2018 IL App (1st) 170185-U

FOURTH DIVISION
August 30, 2018

No. 1-17-0185

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JEROME J. MANCUSO, Plaintiff-Appellant, v. DIANE M. LAHMAN and JOSEPH J. MANCUSO, JR., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 2016 P 1764 Honorable John C. Griffin, Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Trial court's grant of summary judgment on tortious-interference claims was properly based on collateral-estoppel doctrine, as court in prior will contest had already conclusively ruled that defendant had not duly influenced drafting of estate plan that disinherited plaintiff.

¶ 2 This is one of two decisions we are filing simultaneously that arise from Helen Mancuso's estate. See *Estate of Mancuso*, 2018 IL App (1st) 170567-U.

¶ 3 Plaintiff-appellant Jerome Mancuso (Jerome) filed a five-count complaint against his sister and brother, Diane Lahman (Diane) and Joseph Mancuso, Jr., for a will and trust contest

(Counts I and II) and tortious interference with expectancy of inheritance (Counts III, IV, and V) (the tortious-interference claims). The case was originally filed in the probate division, where the probate judge dismissed the trust challenge (Count II) as time-barred and granted summary judgment in favor of defendants on the will contest (Count I), finding that Diane did not unduly influence Helen in the drafting of her estate documents. The probate judge, reasoning that the only remaining claims sounded in tort, then severed the tortious-interference claims and transferred them to the law division.

¶ 4 The law division judge then entered summary judgment on the tortious-interference claims based on the doctrine of issue preclusion, or collateral estoppel. The law division judge reasoned that the probate judge had already ruled that defendant did not unduly influence Helen in the drafting of her will—a ruling that Jerome did not timely appeal, thus rendering that ruling a conclusive determination on that issue. Because that issue, in the eyes of the law division judge, was the same issue that Jerome had to prove to succeed on the tortious-interference claims, and because he could not do so as a matter of law after the probate judge's conclusive finding, the law division judge entered summary judgment in favor of defendant.

¶ 5 It is this ruling by the law division, and only that ruling, that is before the court in this order.

¶ 6 Jerome maintains that collateral estoppel was inappropriate because (1) the tortious-interference claims did not depend on the same issue as the will contest—namely, whether Diane exerted undue influence over Helen, and (2) applying collateral estoppel would be unfair, because Illinois law required that Jerome postpone litigating the tortious-interference claims until his will contest claim had been resolved.

¶ 7 Finding no merit in either contention, we affirm.

¶ 8 BACKGROUND

¶ 9 Helen died on August 29, 2010. Her will was admitted to probate on October 11, 2011. Sometime thereafter, Jerome learned that he had been disinherited. In April 2012, Jerome responded by filing this lawsuit. Jerome's suit was ostensibly packaged as a will contest, but rather than actually contest Helen's will, Jerome's pleading instead purported to state a claim for "intentional interference with prospective advantage-inheritance." In May 2012, the probate court struck Jerome's petition. Thereafter, Jerome filed a first amended petition. Second, third, and fourth amended petitions followed in due course.

¶ 10 We need not belabor the procedural details that are irrelevant to this appeal. Suffice it to note that Jerome eventually filed a fourth amended petition that stated a claim for a will contest, along with three counts—the tortious-interference counts—that alleged tortious interference with expectancy for Helen's will, trust, and 401(k) account. The will contest alleged that Diane exerted undue influence over Helen in the procurement of her will. The tortious-interference claims alleged that Jerome possessed an expectancy of inheritance from Helen with which Diane interfered with by exerting "secret influences" upon Helen.

¶ 11 In August 2015, the court awarded Diane summary judgment on the will contest. As relevant here, in the course of rendering its decision, the court found no question of material fact as to the following: Helen was competent when she drafted the will; she relied on independent legal advice from lawyers who took steps to ensure she was acting of her own free will; Helen told her lawyers that nobody asked her to disinherit Jerome; and neither Diane nor Joseph engaged in any actions that would have unduly influenced Helen in the preparation of her will.

¶ 12 Soon thereafter, finding that only claims sounding in tort—the tortious-interference claims—remained, the probate judge severed those counts and transferred them to the law

division under case No. 16 P 1764. Shortly after that severance order, in April 2016, Jerome appealed a number of rulings not relevant to this appeal but including the entry of summary judgment on the will contest. Diane argued that the appeal of the order regarding the will contest was untimely under Illinois Supreme Court Rule 304(b)(1) (eff. Feb. 26, 2010), because that order "finally determine[d]" the right of Jerome to the assets of the will and, accordingly, had to be appealed within 30 days of their entry. This court agreed and dismissed that appeal of the summary judgment order on the will contest (along with other rulings). (That summary judgment order on the will contest was then appealed *again* once the law division case terminated, and this court again ruled that the appeal was properly dismissed the first time as untimely.)

¶ 13 That left the tortious-interference claims, now pending before the law division. In December 2016, the law division judge awarded Diane summary judgment on the tortious-interference claims based on the doctrine of collateral estoppel: The court found that the August 24, 2015 order entered by the probate judge awarding Diane summary judgment on the will contest, which was not successfully appealed, constituted a conclusive determination on whether Diane exerted undue influence over Helen in the procurement of the will. As we have noted, the probate judge ruled that Diane had *not* exerted undue influence over Helen.

¶ 14 The law division judge noted that one of the essential elements for the tortious-interference claims was tortious conduct, such as fraud, duress, or undue influence. The court saw no meaningful difference between the tortious or unduly influential conduct alleged in the will contest versus that alleged in the tortious-interference claims. Thus, under the doctrine of collateral estoppel, the law division judge ruled that Jerome was precluded from re-litigating that issue on the tortious-interference claims. This appeal followed.

¶ 15 ANALYSIS

¶ 16 Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). "In determining the existence of a genuine issue of material fact, courts must consider the pleadings, depositions, admissions, exhibits, and affidavits on file in the case." *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 48. We review an order granting summary judgment *de novo*. *Thounsavath v. State Farm Mutual Automobile Insurance Co.*, 2018 IL 122558, ¶ 16.

¶ 17 "Collateral estoppel may be applied when the issue decided in the prior adjudication is identical with the one presented in the current action, there was a final judgment on the merits in the prior adjudication, and the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior adjudication." *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77 (2001). Collateral estoppel has the virtue of "[f]oster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153–54 (1979); see *Kessinger v. Grefco, Inc.*, 173 Ill. 2d 447, 460 (1996) ("When properly applied, collateral estoppel or issue preclusion promotes fairness and judicial economy by preventing relitigation in one suit of an identical issue already resolved against the party against whom the bar is sought.").

¶ 18 We agree with the law division judge that each element of collateral estoppel was clearly satisfied. First, Jerome and Diane were both parties to the 2011 probate case. Second, the circuit court's August 24, 2015 order awarding summary judgment to Diane on the will contest was a final and appealable order under Illinois Supreme Court Rule 304(b)(1) that was not timely appealed and thus became conclusively resolved. And third, the issues are identical; as pleaded,

the tortious-interference claims, just like the will contest, hinge on whether Diane exerted undue influence over Helen.

¶ 19 Jerome says that there was no prior adjudication on the merits because "there was no prior, separate proceeding." Instead, he says, "there was only a prior ruling by the Circuit Court on some counts of the very same pleading" on which the law division later ruled. That is incorrect. When the probate judge severed the tortious-interference claims, transferred them to the law division, and renumbered them as case No. 16 P 1764, the probate judge created an entirely new and distinct case that existed separate and apart from the 2011 probate case. See *Carter v. Chicago & Illinois Midland Ry. Co.*, 119 Ill. 2d 296, 304 (1988) (severing claims has effect of "thereby creating separate actions"); *Estate of Wrigley*, 104 Ill. App. 3d 1008, 1015 (1982) (once trial court severed will contest from equitable claim to set aside decedent's gifts to defendants, "the practical effect was the creation of two distinct cases.").

¶ 20 The 2011 and 2016 cases were separate. And they were consecutive. See *People v. Tenner*, 206 Ill. 2d 381, 396 (2002) (collateral estoppel applies " 'when a party * * * participates in two separate and consecutive cases' " (quoting *People v. Moore,* 138 Ill.2d 162, 166 (1990)). Thus, the probate judge's finding that Diane exerted no undue influence took place in a prior, consecutive case—the 2011 probate case—that was binding on the 2016 law division case.

¶ 21 Jerome also maintains there was no identity of issues, because the elements of undue influence for a will contest on the one hand, and a claim for tortious interference with expectancy on the other, are different. It is certainly true that, while the claims are similar, they are not necessarily identical. "Although some of the evidence may overlap with a will contest proceeding," a plaintiff filing a tort claim for interference with inheritance "must establish the following distinct elements: (1) the existence of an expectancy; (2) defendant's intentional

interference with the expectancy; (3) *conduct that is tortious in itself, such as fraud, duress, or undue influence*; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages. (Emphasis added.) *In re Estate of Ellis*, 236 Ill. 2d 45, 52 (2009). That emphasized language is where Jerome hangs his hat; he says that, while the issue of "undue influence" may have been conclusively decided, issues of "fraud" and "duress" were not, and he could have proven such things.

¶ 22 Our supreme court has written that undue influence is "any improper … urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely." *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993). It is difficult to imagine that "undue influence" would not include fraud and duress within its broad umbrella.

¶ 23 Indeed, "[d]uress has been defined as including the imposition, oppression, *undue influence* or the taking of undue advantage of the stress of another whereby one is deprived of the exercise of his free will." (Emphasis added.) *In re Marriage of Riedy*, 130 Ill. App. 3d 311, 314 (1985). Both duress and "undue influence," then, involve improper conduct that overcomes the free will of another. It is hard to imagine that alleging "duress" is not also alleging "undue influence."

¶ 24 As for fraud: Our supreme court, in discussing the concept of undue influence, has also referred to "[f]alse or misleading representations concerning the character of another" that are "connected with the execution of the will." *Hoover*, 155 Ill. 2d at 412. Thus, again, the concept of "undue influence" would seem to encapsulate false or misleading statements (that is, fraud) concerning the character of another—here, presumably, the character of Jerome, impugning his integrity and honesty to turn Helen against him and cause her to disinherit him.

¶ 25 That aside, let's consider how Jerome pleaded his tortious-interference counts. See *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911 ("In ruling on a motion for summary judgment, the court looks to the pleadings to determine the issues in controversy."). The vast majority of the discussion of Diane's alleged misdeeds were contained in general allegations that were incorporated into both the will-contest claim and in the tortious-interference claims. Those general allegations included:

▪ Diane convinced Helen to change the beneficiary on Helen's insurance policy to Diane, thus beginning "a pattern of conduct wherein Diane involved herself in Helen's financial affairs and took advantage of her position of trust" for her own benefit;

▪ Diane criticized Jerome's handling of their grandmother Dora's estate and affairs;

▪ Diane accused Jerome, in Helen's presence, of plotting to steal Helen's money in the sale of certain real estate, later warning Helen not to trust Jerome;

▪ "*Helen threatened to withhold assistance to Helen if Helen continued to rely upon Jerome*";

▪ Diane's jealousy of Jerome led her to sue him over the distribution of grandmother Dora's estate and caused Diane to become ever more hostile toward Jerome;

▪ Diane misrepresented the facts of that litigation to Helen and demanded that Helen pay Diane's attorney fees; "*[a]ll of this had the effect of putting Helen into an extreme state of duress which continued for many months*;"

▪ Diane and her brother Joseph "*proceeded to carry out their plot to exert undue influence and to coerce Helen to change her will by intentionally putting Helen in a state of duress*" *by refusing to assist her in daily activities* "*unless Helen agreed to cooperate and make changes to her Will and Trust to ensure Jerome would not mismanage Helen's estate*";

▪ Diane and Joseph arranged for a different lawyer to revise Helen's estate plan;

▪ Helen's estate planning documents were executed at Diane's and Joseph's direction; Diane drove Helen to the lawyer, waited while she signed the documents, and drove her home thereafter, "*thus depriving Helen of her own free will and agency and leaving Helen no choice but to follow through with*" Diane's scheme "*for fear of reprisal by Diane and Joseph should Helen refuse to cooperate*."

¶ 26 These general allegations, as we have said, were incorporated into both the will-contest count and the tortious-interference counts. It is plain to see from what we have outlined above, and in particular the portions we emphasized, that the general allegations quite specifically alleged all manners of improper or undue influence, including threats, duress, manipulation, and misrepresentations. The tortious-interference counts, themselves, added nothing of substance to those general allegations, other than to summarize them and refer to them as "secret influences."

¶ 27 In her motion for summary judgment on the will contest, for her argument that Jerome could not establish undue influence, Diane offered the affidavit of the lawyer who drafted Helen's will. That lawyer, Mr. Taylor, swore that after meeting with Helen, he mailed her estate documents, and they scheduled a follow-up meeting weeks later. At that meeting, Helen met with Taylor and a second lawyer (not with Diane or Joseph). Helen confirmed to Taylor at that time that she wanted to disinherit Jerome. The probate judge was particularly moved by Taylor's averment that "Helen told him that no one had asked her to exclude Jerome from her estate plan and she confirmed that the changes made by her new will and trust were what she intended."

¶ 28 In granting summary judgment, the probate judge also noted Taylor's description of "the procedures he employed to ensure the lack of undue influence during the preparation and execution of the will," adding that "[t]here was no evidence to the contrary" in the record.

¶ 29 In opposition to the motion for summary judgment on the will contest, Jerome again reiterated the "secret influences" that Diane exerted over Helen. He argued about Diane's hostility toward him; the lawsuit she filed over Jerome's handling of their grandmother's estate and her criticism of Jerome that she relayed to Helen; and that Diane took Helen to a new lawyer to re-draft the will during the pendency of this lawsuit over grandmother Dora's estate. But as the probate judge noted, the *evidence* of these allegations was found "only in Jerome's affidavit" that he attached to his response to the motion for summary judgment, in which he averred:

> "During April 1995, my sister Diane brought my mother Helen ... in the dispute between myself and Dora's other grandchildren. Diane brought Helen to court during April of 1995 for the purpose of involving [Helen] unnecessarily in the distribution of grandmother Dora's estate. My sister Diane misinformed my mother Helen ... to cause [her] to pay the eight plaintiffs' [grandchildren] attorney's fees out of [Helen's] pockets ***."

¶ 30 The probate judge found "no competent evidence" to support Jerome's conclusions, referring to his affidavit as containing "scant facts, relying heavily on his beliefs, opinions and conclusions in describing Diane's actions in connection with that litigation and its purported influence on Helen." The court found "no competent evidence" that, in fact, Helen actually paid attorneys' fees in that matter, nor was there any competent testimony as to her reason for doing so, if she did. The court found "no facts offered in support" of the claim that Diane misinformed Helen in this regard in any way. The probate judge concluded:

> "[Jerome] asserts merely that Diane tried to get his mother to disinherit him by misrepresenting to her the way that Jerome had mishandled his grandmother's estate. Moreover, his assertions are based upon beliefs, opinions, and conclusions, not facts.

> Also … the evidence is that Helen continued to exhibit a warm and loving relationship with Jerome until her death. The facts asserted herein do not equate to the series of lies and misrepresentations that were alleged in the *Hoover* case[,] where our supreme court described a 'subtle, invidious kind of undue influence.' [Citation.]"

¶ 31 In light of what was argued at the summary judgment motion regarding the will contest, and what the probate judge ruled, it is clear that the trial court's ruling on the lack of undue influence encapsulated any arguments Jerome might make with regard to the tortious-interference counts. His claim that he would argue "duress" and "fraud" and "secret influences," separate and apart from "undue influence," falls flat, considering that those are the same allegations he alleged and argued when opposing summary judgment on the will contest.

¶ 32 Even if we could divine some difference between fraud and duress that would make those actions different from "undue influence," Jerome commingled those claims in his complaint and in his arguments regarding the will contest. And the probate judge rejected each of them, finding no evidence of misrepresentations or manipulation of any kind, finding no evidence that Helen's estate documents were the product of anything but her own free will.

¶ 33 The law division judge thus correctly ruled that there was an identity of issues between the probate judge's ruling of no-undue-influence in the 2011 probate case and the tortious-interference claim in the 2016 law division action.

¶ 34 Jerome makes a final objection—one of fundamental fairness. It is well established that collateral estoppel is an equitable doctrine. *Gumma v. White*, 216 Ill. 2d 23, 38 (2005); *DuPage Forklift*, 195 Ill. 2d at 77; *Herzog v. Lexington Township*, 167 Ill. 2d 288, 294 (1995). As such, "[e]ven with the threshold elements of the doctrine met, courts will not apply collateral estoppel to preclude relitigation 'unless it is clear that no unfairness results to the party being estopped.' "

Allstate Indemnity Co. v. Hieber, 2014 IL App (1st) 132557, ¶ 63 (quoting *Village of Crestwood v. Ironshore Specialty Insurance Co.*, 2013 IL App (1st) 120112, ¶ 3). "A court's determination not to apply collateral estoppel because of unfairness typically rests either on some inadequacy in the forum in which the matter was first determined [citation], or on the view that the party to be estopped did not previously have a full and fair opportunity to litigate the issue, perhaps because the party had no motivation to vigorously litigate the issue in the earlier case." *Richter v. Village of Oak Brook*, 2011 IL App (2d) 100114, ¶ 25.

¶ 35 As we have demonstrated above, however, Jerome was given a full and fair opportunity to prove the existence of a question of material fact on the issue of undue influence. The probate judge simply ruled that he failed to do so.

¶ 36 In a similar vein, Jerome claims that it would be unfair to apply collateral estoppel because, under *DeHart v. DeHart*, 2013 IL 114127, he could not litigate the tortious-interference claims until his will and trust contest claims had been resolved against him. See *id*. ¶ 41 ("If plaintiff fails in his will contest on remand in the probate court, however, he would then be able to proceed against defendant on his tort claims."). From there, citing *A.W. Wendell & Sons, Inc. v. Qazi*, 254 Ill. App. 3d 97, 108 (1993) for the proposition that "collateral estoppel will not be applied unless it appears that the party against whom the estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding[,]" Jerome concludes that it would be unfair to apply collateral estoppel here because he did not have a chance to litigate the tortious-interference claims.

¶ 37 The problem with that argument is that, while Jerome may not have had the chance to litigate certain *claims*—the tortious-interference counts—he most certainly had the opportunity to litigate the *issue* of undue influence. The law division judge did not find the claim precluded

but the issue of undue influence precluded. *Wendel* spoke in terms of issues. See *id*. It just so happens that, in this case, that precluded issue was the death knell of the tortious-interference counts, because Jerome could not maintain those claims without showing some improper conduct that overcame the will of Helen in drafting her estate documents.

¶ 38 Jerome had a full and fair opportunity to litigate the issue of undue influence and lost. He did not appeal that loss in a timely manner. The probate judge's ruling became binding and conclusive. The law division correctly applied the elements of collateral estoppel, and we find nothing unfair or inequitable about that ruling that would permit us to disturb it.

¶ 39 Affirmed.