

2019 IL App (2d) 180897-U  
No. 2-18-0897  
Order filed June 13, 2019

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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CATHERINE DUHR and KIM USLANDER,	)	Appeal from the Circuit Court
As Co-Trustees of the EARL DUHR	)	of Winnebago County.
REVOCABLE LIVING TRUST NO.	)	
13310.01, KOREN J. DUHR, JAMES E.	)	
DUHR, and MICHAEL C. DUHR,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 17-L-320
	)	
GWYNN A. WEYER and NICOLETTE	)	
WEYER,	)	Honorable
	)	Eugene G. Doherty,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justice Jorgensen and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* In the previous case, the order dismissing with prejudice the litigation over trust assets and accountings between plaintiffs and defendants while it retained jurisdiction to enforce the terms and conditions of the parties' Settlement Agreement and the subsequent order closing the probate estate and discharging the executor constituted a final judgment for purposes of *res judicata* barring plaintiffs from seeking relief in the present suit; no exceptions to *res judicata* are applicable. Affirmed.

¶ 2 Plaintiffs, Catherine Duhr and Kim Uslander, as co-trustees of, and on behalf of all beneficiaries and heirs of the Earl Duhr Revocable Living Trust, Koren J. Duhr, James E. Duhr, and Michael C. Duhr, brought an action against defendants, Gwynn A. Weyer (hereinafter referred to as defendant) and Nicolette Weyer<sup>1</sup>, to recover damages, documents, and personal property occasioned by the alleged inappropriate actions by defendant as trustee of the parties' deceased father's trust. The trial court found that the action was barred by the doctrine of *res judicata* and dismissed it pursuant to section 2-619(a)(4) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). Plaintiffs contend that the trial court erred in finding that the present case was barred by the doctrine of *res judicata* because the order dismissing the litigation over trust assets and accountings between plaintiffs and defendants and the subsequent order closing the probate estate and discharging the executor did not constitute a final judgment on the merits. Plaintiffs also contend that, even if we find that a final judgment was entered in the prior litigation, the present case is not barred because exceptions to *res judicata* apply. We affirm.

¶ 3 I. FACTS

¶ 4 Earl Duhr passed away on January 20, 2006. Earl and his wife, who predeceased him, had six children: Catherine Duher, Kim Uslander, Koren J. Duhr, James E. Duhr, Michael C. Duhr, and defendant. Earl executed a will and a revocable living trust. Earl was named trustee of the trust. Defendant was named executor of the will and first successor trustee of the trust. Defendant became the trustee upon Earl's death in 2006. The children were beneficiaries of the trust.

¶ 5 A. Previous Cases: Nos. 2006-P-132; 2007-P-41

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<sup>1</sup> Nicolette is the daughter of defendant, who was the former trustee of the parties' deceased father's trust. Plaintiffs' allegations only relate to the actions of defendant.

¶ 6 On March 24, 2006, in case No. 2006-P-132, Kim filed a petition to open decedent's estate. Defendant filed a motion to dismiss the petition on the basis that there were no estate assets to administer, as all of the decedent's assets were in trust. The motion to dismiss was eventually granted. This suit has no substantive impact on the present case.

¶ 7 On January 31, 2007, in case No. 2007-P-41, plaintiffs, Kim M. Uslander, Catherine M. Duhr, Koren J. Duhr, James E. Duhr, and Michael C. Duhr, sued defendant, individually and as Trustee of the Earl Duhr Revocable Living Trust No. 13310.01. Plaintiffs challenged the validity of testamentary documents executed by decedent, including his will and his trust. Plaintiffs also alleged that defendant failed to provide a proper accounting and mismanaged the trust property.

¶ 8 The litigation continued for several years, but the parties finally agreed to a mediation of their dispute, resulting in a Memoranda of Agreement dated February 23, 2011. It provided, in relevant part:

“The executor or trust to provide a full accounting of estate and trust assets and liabilities (including previous assets owned by the trust, estate and decedent) on a quarterly basis with the first accounting to be complete within 60 days.

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The plaintiffs will execute a release of all claims and file a stipulation to dismiss with prejudice. This agreement is enforceable in the Circuit Court of Winnebago County.”

¶ 1 On March 16, 2011, the parties appeared before the court and advised that a settlement had been reached. The order stated that the case would be continued for status “or for the entry of a stipulation and order to dismiss.”

¶ 2 Further status hearings were held, the majority of which concerned the status of the accounting of trust and estate assets. Finally, on January 17, 2012, (inadvertently dated 2011)

approximately one year after the execution of the agreement, plaintiffs executed a settlement and release agreement (Settlement Agreement). The Settlement Agreement provided the following relevant provisions:

“WHEREAS, except for any claims arising out of the terms and conditions of the Memoranda of Agreement dated February 23, 2011, Plaintiffs, [defendant] and Nicolette A. Weyer have, through mediation, agreed to settle and resolve all disputes between them in accordance with the terms and conditions of the Memoranda of Agreement.

\* \* \*

Upon completion of all the covenants and agreements that are contained both within this Agreement, and which are contained in the Memoranda of Agreement, Plaintiff, [defendant] and Nicolette A. Weyer shall dismiss *with prejudice* the Litigation and cause an agreed stipulation to dismiss and agreed order of dismissal to be delivered for entry to the Circuit Court

\* \* \*

The executor or trust to provide a full accounting of estate and trust assets and liabilities (including previous assets owned by the trust, estate and decedent) on a quarterly basis with the first accounting to be completed within 60 days.

\* \* \*

MUTUAL RELEASE: The parties hereto agree that they are not releasing each other from or against any claims, demands or expectations that the parties may have and which may arise out of the above mentioned litigation until the parties have completed and fully complied with all of the covenants, conditions and requirements that are contained both in the Memoranda of Agreement and in this Agreement.

After the parties have completed and fully complied with the terms and conditions of both the Memoranda of Agreement dated February 23, 2011, and this Agreement, the parties, Plaintiffs, [defendant] and Nicolette A. Weyer, release and forever discharge one another \*\*\* from any and all demands, claims, including without limitation, breach of fiduciary duties claims, undue influence claims, fraudulent conveyance claims, tortious interference with inheritance claims, lack of capacity claims, insane delusion claims, constructive trust claims or unjust enrichment claims, fraud claims, liabilities, obligations, indebtedness, costs, expenses fees, attorney's fees, or any other causes of action in existence as of the date of this Agreement relating to any and all demands, claims, commissions, liabilities, obligations, indebtedness, costs, expenses, fees, or other causes of action. ” (Emphasis added.)

¶ 3 On August 29, 2012, after several status hearings regarding the sufficiency of defendant's accounts, the executed Settlement Agreement was filed of record. The trial court dismissed case No. 2007-P-41<sup>2</sup>, but the trial court did not dismiss case No. 2006-P-132 due to the mistaken assumption that the probate estate, which still needed to be finalized and closed, was opened under the 2006 case number rather than the 2007 case number. All that remained was to close the probate case.

¶ 4 Plaintiffs filed a motion requesting the court to remove defendant as both executor of the probate estate and trustee of the trust on March 21, 2013. They contended, as they do in the present case, that defendant had not made the proper accountings as required under the parties' Settlement Agreement. The court ordered plaintiffs to provide a specific list of objections to defendant's accounting and ordered defendant to respond.

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<sup>2</sup> Case No. 2007-P-41 was later reinstated, as explained infra.

¶ 5 After hearing the evidence, the court issued a rule to show cause as to why defendant should not be removed as executor and trustee. Subsequently, the court denied the motion to remove defendant as executor of the probate estate, but it ordered the estate to be closed. It granted the motion to remove defendant as trustee and appointed plaintiffs Kim Uslander and Catherine Duhr as successor co-trustees, effective September 3, 2013. Defendant was to turn over all trust paperwork and personal property. On October 15, 2013, defendant filed of record her final accounting as to the probate estate showing no assets.

¶ 6 At the final status hearing on November 27, 2013, the trial court entered an order discharging defendant as executor and it closed case No. 2007-P-41.

¶ 7 B. Case No. 2017-L-320

¶ 8 On October 20, 2017, plaintiffs filed the present three-count complaint: count I for conversion of trust property, alleging that defendant failed to provide plaintiffs, as successor trustees, with trust funds and other items of trust property as ordered by the court in case No. 2007-P-41; count II for breach of fiduciary duty, alleging mismanagement of trust property and failing to provide information “as provided by law and as provided by the Settlement Agreement”; and, count III for punitive damages in relation to the foregoing.

¶ 9 Defendant filed a motion to dismiss pursuant to section 2-619(a)(6) of the Code (735 ILCS 5/2-619(a)(6) (West 2016)), and also argued that the matter was subject to dismissal under the doctrine of *res judicata* pursuant to section 2-619(a)(4). The trial court dismissed the complaint on *res judicata* grounds.

¶ 10 Following the denial of plaintiffs’ motion to reconsider, plaintiffs timely appeal.

¶ 11 II. ANALYSIS

¶ 12 Plaintiffs' complaint was dismissed on *res judicata* grounds pursuant to section 2-619(a)(4) of the Code. A motion to dismiss under section 2-619 admits the legal sufficiency of the pleading but asserts an affirmative defense or other matter that avoids or defeats the claim. *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011). Section 2-619(a)(4) permits a defendant to file a motion for dismissal on the basis that the cause of action is barred by a prior judgment, *i.e.*, *res judicata*. See *Illinois Non-Profit Risk Management Association v. Human Service Center of Southern Metro-East*, 378 Ill. App. 3d 713, 719 (2008) (noting that section 2-619(a)(4) of the Code incorporates the doctrine of *res judicata*). Our review of a dismissal under section 2-619 is *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Additionally, whether *res judicata* applies is a question of law subject to *de novo* review. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 43.

¶ 13 “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 or their privies on the same cause of action.” *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). *Res judicata* bars not only what was actually decided in the first action but also those matters that could have been decided. *Id.* at 334-35. The underlying policies of the doctrine are to promote judicial economy and to protect defendants from the burden of having to relitigate essentially the same claim. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 21 (citing *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 45). For *res judicata* to apply, three requirements must be met: (1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3) an identity of parties or their privies. *Id.*

¶ 14 Plaintiffs agree that the second and third requirements are met. They argue that there was not a final judgment and that certain exceptions bar the application of *res judicata*.

¶ 15 A. Final Judgment

¶ 16 As stated, the parties entered into the Settlement Agreement and on August 29, 2012, they agreed to dismiss the claims in case No. 2007-P-41. The trial court reserved jurisdiction to enforce the agreement and it closed the case. In a follow-up order on January 31, 2013, the court dismissed case No. 2006-P-132 and re-opened case No. 2007-P-41 to conclude the probate of the estate. After that date, the parties brought several matters to the court regarding enforcement of the agreement.

¶ 17 Plaintiffs set forth several arguments as to why the August 29, 2012, order was not a final order. Chief among them is that the August 29 order was not final because the Settlement Agreement left open the question regarding the insufficiency of defendant's accountings, which is reflected by the orders entered from February 2013 through August 2013. Plaintiffs assert that the trial court "contended that the Plaintiffs would not sign the settlement agreement or submit a dismissal order until the Plaintiffs' concerns about the sufficiency of [defendant's] accountings were addressed." Plaintiffs maintain that the trial court believed that, by entering the August 29 order, the parties made it appear that any precondition to dismissal had been satisfied, and that it was clear that a dismissal with prejudice was probably what the parties intended. Plaintiffs argue that the record clearly contradicts the trial court's findings as plaintiffs would not sign the Settlement Agreement or submit a dismissal order until their concerns regarding the sufficiency of defendant's accounting were addressed. They cite *Elliot v. LRSL Enterprises, Inc.*, 226 Ill. App. 3d 724 (1992), to support their argument that the Settlement Agreement could not be the basis for the application of *res judicata*.

¶ 18 In *Elliot*, the defendants failed to pay rent and the plaintiff sued for possession and past-due rent. The parties entered into an agreement for the past due rent, but the defendants failed to make all of the payments specified in the agreed order. The plaintiff petitioned the court and obtained both a judgment for immediate possession of the premises and a judgment against the defendants pursuant to the terms of the order. Thereafter, the plaintiff brought a breach of contract action against the defendants seeking damages under the lease for the period of time after the termination of the tenancy, as set forth in the agreed order. *Id.* at 727. The defendants filed a motion to dismiss pursuant to section 2-619, which was granted. On appeal, the plaintiff contended that the court improperly dismissed the breach of contract action under the doctrine of *res judicata* because the agreed order was not an adjudication of the rights of the parties and, therefore, did not constitute a final judgment on the merits. *Id.* at 728. Citing the following, we found that an agreed order can be the basis for the invocation of *res judicata*, stating:

“A judgment is final for purposes of *res judicata* if it terminates litigation on the merits so that the only issue remaining is proceeding with its execution. It is true that an agreed order neither constitutes a judicial determination of the rights of the parties nor represents judgment of the court. Instead, it is a recordation of the private agreement of the parties. However, an order entered by consent of the parties operates to the same extent for purposes of *res judicata* as a judgment entered after contest, because it is conclusive with respect to the matters settled by the order, judgment, or decree. Any other interpretation would effectually nullify all settlements because the same claim would be subject to the possibility of future litigation and double recovery. Therefore, we find

plaintiff's contention, that *res judicata* does not apply because an agreed order cannot be a final judgment on the merits, erroneous as a matter of law." (Citations omitted.) *Id.*

¶ 19 We determined, however, that *res judicata* would not apply beyond the specific language of the agreed order. *Id.* It then became necessary to interpret the agreed order to determine whether the disposition of the underlying case finalized any further actions. *Id.* at 729. There, the agreed order did not abrogate the lease agreement, which did not preclude the plaintiff from bringing a breach of contract action. Thus, as *Elliot* teaches and the trial court aptly stated, the "interpretation of the dismissal order should be accomplished by reference to the settlement agreement which led to it."

¶ 20 Here, unlike in *Elliot*, the agreed order specifically terminated the litigation. The trial court only retained jurisdiction to settle the accounting. The specific language of the August 29 order in case 2007-P-41 states that the "Court reserves jurisdiction to enforce the terms and conditions of the Settlement Agreement." Up until November 27, 2013, plaintiffs in fact vigorously pursued enforcement of their Settlement Agreement. That enforcement took place in case No. 2007-P-41.

¶ 21 Although plaintiffs did not sign the Settlement Agreement or submit a dismissal order until the sufficiency of defendant's accounting was addressed, any precondition to dismissal had been satisfied as of the August 29, 2012, order. And, as stated by the trial court in its memorandum opinion and order denying plaintiffs' motion to reconsider, the order reserved jurisdiction to enforce the Settlement Agreement, meaning that plaintiffs' claims did not "merely drift away from the case, subject to being refiled again. The claims were dismissed *pursuant to settlement.*" (Emphasis in original.) This makes sense; otherwise litigants could refile lawsuits all the time after entering into agreements disposing of the same claims.

¶ 22 We observe that the parties stated in their Settlement Agreement that the dismissal would be with prejudice, which plaintiffs argue has no bearing on any claims raised in the prior litigation. Plaintiffs, in what seems to be a related argument, maintain that the November 27 order made no determination of defendant's liability or plaintiffs' right to recover regarding any claim in the prior litigation. We fail to see the merits of plaintiffs' argument. It is clear by the language of the Settlement Agreement that the parties intended to close the estate and discharge defendant's liabilities as executor but that the trial court would reserve jurisdiction until defendant complied with all of the covenants and agreements contained in the Settlement and Release Agreement. It is also clear that plaintiffs repeatedly availed themselves of the enforcement of the covenants and agreements until the terms of the agreement were met, and the November 27, order discharged defendant, closed the estate, and terminated the court's jurisdiction over the enforcement of the agreement. Moreover, as the trial court stated, if there was any doubt about the preclusive effect of the August 29, 2012, order dismissing plaintiffs' claims, it was eliminated by the fact that the dismissal was followed by a final judgment order in the same case (*i.e.*, the judgment order approving defendant's accounting as executor and discharging her).

¶ 23 Almost four years later, plaintiffs filed the present complaint alleging the exact claims they presented in the previous complaint; the failure to make a full accounting, the failure to return trust property, and the failure to return documents. The doctrine of *res judicata* prohibits relitigation of not only those issues which were actually raised in the first proceeding but also any issue which might have been raised. *Elliott*, 226 Ill. App. 3d at 728.

¶ 24 B. Exceptions

¶ 25 In what appears to be related arguments, plaintiffs claim that *res judicata* should not apply when they learned of defendant's alleged misconduct after the August 29, 2012, and November

27, 2013, orders. Plaintiffs argue that they alleged that they began to observe the severity of the deterioration of Earl's home in May of 2013 through September of 2017, which requires different proof than the elements of the claims raised in the prior litigation. Plaintiffs never state what allegations are different than the prior litigation. Regardless, we need not address these arguments because, as previously stated, plaintiffs conceded that there is an identity of cause of action.

¶ 26 Plaintiffs further argue that the court in the first action expressly reserved their right to maintain the second action and the case involves a continuing wrong. Quite simply, we resolved these issues against plaintiffs when we stated above that both the accounting issue and the enforcement of the agreement were finalized in the August 29, 2012, and November 27, 2013 orders.

¶ 27 **III. CONCLUSION**

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

¶ 29 Affirmed.