2017 IL App (1st) 161337-U

FOURTH DIVISION
August 24, 2017

Nos. 1-16-1337 and 1-16-1941 (Cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAKESHORE NUMISMATIC INVESTMENT CORP., an Illinois corporation, CATHY PAPAGIORGIO, Individually and as the sole shareholder of Lakeshore Numismatic Investment Corp., an Illinois corporation,	)	Appeal from the Circuit Court Cook County.
Plaintiffs-Appellants,	)	No. 14 L 10411
v.	)	
SCOTT COWEN, as Special Administrator of the Estate of RICHARD COWEN, and as an agent for STAHL CROWLEY COWEN ADDIS, LLC, and SHARON VARGAS,	)	Honorable Lynn Egan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed plaintiffs' amended complaint as barred under the doctrine of *res judicata*.

¶ 2 This case arises out of proceedings related to the death of Charles Walanka and the subsequent administration of his estate. Walanka owned and was the sole shareholder in Lakeshore Numismatic Investment Corp. (LNI), a rare coin business. Walanka died in July 2012

and named plaintiff Cathy Papagiorgio as executor and sole heir of his estate, which included the ownership of LNI stock. The petition to probate estate was filed in Lake County. Subsequently, defendant Sharon Vargas, Walanka's live-in girlfriend at the time of his death, disputed several assets within the estate and filed a separate action in the chancery division of the Lake County circuit court. The chancery action was consolidated with the probate action. Defendant Richard Cowen, now deceased, was an attorney with defendant Stahl Crowley Cowen Addis, LLC (SCCA) and represented Vargas in her chancery action.

¶ 3 In October 2014, Papagiorgio, individually and on behalf of LNI, filed the instant action alleging multiple torts against the named defendants. In response, Cowen and SCCA filed a motion to dismiss arguing that the claims were barred under the doctrine of *res judicata* under section 2-619(a)(4) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619(a)(4) (West 2014)) and that plaintiffs failed to plead a cause of action for several of the counts pursuant to section 2-615 (735 ILCS 5/2-615 (West 2014)). Vargas subsequently filed a *pro se* motion to adopt Cowen and SCCA's motion to dismiss, which the trial court granted. In April 2016, the trial court granted Cowen and SCCA's motion to dismiss as barred by *res judicata*. The court also found, assuming *arguendo* that the counts were not barred, five of the eight counts were insufficient under section 2-615 of the Code. In June 2016, the trial court granted Vargas's motion to dismiss.

¶ 4 Plaintiffs appeal, arguing that (1) the trial court erred in considering pleadings from the Lake County case to find *res judiciata* barred the instant case; (2) the trial court erred in finding that plaintiffs' first amended complaint was barred by *res judicata*; and (3) the trial court erred in finding that several claims in the first amended complaint were insufficient as a matter of law. We note that plaintiffs' appeal from the trial court's grant of Cowen and SCCA's motion to

dismiss is appeal number 1-16-1337, while appeal number 1-16-1941 is plaintiffs' appeal from the trial court's order granting Vargas's motion to dismiss. The appeals were consolidated in this court.

¶ 5 In order to set forth the complicated history involved in this appeal, the factual background will be set forth chronologically beginning with the underlying probate case in Lake County.

¶ 6 As previously stated, Charles Walanka died in July 2012. In August 2012, Papagiorgio was appointed the executor of the Estate of Charles Walanka (the Estate). Walanka's will also named Papagiorgio as the sole heir to his entire estate, which included all shares of stock in LNI, as well as two residential properties, rare coins, currency computers, business records, and other business and personal property. LNI, through Walanka, engaged in business as a rare coin collector and trader, with business offices in Northbrook, Illinois, and at his residence, located at 1885 Keats Lane in Highland Park, Illinois. At the time of his death, Walanka resided with Vargas at his Highland Park home.

¶ 7 In September 2012, Papagiorgio, as the executor of the Estate, filed a petition to obtain possession of the Highland Park residence. Vargas retained Cowen and his law firm SCCA to represent her. In October 2012, Vargas filed her chancery complaint to construe the will and for a constructive trust, which was consolidated with the probate case in March 2013. In December 2012, the Lake County trial court denied Papagiorgio's petition to obtain possession and allowed Vargas to remain in the home, provided that Vargas pay half of the mortgage and homeowner's insurance, and all of the utilities. The court also directed Vargas to give Walanka's home computer to the Estate for imaging, or alternatively, a flash drive image of the computer.

¶ 8 On December 22, 2012, the Estate was given access the Highland Park residence for inventory purposes. During the inventory, a dispute arose between Vargas and the Estate over certain property. Cowen called the Highland Park police. On December 31, 2012, the Estate, through Papagiorgio, filed a motion for sanctions, alleging that Vargas improperly claimed that collectible coins and currency belonged to her. The motion also alleged that Cowen, as Vargas's attorney, refused to allow records for LNI to be removed from the residence. In the motion, it was argued that it was Papagiorgio's belief that "Ms. Vargas' attorney has crossed the line from appropriate representation of Ms. Varags to actively promoting and perpetrating Ms. Vargas conduct and actions." In the motion, sanctions were requested as well as an order that Vargas immediately vacate the residence and not remove any property in dispute, and for Papagiorgio to be granted immediate access. In January 2013, the trial court denied the motion, but ordered Vargas to grant access to the residence for inventory purposes. Later in January 2013, the court ordered the inventory of the residence to be completed by February 14, 2013, and allowed for Cowen or his law partner or associate to be present.

¶ 9 In April 2013, Vargas filed an amended complaint to construe will and for a constructive trust, seeking certain assets to be put in a constructive trust. In June 2013, Papagiorgio filed a motion for immediate possession of the Highland Park residence, but the motion was never heard because Vargas vacated the residence on June 22, 2013.

¶ 10 In September 2013, Papagiorgio, individually and on behalf of the Estate, filed a motion to disqualify Cowen and SCCA from representing Vargas, alleging that Cowen and Vargas went through Walanka's personal items and business records of LNI, and "touched, disturbed, reviewed and removed personal property and LNI's business records" from the residence. In the motion, it was further alleged that based on Cowen's aforementioned conduct, he was "expected

to be called as a witness in these proceedings." Also in September 2013, the Estate, through Papagiorgio, filed a petition for citation to recover assets against Vargas. The assets listed in the motion included "stacks of $2 dollar bills," "rare and valuable coins," and business records from LNI. The citation stated that the executor "did not consent to the touching, disturbing, reviewing or removing property of Mr. Walanka or any of the records or property of LNI from [the residence] by Mr. Cowen and/or Ms. Vargas without the approval, knowledge or authority of the [e]xecutor." The motion to disqualify was denied in November 2013.

¶ 11 In March 2014, the trial court entered orders dismissing any claims filed by Vargas against both Papagiorgio and the Estate with prejudice. In April 2014, Papagiorgio, individually and on behalf of the Estate, filed a motion for sanctions under Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)), arguing that Vargas and Cowen had no legal basis to file her complaint for constructive trust, and that Vargas and Cowen removed business records from the residence without authority. Papagiorgio sought sanctions against Vargas, Cowen, and SCCA, jointly and severally. The motion included the allegation that Vargas and Cowen removed "the business records of Mr. Walanka's business from his home without authority." The trial court denied the motion for sanctions in December 2014.

¶ 12 In October 2014, plaintiffs filed their initial complaint against defendants in the instant case in Cook County. An amended complaint was filed in October 2015, to add Papagiorgio as plaintiff and add a special administrator for Richard Cowen, who had passed away since the initial complaint was filed. The amended complaint alleged eight counts against the defendants, individually and collectively.

¶ 13 The complaint stated that Papagiorgio was the sole owner and shareholder of LNI, an Illinois corporation. Count I alleged trespass against all defendants. Plaintiffs alleged that on or

about January 26, 2013, and continuing through 2013, Cowen, individually and on behalf of SCCA, "knowingly and without legal authority, permission or justification, entered upon the [Highland Park residence] and removed, encumbered and permanently confiscated and absconded" with business property belonging to plaintiffs, including, rare coins, currency, computers, and several business records. Plaintiffs have made demands for the return of the property, but defendants have refused to comply. Plaintiffs sought $1,000,000 in actual damages as well as $1,000,000 in punitive damages for this count. Counts II, III, and IV alleged identical claims of negligence against SCCA, Cowen, and Vargas, respectively, based on the same allegations relating to LNI property. These counts sought an amount in excess of the jurisdictional minimum. Count V alleged theft against all defendants of the LNI business property. Count VI set forth a claim of conversion against all defendants of the LNI business property. Each of these counts sought $1,000,000 in actual and punitive damages. Counts VII and VIII alleged tortious interference with contract and tortious interference with prospective and future business advantage against all defendants. Count VII sought $4,600,000 in compensatory damages and $5,000,000 in punitive damages while Count VIII sought $25,000,000 in compensatory damages and $10,000,000 in punitive damages.

¶ 14 In November 2015, defendants Cowen and SCCA filed an amended motion to dismiss plaintiffs' first amended complaint under sections 2-619(a)(4) and 2-615 of the Code (735 ILCS 5/2-619(a)(4), 2-615 (West 2014)). In their motion, defendants argued that plaintiffs' action was barred pursuant to *res judicata* and collateral estoppel and should be dismissed under section 2-619(a)(4) of the Code. Alternatively, defendants asserted that all counts against Cowen or SCCA, excluding Count VI for conversion, should be dismissed for failure to state a cause of action

under section 2-615 of the Code. Vargas subsequently filed a *pro se* motion to adopt the motion to dismiss, which the trial court granted.

¶ 15 In April 2016, following briefing on the motion, the trial court granted Cowen and SCCA's motion to dismiss plaintiffs' amended complaint. The court found that plaintiffs' complaint was barred by the doctrine of *res judicata*. The order dismissed all counts of the complaint, except the court did not consider count IV in this order because that alleged negligence against Vargas alone. Assuming *arguendo* that plaintiffs' claims were not barred by *res judicata*, the court held that counts II, III, V, VII, and VIII failed to state a cause of action. The court ruled that count I set forth sufficient facts to plead a claim of trespass. In May 2016, the court granted plaintiffs' request for Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016)) language to be added *nunc pro tunc* to the April 11, 2016 order.

¶ 16 This appeal followed.

¶ 17 Initially, we must address plaintiffs' appeal from the dismissal of count IV alleging negligence against Vargas. The record on appeal does not contain a judgment order dismissing this count, nor is the notice of appeal from that order in the record. According to plaintiffs' notice of appeal filed in this court, on June 17, 2016, the trial court granted Vargas's motion to dismiss plaintiffs' first amended complaint *nunc pro tunc* to April 11, 2016.

¶ 18 Supreme Court Rule 321 provides in relevant part that "[t]he record on appeal shall consist of the judgment appealed from, the notice of appeal, and the entire original common law record, unless the parties stipulate for, or the trial court, after notice and hearing, or the reviewing court, orders less." Ill. S. Ct. R. 321 (eff. Feb. 1, 1994). Plaintiffs, as the appellants, bear the burden of providing a sufficiently complete record to support his claim or claims of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial

court was in conformity with law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Moreover, any doubt arising from the incompleteness of the record will be resolved against the appellants. *Foutch*, 99 Ill. 2d at 392. Here, the June 17, 2016 order disposing of count IV is not included in the record, nor do plaintiffs contest the trial court's dismissal under section 2-615 of the Code for failure to state a cause of action. Therefore, we affirm the dismissal of count IV.

¶ 19 Plaintiffs argue for the first time on appeal that the trial court erred in considering the documents and pleadings filed in the Lake County probate case. However, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *K & K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 25. Further, " '[i]t is fundamental to our adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding.' " *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000) (quoting *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 543 (1984)). "A party cannot complain of error which he induced the court to make or to which he consented." *Id.* " ' "The rationale of this rule is obvious. It would be manifestly unfair to allow one party a second trial upon the basis of error which he injected into the proceedings." ' " *Id.* (quoting *Auton*, 105 Ill. 2d at 543, quoting *Ervin v. Sears, Roebuck & Co*., 65 Ill. 2d 140, 144 (1976)). Since plaintiffs failed to raise any objection in the trial court of its consideration of the Lake County case documents and acquiesced in the use of the documents, this claim has been forfeited on appeal. We also point out that plaintiffs have appended the docketing statement in the Lake County probate case to their brief. However, this document was not included in the record on appeal and we will not consider it on appeal. See *Kensington's Wine Auctioneers &*

Brokers, Inc. v. John Hart Fine Wine, Ltd., 392 Ill. App. 3d 1, 14 (2009) ("An appellate court may not consider documents that are not part of the certified record on appeal.").

¶ 20 Section 2-619.1 is a combined motion that incorporates sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-619.1, 2-615, 2-619 (West 2010). We review a trial court's dismissal of a complaint under section 2-619.1 of the Code *de novo*. *Morris v. Harvey Cycle and Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009). A motion to dismiss pursuant to section 2-615 of the Code attacks the legal sufficiency of the complaint by alleging defects on its face. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10. In contrast, a motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the complaint, but raises an affirmative defense or another basis to defeat the claims alleged. *Id.* Section 2-619(a)(4) permits involuntary dismissal where "the cause of action is barred by a prior judgment." 735 ILCS 5/2-619(a)(4) (West 2014).

¶ 21 We first consider whether the trial court erred in dismissing plaintiffs' complaint because the cause of action was barred by the doctrine of *res judicata*. "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction acts as an absolute bar to a subsequent action between the same parties or their privies involving the same claim, demand, or cause of action. The bar extends not only to all matters that were actually decided but also to those matters that could have been decided in the prior action." *Wilson v. Edward Hospital*, 2012 IL 112898, ¶ 9. "The underlying policy of *res judicata* is to promote judicial economy by preventing repetitive litigation and to protect a defendant from the harassment of relitigating essentially the same claim." *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 21. The party raising *res judicata* carries the burden of establishing its applicability. *Id.* ¶ 22.

¶ 22 "Three requirements must be met for *res judicata* to apply: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) identity of cause of action; and (3) identity of parties or their privies." *Wilson*, 2012 IL 112787, ¶ 9. Plaintiffs assert that none of the requirements have been met in this case.

¶ 23 The first requirement is a final judgment on the merits. "To be 'final,' a judgment or order must terminate the litigation and fix absolutely the parties' rights, leaving only enforcement of the judgment." *Richter*, 2016 IL 119518, ¶ 24. "In determining when a judgment or order is final, one should look to its substance rather than its form." *Id.* For purposes of *res judicata*, a judgment on the merits amounts to a decision on the respective rights and liabilities of the parties based on the facts before the court. *SDS Partners, Inc. v. Cramer*, 305 Ill. App. 3d 893, 896 (1999).

¶ 24 Defendants argued that the Estate cases were dismissed with prejudice, which resulted in a final judgment on the merits. The trial court agreed in its written decision. Plaintiffs assert in their opening brief that this was error because while the dismissal may have been final as to Vargas's claims against the Estate, the claims did not involve LNI. Plaintiffs also cite no authority for this proposition. This argument is misplaced when considering whether a final judgment has been entered as it is essentially arguing the third requirement, identity of parties or their privies. In their reply brief, plaintiffs cite a single case, *John G. Phillips & Associates v. Brown*, 197 Ill. 2d 337 (2001). This case had been cited by defendants in response to plaintiffs' assertion that they are seeking different relief in the instant case compared to claims filed in the Lake County case. *Phillips* did not consider an issue of *res judicata*, but instead reviewed whether the court had jurisdiction over the appeal because the appellant filed a premature notice of appeal prior to the resolution of a subsequent motion for sanctions. *Id.* at 338-39. Plaintiffs

contend that any decision in the Lake County case should not be considered a final decision because the general probate case remains pending, but do not assert any unresolved claims between the parties at issue here.

¶ 25 Here, the trial court in Lake County entered a voluntary dismissal with prejudice in March 2014. Illinois courts have held that voluntary dismissal with prejudice should be treated as a final judgment on the merits for *res judicata* purposes. *Mann v. Rowland*, 342 Ill. App. 3d 827, 835 (2003) (citing *Knodle v. Jeffrey*, 189 Ill. App. 3d 877, 885-86 (1989)). Plaintiffs fail to acknowledge the principle that *res judicata* acts as a bar to all matters raised as well as all matters that could have been raised in the prior action. See *Wilson*, 2012 IL 112898, ¶ 9. Their contention that additional claims involving LNI could be raised does not negate the entry of a final order on the merits. Accordingly, we find the first requirement has been satisfied for *res judicata*.

¶ 26 The second requirement for application of the doctrine of *res judicata* is identity of the cause of actions. "To determine whether there is an identity of cause of action for *res judicata* purposes, the 'transactional test,' is used." *Mular v. Ingram*, 2016 IL App (1st) 152750, ¶ 18 (citing *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 309-10 (1998)). "Accordingly, differing claims are '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.' " *Id.* (quoting *River Park*, at 311). " ' "If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is identity between the allegedly different causes of action asserted and *res judicata* bars the latter action." ' " *Wilson*, 2012 IL 112898, ¶ 10 (quoting *People ex rel. Burris v. Progressive Land Developers*,

Inc., 151 Ill. 2d 285, 295, quoting *Morris v. Union Oil Co. of California*, 96 Ill. App. 3d 148, 157 (1981)).

¶ 27 Plaintiffs argue that the trial court erred in finding an identity of the cause of action by not distinguishing between "motions and citations versus claims." Plaintiffs contend that the parties' claims do not arise from the same set of operative facts. We disagree.

¶ 28 Plaintiffs' amended complaint alleged in count I that defendants "knowingly and without legal authority, permission or justification, entered upon the [Highland Park residence] and removed, encumbered and permanently confiscated and absconded" with business property belonging to plaintiffs, including, rare coins, currency, computers, and several business records. Similar allegations related to property were raised in all of the other counts of the complaints. These actions took place during the pendency of the probate case.

¶ 29 In the probate action, Papagiorgio filed numerous motions and claims based on similar conduct on behalf of herself and the Estate. The December 2012 motion for sanctions alleged that Vargas improperly claimed ownership of rare coins and that she refused to turn over business records. The motion also alleged that Cowen refused access to Papagiorgio as the executor and his conduct "crossed the line from appropriate representation of Ms. Vargas to actively promoting and perpetrating Ms. Vargas conduct and actions." In September 2013, Papagiorgio filed a motion to disqualify Cowen and SCCA from representing Vargas. The motion specifically alleged, "Cowen and Vargas went through Walanka's personal items and business records of LNI, and "touched, disturbed, reviewed and removed personal property and LNI's business records" from the residence. Also in September 2013, the Estate filed a citation against Vargas seeking to recover property, including a stack of $2 bills, rare coins, and business records. The citation alleged that the executor "did not consent to the touching, disturbing,

reviewing or removing property of Mr. Walanka or any of the records or property of LNI from [the residence] by Mr. Cowen and/or Ms. Vargas without the approval, knowledge or authority of the [e]xecutor." After the voluntary dismissal, Papagiorgio filed a motion for sanctions under Rule 137 against defendants, which in part alleged that Vargas and Cowen removed "the business records of Mr. Walanka's business from his home without authority."

¶ 30 Each of the claims in plaintiffs' amended complaint is based on the same set of operative facts as pursued in the Lake County case, which is that defendants, either directly or vicariously, removed, disturbed, or interfered with LNI business property, including coins and business records. Although our review is *de novo*, we agree with and quote the trial court reasoning on this issue in its written decision.

> "Overall, the exact same set of facts giving rise to the current matter also gave rise to issues addressed in the estate cases. Indeed, plaintiffs fail to point to any distinguishing issue or factual matter in the present case. This deficiency is fatal. *** Instead, plaintiffs merely argue that the purpose of the estate cases was 'to recover and liquidate all of Mr. Walanka's assets' while in the present matter, plaintiffs are 'seeking damages for the wrongful conduct of defendants.' *** However, this ignores the very extensive motion practice that accompanied the administration of the Estate and the resulting corollary issues addressed. *** Thus, while plaintiffs did not assert the same theories of relief in the estate cases, the fact remains they *could have been raised* because

> the claims arise from the same set of operative facts." (Emphasis in original).

Thus, we find the second requirement, identity of the cause of action, has been established.

¶ 31 The third and final requirement is an identity of the parties or their privies. Since there is no identity of parties as LNI, Cowen and SCCA were not named in the probate case, the question is whether these parties were in privity with any of the named parties, specifically Papagiorgio, the Estate, or Vargas. "The rule of privity extends the preclusive effect of *res judicata* to those who were not parties to the original action, if their interests were adequately represented by someone else." *Cooney v. Rossiter,* 2012 IL 113227, ¶ 33. The supreme court further explained,

> " ' "Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." ' " *Id.* ¶ 34 (quoting *People ex rel. Burris*, 151 Ill. 2d at 296, quoting Restatement of Judgments § 83 cmt. a, at 389 (1942)).

¶ 32 The trial court concluded that LNI, Cowen, and SCCA were in privity with the Estate and Vargas, respectively. Plaintiffs assert that the trial court erred in finding privity between Cowen and SCCA and Vargas, but does not challenge the finding of privity between LNI and the Estate. As to the attorneys, plaintiffs contend that their representation of Vargas does not establish privity. In support, they cite *Yorulmazoglu v. Lake Forest Hospital*, 359 Ill. App. 3d 554, 562-63 (2005), for the proposition that "an attorney is not a party and does not control a legal action for

purposes of privity." However, we find this reliance misplaced as *Yorulmazoglu* involved the rejection of a claim of privity where two parties employed the same attorney. *Id.*

¶ 33 Here, the probate action included specific claims and motions against Cowen and his actions, with his employer SCCA vicariously liable. The Estate and Papagiorgio made direct allegations against Cowen throughout the probate case, including moving to disqualify his representation and to seek sanctions. Further, his conduct in the probate action formed the basis of the claims in the probate case as well as the allegations in the instant case. Cowen, as Vargas's attorney, defended that conduct in the probate case, and thus, his interests were adequately represented in the probate case for purposes of privity. For the same reasons, we find privity between SCCA as Cowen's employer and Vargas. Since we have found privity between Cowen and SCCA and Vargas, the third requirement for *res judicata* has been met.

¶ 34 Because we have concluded that all three requirements for the application of *res judicata* have been met, we hold that plaintiffs' amended complaint is barred. The trial court properly granted defendants' motion to dismiss under section 2-619(a)(4) of the Code.

¶ 35 Since we have found that the doctrine of *res judicata* bars plaintiffs' complaint, we need not reach the issue of whether the trial court properly dismissed counts under section 2-615 of the Code for failure to state a cause of action.

¶ 36 Affirmed.