2014 IL App (2d) 131034-U
No. 2-13-1034
Order filed June 4, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF ROY BETHKE, Deceased	)	Appeal from the Circuit Court
	)	of Kane County.
	)	
	)	No. 10-P-627
	)	
(Lorina Kucynda and Rima Todorovich,	)	
Citation Petitioners-Appellants, v. Kathleen	)	Honorable
Bethke-Sullivan, Citation Respondent-	)	Joseph M. Grady,
Appellee).	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hudson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in dismissing petition for citation to recover assets on the ground that prior rulings in a related case barred the citation.

¶ 2 In this probate case, the decedent's former caregivers, Lorina Kucynda and Rima Todorovich, petitioned for the issuance of a citation to recover assets against Kathleen Bethke-Sullivan, the daughter and only heir of the decedent, alleging that she had in her possession certain assets of the estate, namely, sets of coins. Bethke-Sullivan moved to dismiss the petition and the trial court granted the motion. Kucynda and Todorovich appeal the dismissal. We affirm.

¶ 3 BACKGROUND

¶ 4 In January 2010, a petition to declare Roy Bethke disabled and in need of a guardian was filed in the circuit court of Kane County (No. 10 P 90) (the guardianship case). On February 23, 2010, the trial court found that Bethke was unable to manage his personal and business affairs due to Parkinson's disease and that he was being financially exploited by his caregivers, Kucynda and Todorovich. Christine Adelman, the Kane County Public Guardian and Administrator, was appointed as Bethke's temporary guardian. On March 23, 2010, Adelman was appointed as his plenary guardian.

¶ 5 Fiona Chen, Bethke's accountant, filed a petition for a citation to discover assets, seeking to depose Bethke's daughter, Bethke-Sullivan, regarding Bethke's coin collection. The citation was issued, and Bethke-Sullivan was deposed on September 17, 2010. She testified that, in July 2008, Bethke gave her sons some sets of coins on their birthdays. She provided photographs of the coins that were given to the boys. She had never had the coins valued and did not know how much they were worth. In April or May of 2009, her father called her and asked her to take the coins out of the Lake Forest Bank and Trust safe deposit box where she kept them so that his coin collector could appraise them. She told him that it would be difficult for her to do so then, as she was busy. About a month later, her father again asked her about the coins. Finally, during the summer of 2009, she became aware that her father was having financial difficulties as a result of his gambling. Her father asked her to give the coins back to him. Bethke-Sullivan responded that he had given the coins to his grandsons, not to her, and he would need to talk to his grandsons about it. Bethke never contacted his grandsons about the coins after that.

¶ 6 Bethke-Sullivan also testified that, a few years earlier, Bethke called her and told her that he wanted to add her name to two safe deposit boxes. They traveled to a branch of Midwest Bank near his house, Bethke added his daughter as a co-signatory to two safe deposit boxes, and Bethke placed some coins in the boxes. Bethke-Sullivan was given the second set of keys to the

boxes. However, she never opened the boxes or removed anything from them. She was later notified that that branch of Midwest Bank was closing and the contents of the safe deposit boxes would be transferred to another branch. Bethke-Sullivan did not know what happened to the contents of the boxes. Her father told her that a coin dealer occasionally visited him, and Bethke-Sullivan believed that her father was starting to sell off his collection.

¶ 7 On November 23, 2010, the guardian moved to terminate the citation proceeding, stating that the evidence showed that Bethke had given his grandsons (Bethke-Sullivan's sons) coins from his collection in 2008; that Bethke had not been adjudicated disabled at that time and currently did not express any desire to rescind the gift; and the claim regarding Bethke's coin collection was of dubious value and it would be a waste of the guardianship estate to pursue it.

¶ 8 Bethke died intestate on November 27, 2010. In December 2010, an estate was opened for the decedent (No. 10 P 627), and Adelman was appointed as the independent administrator of Bethke's estate. Her appointment was later converted to supervised administration. Bethke-Sullivan was the decedent's sole heir.

¶ 9 On February 25, 2011, the trial court entered an order in the guardianship case granting the guardian's motion to terminate the discovery citation proceeding against Bethke-Sullivan. The trial court subsequently entered an order approving the guardian's final accounting in that case. The accounting did not list Bethke's coin collection as an asset of the estate. (Although this order and the final accounting in the guardianship case are not contained in the record on appeal, they are described in the parties' briefs and there does not appear to be any dispute regarding them.) No appeal was filed from the final judgment in the guardianship case.

¶ 10 In January 2011, Kucynda and Todorovich (the claimants) filed a claim against the decedent's estate, seeking $103,305 for caregiving services allegedly rendered to the decedent during the time that he was adjudicated disabled, under an oral contract formed in 2006. The

administrator filed an objection to the claim, raising the defenses that the claim was insufficiently pled and that Bethke was disabled and was represented by the plenary guardian during the time the services were rendered, and that she had not approved or agreed to any contract for caregiving services.

¶ 11 In April 2011, the administrator filed an initial inventory of the decedent's estate. The assets listed included his house, valued at about $202,000; the personal property "owned by the decedent at the time of his death and located at" his home; and a checking account valued at about $500.

¶ 12 In August 2011, the administrator filed a petition for a citation to discover assets against the claimants, alleging that they breached their fiduciary duty toward Bethke and unduly influenced him, with the result that since 2006 over $700,000 of Bethke's assets had been liquidated (including over $450,000 of checks written by the claimants to themselves from Bethke's accounts), and that over $500,000 in gambling winnings by Bethke could not be located. The petition was granted and the citation was issued in October 2011.

¶ 13 In April 2012, the trial court granted fee petitions for the administrator and her counsel, and the claimants appealed that order. In December 2012, this court issued an unpublished order affirming the trial court's grant of the attorney fee petition. See *In re Estate of Bethke*, 2012 IL App (2d) 120568-U.

¶ 14 On September 10, 2012, the administrator and the claimants entered into a settlement of the claimants' claim against the estate and the estate's citation against the claimants. Pursuant to the settlement, $18,000 of the claimants' claim was classified as a Class 1 administrative expense; $1,600 of the claim was classified as a Class 4 home care expense; the remainder of the claim was classified as a Class 7 claim; and the estate paid the claimants and their attorney $7,704.26. Paragraph 2.3(d) of the agreement specified that the claimants retained the right to

petition the court to issue a citation against Bethke-Sullivan on behalf of the estate; any money recovered as a result would belong to the estate. On September 14, 2012, the trial court entered an order approving the settlement, requiring that any petition for a citation against Bethke-Sullivan be filed within 30 days, and requiring the administrator to file the final tax return of the estate within the same period.

¶ 15 On October 15, 2012, the claimants filed a petition for a citation to recover assets against Bethke-Sullivan. The petition alleged that Bethke-Sullivan owed her father a fiduciary duty because he had designated her as his agent under a power of attorney signed in 2006, and that she had breached that duty by taking possession of her father's coin collection.

¶ 16 In response, Bethke-Sullivan filed a combined motion to dismiss the petition under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). In it, Bethke-Sullivan argued that the trial court's termination of the citation petition filed against her in the guardianship case regarding the same coin collection disposed of the issue on the merits, barring relitigation of the same claim. She also argued that the power of attorney, by its own terms, became effective only when Bethke was unable to make his own decisions and both his physician and Bethke-Sullivan certified that condition, and she had never executed such a certification. Accordingly, the power of attorney never became effective and she never became her father's fiduciary.

¶ 17 On March 26, 2013, the administrator filed a motion for discharge and a final account showing that, after the administrative costs of the estate had been paid, only about ten dollars remained.

¶ 18 In the claimants' response to Bethke-Sullivan's motion to dismiss, they conceded that Bethke-Sullivan owed her father no fiduciary duty at the time the coins were given to her sons. However, they requested that the citation be issued so that they could present unspecified

evidence that Bethke did not make an *inter vivos* gift of the coins as described by Bethke-Sullivan in her deposition. They also disputed whether the termination of the citation proceeding in the guardianship case was an adjudication of the issue on the merits that would give rise to *res judicata*. On June 14, 2013, the trial court granted the motion to dismiss, finding that the citation was barred "based on the prior disposition [of] this issue in the guardianship of Roy Bethke." The claimants moved for reconsideration, which the trial court denied "for reasons stated on the record." (The transcript does not contain any explanation of the reasons for the trial court's denial of the motion for reconsideration; instead, the trial court simply stated that, in reaching that ruling, it considered the parties' arguments, the history of the case, the "various hearings we've had and the evidence adduced.") The claimants now appeal.

¶ 19 ANALYSIS

¶ 20 The sole argument raised by the claimants on appeal is that their citation proceeding against Bethke-Sullivan should not have been dismissed on the basis of *res judicata* because the first citation proceeding against Bethke-Sullivan (in the guardianship case) was "voluntarily dismissed" by the guardian, and thus the dismissal was not an adjudication on the merits. The doctrine of *res judicata* applies where three requirements are met: a final judgment on the merits, the two causes of action are the same, and the parties or their privies are the same. *Downing v. Chicago Transit Authority*, 162 Ill. 2d 70, 73-74 (1994). The claimants attack only the first prong, and do not raise any argument here disputing the existence of the other two requirements.

¶ 21 Bethke-Sullivan responds that the guardian's motion to terminate the citation proceeding in the guardianship case was not equivalent to a voluntary dismissal, and the trial court's order granting that motion constituted an adjudication on the merits. She further argues that, even if *res judicata* does not apply, the claimants concede that she owed her father no fiduciary duty, and they have presented no evidence that would overcome the presumption that her father made

a valid *inter vivos* gift of the coins. Thus, she argues, there was no basis for the issuance of a citation to recover assets against her.

¶ 22 A motion to dismiss under section 2-619 of the Code assumes that the allegations of the complaint are true, but asserts an affirmative defense or other matter which would defeat the plaintiff's claim. 735 ILCS 5/2-619 (West 2010); *Nielsen-Massey Vanillas, Inc., v. City of Waukegan*, 276 Ill. App. 3d 146, 151 (1995). (Although the motion was labeled as a combined motion under section 2-619.1, it is more properly viewed as a motion pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)) that simply alleged two grounds for dismissal under section 2-619.) We review *de novo* the dismissal of a complaint pursuant to section 2-619. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002).

¶ 23 On appeal, the claimants do not identify any evidence supporting their contention that the guardian's motion to terminate the first citation proceeding against Bethke-Sullivan was the equivalent of a voluntary dismissal. So far as we can determine, the record on appeal does not contain any copy of the guardian's motion to terminate, the trial court's order granting that motion, or a transcript of the court proceedings in the guardianship case on the date the order was entered. Although Bethke-Sullivan attached a copy of the trial court's order to her appellee brief, she did not move to supplement the record on appeal with that document, and thus it is not properly before us. *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826 (2001) (it is improper to include matter not contained in the record in an appendix to an appellate brief); *People v. Williams*, 2012 IL App (1st) 100126, ¶ 27 (information *dehors* the record will not be considered by the appellate court). We therefore cannot consider the improperly appended material.

¶ 24 The meager evidence that is before us undermines rather than strengthens the claimants' argument: it was Chen (Bethke's accountant) who sought the issuance of the discovery citation against Bethke-Sullivan in the guardianship case, but it was a different person—the guardian—

who sought to terminate that citation proceeding. Moreover, according to the parties' briefs on appeal, the guardian sought termination of the citation on the ground that the evidence uncovered did not reveal that Bethke-Sullivan was holding any property belonging to Bethke, not as a voluntary withdrawal of a claim asserted by the estate. Logically, then, the trial court's order granting the guardian's motion must be seen as a determination that the guardian was correct that the evidence did not show that Bethke-Sullivan had in her possession any coins properly belonging to Bethke. No other basis for the trial court's ruling appears in the record.

¶ 25 In any appeal, it is the responsibility of the appellant to supply a complete record sufficient to permit review of the issues it wishes to raise on appeal. *In re County Treasurer and Ex Officio County Collector*, 373 Ill. App. 3d 679, 684 n.4 (2007). In the absence of such a record, we must presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. *Koppel v. Michael*, 374 Ill. App. 3d 998, 1008 (2007) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). Here, the claimants have not pointed to any facts in the record to support their contention that the trial court erred in finding that the order entered in the guardianship case, terminating the citation proceeding, was an adjudication of the merits of that proceeding that embodied a finding that Bethke-Sullivan was not in possession of any property belonging to her father. That being so, the claimants' citation to recover assets against Bethke-Sullivan in the current case lacked the necessary factual basis: that Bethke-Sullivan was in possession of the decedent's property. See 755 ILCS 5/16-1(a) (West 2012) (citation to recover assets may be filed against anyone who has in his or her possession or control any personal property or evidence of title belonging to the person whose estate is being administered). Accordingly, the trial court's dismissal of the petition was correct.

¶ 26 Finally, we note that even if the trial court's ruling in the guardianship case (that the coins Bethke-Sullivan was holding for her sons did not belong to Bethke) was not final at the

time it was entered, it became so when the trial court approved the final accounting in the guardianship case (which did not list the coins among the assets of the guardianship estate) and closed that case. At that point, if the claimants or anyone else wished to contest the trial court's finding regarding the coins held by Bethke-Sullivan, it was incumbent on that person to file an appeal from the final judgment in the guardianship case. As no appeal was filed, there is no basis for any further contesting the trial court's ruling.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 29 Affirmed.