, the respondents argued that the wills attached to the petition were not mutual or reciprocal wills. As to count II, the respondents pointed out that count II did not set forth a cause of action. The respondents maintained that count II was defective in that it failed to allege by what means Suzan "persuaded" Sophie to put Suzan's name on Sophie's bank accounts at Parkway Bank. Finally the respondents maintained that count II was defective because the petitioners failed to attach copies of the signature cards and other documentation as exhibits to their petition.

¶ 11 In their response to the motion to dismiss, the petitioners maintained with respect to count I that the wills executed by Russel and Sophie, together with the facts and circumstances of their family situation, demonstrated the existence of an agreement to divide the ultimate residuary estate equally between the two families. With respect to count II, the petitioners maintained that count II set forth a cause of action for conversion against Suzan and did not require the attachment of documentation.

¶ 12 On June 14, 2011, a hearing was held on the respondents' motion to dismiss the petition. The circuit court dismissed count I, the unjust enrichment claim, with prejudice. The court denied the motion to dismiss as to count II and ordered Suzan to answer the petition. On September 20, 2011, the court denied the petitioners' motion for reconsideration of the dismissal of count I of the amended petition. On October 19, 2011, the petitioners filed a notice of appeal from the June 14, 2011, order. Subsequently, this court granted the

petitioners' motion to voluntarily dismiss the appeal. On January 5, 2012, the circuit court ordered count II set for trial on May 8-9, 2012.¹

¶ 13 On March 9, 2012, the petitioners, through their newly retained counsel, filed a motion for leave to file their second amended petition. The second amended petition asserted claims of breach of fiduciary duty and undue influence against Suzan and Cynthia. The petitioners alleged that Cynthia had Sophie's power of attorney for health care, either through a written document, which could not be located, or based on Cynthia's assertion to Ronald that Sophie's family now had control over her finances and health care, as well as actions by Sophie's family restricting access to Sophie's financial records and health care information.

¶ 14 The petitioners further alleged that Sophie had relied on Russel to make all the financial decisions, that she lacked experience in financial matters, and had numerous physical limitations: she wore trifocals, had difficulty writing, suffered periods of confusion and forgetfulness, took medication known to cause confusion and hallucinations and, by 2006, she had a 24-hour-a-day caregiver. On information and belief, the petitioners alleged that in 2004, Cynthia and Suzan used their influence to convince Sophie to liquidate certain funds and place them in the American Fund accounts and to name her family members as beneficiaries of those accounts. On March 14, 2008, four months prior to her death, Sophie executed a transfer on death form (TOD) dividing the brokerage account as follows: Suzan (40%), Cyril (30%), and Cynthia (6%). The remaining relatives, two nieces, a sister-in-law and a sister, were designated 6% beneficiaries.

¶ 15 On March 23, 2012, the petitioners filed a supplement to their petition containing documentation they had received from the daughter of attorney Berthold H. Schreiber. Now

¹ Count II was tried on September 15, 2012, and resulted in an order requiring Suzan to return the proceeds from the Parkway Bank accounts to Sophie's estate. On December 31, 2012, the respondent Suzan filed a notice of appeal from the circuit court's order. That appeal is pending.

deceased, attorney Schreiber had prepared the wills for Russel and Sophie, including Sophie's October 25, 2002 will. The documentation included a short form power of attorney for property, appointing Cynthia as Sophie's "attorney in fact." The document was dated October 25, 2002, but was not executed by Sophie as required by the terms of the document for the power of attorney to take effect. Relying on attorney Schreiber's notes, the petitioners maintained that since Sophie executed her will on October 25, 2002, she must have also executed the power of attorney that same day.

¶ 16 On April 30, 2012, following a hearing, the circuit court denied the petitioners' motion for leave to file a second amended petition. Following the denial of their motion for reconsideration, the petitioners filed a timely notice of appeal, pursuant to Illinois Supreme Court Rule 304(b)(1) (eff. Feb. 26, 2010).

¶ 17 ANALYSIS

¶ 18 During the pendency of this appeal, this court denied the respondents' motion to dismiss the appeal on the basis of *res judicata*. Nonetheless, the parties have addressed whether the doctrine of *res judicata* barred the proposed second amended petition to recover assets.

¶ 19 The April 30, 2012, order denying the motion for leave to file the second amended petition did not specify the basis for the denial. "As a reviewing court, we can sustain the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was sound." *City of Chicago v. Holland*, 206 Ill. 2d 480, 492 (2003). We review the court's judgment not its reasoning. *Holland*, 206 Ill. 2d at 491-92. Our review is *de novo*. See *Philips Electronics, N.V. v. New Hampshire Insurance Co.*, 312 Ill. App. 3d 1070,

1080 (2000) (whether a subsequent claim is barred by *res judicata* is a question of law which the court reviews *de novo*).

¶ 20 "Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). The bar extends to those issues actually litigated in the prior suit and to those issues that could have been raised. *River Park, Inc.*, 184 Ill. 2d at 302. *Res judicata* will apply where the following elements have been established: (1) a final judgment on the merits by a court of competent jurisdiction, (2) identity of the cause of action, and (3) identity of the parties or their privies. *River Park, Inc.*, 184 Ill. 2d at 302.

¶ 21 The petitioners do not dispute that the elements of a final judgment on the merits and the identity of the parties have been satisfied. They contend only that *res judicata* does not bar their second amended petition because there is no identity of the cause of action. They point out that the amended petition claimed unjust enrichment based on the agreement between Russel and Sophie to divide their estate equally between their respective families, as evidenced by their wills. The second amended petition claiming breach of fiduciary duty and undue influence relied on a totally different set of facts than did the unjust enrichment claim, *i.e.* the influence of Cynthia and Suzan over Sophie which resulted in the transfer of assets out of the estate.

¶ 22 In order to determine whether the causes of action are the same, the court applies the transactional test. See *River Park, Inc.* 184 Ill. 2d at 310-11 (transactional test rather than the same evidence test controls whether the claims are the same cause of action for purposes of *res judicata*). Under the transactional test, claims are part of the same cause of action if they

arise from the same transaction or series of connected transactions. *Cload v. West*, 328 Ill. App. 3d 946, 950 (2002). *Res judicata* may bar subsequent claims if they arise from a single group of operative facts, regardless of whether the claims assert different theories of relief or are based on evidence which does not substantially overlap, as long as they arise out of the same transaction. *Cload*, 328 Ill. App. 3d at 950. Even if the evidence does not overlap, a claim may still be considered part of the same cause of action under the transactional test. *Cload*, 328 Ill. App. 3d at 951. In performing our analysis, we consider the claims in factual rather than evidentiary terms. *Cload*, 328 Ill. App. 3d at 951; see *River Park, Inc.*, 184 Ill. 2d at 309.

¶ 23 The claims of unjust enrichment, breach of fiduciary duty and undue influence are different theories for relief which arose out of the same group of operative facts. Regardless of whether the transfer was improper because it violated the alleged agreement to divide their estate equally as alleged in count I of the amended petition or because it resulted from a breach of fiduciary duty or the exercise of undue influence, these theories all stem from the alleged agreement to an equal division of the estate and the transfer of the funds from the estate into the American Fund accounts. The fact that the claims require different evidence to prove them is not determinative, since all three claims arise out of the transfer of those funds out of Sophie's estate.

¶ 24 We conclude that under the transactional test, the doctrine of *res judicata* barred the second amended petition because the claims in both the second amended petition and the amended petition are the same cause of action since the claims arose from a single group of operative facts.

¶ 25

CONCLUSION

¶ 26 The judgment of the circuit court is affirmed.

¶ 27 Affirmed.