

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
THIRD DISTRICT

CASE NO. 3D2023-2262

SHEILA NIEBURG EDELSTEIN,

Appellant,

vs.

ERIC W. SULZBERGER, et al.,

Appellees.

On appeal of a final orders granting summary judgment of the Circuit Court
for the Eleventh Judicial Circuit, in and for Miami-Dade County

INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

This is an appeal by Plaintiff/Appellant, Sheila Nieburg Edelstein (hereinafter referred to as “Shiela”), from a final summary judgment entered against her and in favor of her lawyer, Eric W. Sulzberger, and his law firm, Sulzberger and Sulzberger. The summary judgment was entered against her on the claims for legal malpractice, breach of fiduciary, constructive fraud, and fraudulent misrepresentation. (R. 5377-5379) (January 8, 2023 Order).¹ The basis for the trial court’s ruling was that Shiela’s claims “had been finally resolved/adjudicated.” (R.5378).

Prior to entry of the final summary judgment, a partial summary judgment was also entered concerning applicability of Florida Statute § 733.103 as a defense to Sulzberger’s legal malpractice. This ruling had the effect of precluding certain evidence and argument concerning fraud, undue influence, or mistake as to Bernard’s estate plan as devised and implemented by Sulzberger adverse to his other client, Shiela. (R.4688-4690).

Neither summary judgment order expressly mentions either res judicata or collateral estoppel as a legal predicate for the trial court’s rulings. Of necessity, this would be the only basis upon which the trial court could enter these orders.

¹ References to the record on appeal will be in the form “R. ____.”

This Court has jurisdiction under rule 9.030(b)(1)(A), Florida Rules of Appellate Procedure. *See also* Fla. R. App. P. 9.110(k) pertaining to review of partial final summary judgments.

A. Overview of the Facts

The orders granting summary judgment were not predicated upon an analysis of the facts giving rise to Shiela's claims sounding in legal malpractice and other attorney malfeasance. As set forth in the orders, the trial court examined the Petitions filed in the probate court and the claims pursued in this action. Nevertheless, to best understand this matter, the salient facts giving rise to Shiela's claims are set forth below.

After a nineteen-year relationship, Sheila, married Bernard Edelstein approximately three weeks before he died on November 20, 2009, following his battle with metastatic cancer. (R.334). The Appellee (Eric Sulzberger) represented Sheila at various stages of Bernard's life, illness, and after his death. His representation was primarily for the purpose of Bernard or Sheila's joint and individual estate planning, or for legal advice regarding Sheila's financial interest in Bernard's sizeable estate. Bernard's estate was "conservatively" valued at over \$21 million several months before his death. (R.332). Bernard and Sheila married on the advice and urging of Attorney Sulzberger, who had advised the couple to wed in order to gain certain tax advantages for themselves and for future bequests to Sheila.

(R.332). The effect of the marriage was actually to confer upon Bernard's Estate a tax benefit in the amount of the payment to Sheila, thereby relieving the Edelstein Estate of any payments that were to be made to her under the pre-marriage estate plan.

The parties entered into a prenuptial agreement at the urging of Attorney Sulzberger. At the time of the entry of the prenuptial agreement, Bernard lacked capacity and was unduly influenced by Sulzberger. Had there not been a prenuptial agreement, Sheila would have been entitled to that which was provided for in the prior pre-marital estate plan, or, more importantly, either an elective share or the amount she would receive under intestacy as a pretermitted spouse.

It was always Bernard's intention, prior to becoming deathly ill, to leave a significant portion of his estate to Sheila. Specifically, in 2006, Bernard directed Sulzberger to draft a will (the "2006 Will") leaving Sheila a monetary bequest of \$500,000, all of his personal property, and a \$2M interest in a limited partnership.

(R.332). Subsequently, in 2008, Sulzberger drafted (and Bernard executed) the "Bernard S. Edelstein Revocable Trust ("2008 Trust")," providing for a bequest to Sheila of \$500,000 and created trusts in which 30% of the estate's income would be distributed as follows:

- 5% to the Lauren Nieburg Trust
- 5% to the Neil Nieburg Trust

- 20% to the Sheila Nieburg Trust

(R.332).²

After the couple's execution of the antenuptial agreement, Sulzberger induced Bernard to then sign a series of deathbed amendments to his testamentary documents all while suffering from cancer negatively affecting his mental acuity and heavily medicated on pain medications rendering him incapable of understanding what he was signing. These amendments deleted a provision that originally provided Sheila a 20% income share of Bernard's multi-million-dollar estate, contrary to what Appellant alleged was Bernard's original intent. (R.341).

Sheila's interest in the trust was ultimately reduced from a 20% income interest of Bernard's \$21 million estate to a general bequest of \$2.36 million, and she waived valuable spousal rights as a consequence of the antenuptial agreement, including homestead rights in the home she had shared with Bernard for over a decade. (R.331).

Based upon these facts, the gist of the allegations against Sulzberger was that he committed malpractice as Sheila's attorney by taking action adverse to her. In sum, Sulzberger had two clients, Bernard and Sheila, and he affirmatively chose to disregard his professional obligations to Sheila before, during, and after Bernard's

² The balance of the estate was to be distributed in trust for the benefit of Bernard's two biological children from a prior marriage.

death to the benefit of third parties – who were also Sulzberger’s clients. Sulzberger’s actions resulted in a significant degradation of Sheila’s inheritances from Bernard. He also failed to properly advise her on her ability to challenge the testamentary and legal documents during the estate’s administration on the grounds of lack of capacity or undue influence. (R.347).

Notwithstanding these facts, nearly simultaneous with the filing of this case in November 2011, Sheila also initiated two actions in the probate court. First, Sheila filed an action seeking to revoke Bernard’s will and challenging the validity of the antenuptial agreement (hereinafter referred to as the “Probate Action”). (App. III -Case No. 2011-4255 CP 04)³. Sulzberger was not a party to this action. Second, Sheila filed an action seeking declaratory relief, to revoke trust amendments on the basis of fraud, undue influence and/or lack of capacity (hereinafter referred to as “Trust Action”). (App. II -Case No. 11-4254 CPO4). Sulzberger was named in his capacity as trustee in the Trust Action.

Recognizing that the resolution of the Probate and Trust Actions challenging Edelstein’s will and the couple’s antenuptial agreement had some bearing on this case, Sheila successfully moved to stay this case until final resolution of the probate proceeding. (R.150-153 and R.155). Ultimately, Sheila’s claims in the Probate and

³ An Appendix has been filed simultaneously with this Initial Brief which includes the Petitions filed in both the Trust Action and Probate Action. The Petitions in the Appendix are the version provided to the trial court and already had handwritten notations therein.

Trust Actions case were dismissed by the probate court. Once the probate proceeding was dismissed, Shiela moved to lift the stay in this case and resumed litigation. (R.161-162).

B. Procedural Posture and Order Granting Summary Judgment in this Case

The Amended Complaint alleges that Sulzberger had on-going attorney client relationships with Shiela, Bernard, and other members of Bernard's family. These attorney-client relationships existed when Sulzberger devised and implemented Bernard's testamentary documents to the significant detriment of his client Shiela. All of this was done "behind Shiela's back," without disclosure and without even, any attempt, to obtain a conflict waiver. (R.2326 - deposition transcript p.17 confirming Sulzberger did not obtain a conflict waiver from Sheila). The record reflects compelling evidence synthesizing and confirming the allegations set forth in the Amended Complaint. (R.3385-3393). In addition to the legal malpractice claim, the Amended Complaint states claims against Sulzberger for breach of fiduciary duty, constructive fraud, and misrepresentation. All of these counts solely concern Sulzberger's actions as Shiela's lawyer. These claims were not brought in the Probate nor Trust Actions that were ultimately dismissed.

This Court should be aware that Sulzberger initially filed a Motion for Summary Judgment arguing that Shiela's claims for legal malpractice, breach of

fiduciary duty and fraud were barred by collateral estoppel. (R.770-1230). This motion was denied. (R. 3653).

These separate nature of the claims in this case were commented upon by the trial court in one of the many hearings held on summary judgment. From the outset, the trial court recognized Sulzberger's potential liability when stating, on the record, the following:

“Under this scenario, if he's (Sulzberger) the driving force between these changes which could have an effect on her (Sheila), why shouldn't he have backed away from both and said, “Here's my idea. You both go do what you've got to do.” Why isn't that at least a question a fact question? That your own case.”

(R.4622).

Furthermore, the trial court also recognized the importance of Attorney Sulzberger's letter dated July 21, 2009,⁴ to provide, at least, a factual predicate for the Sheila's claim theory that Sulzberger was the “driving force” to initiate the changes to Bernard's estate, which were inarguably detriment to Sheila. Importantly, the trial court stated the following:

“[i]f the lawyer gave bad advice, he may be on the hook **what she couldn't have gotten in the probate.** And there's a big argument as to 30 percent elective share, pretermitted spouse, was the pre-nup properly signed or not. Those are different issues. (emphasis added)

Mr. Sulzberger seems to be too close to both for me to grant summary judgment today, based on what I've heard.

⁴ The letter is attached to Sheila's Omnibus Memorandum of Law dated December 5, 2018. (R.4078)

(R.4628)

After making these comments, the trial court denied Sulzberger's motion for summary judgment. It was after only subsequent successive motions that the two summary judgment orders were entered now warranting this appeal.

A successive motion for summary judgment was filed by Sulzberger and the Court granted same finding "unfortunately for Plaintiff in this case, the conduct for which Sulzberger's liability would flow from has been adversely adjudicated against her and affirmed on appeal." (R. 4806-4897 and R.5398-5401).

This statement by the trial court is incorrect. Neither the Trust Action to which Sulzberger was a party nor the Probate Action, to which Sulzberger was not a party, adversely adjudicated the claims in this case. The trial court's order incorrectly presupposes that Sulzberger was a party to the Probate Action. Namely, the trial court states that that Sulzberger was a party to both the Probate and Trust Actions. (R. 5399). This is incorrect. (App. III - Case number 11-4255 CP04). Sulzberger was a party, as trustee, in the Trust Action. Regardless, neither action adjudicated legal malpractice or other attorney malfeasance.

Sulzberger was, in fact, a named party in the Trust Action (case number 11-4254 CP04) because he was both the trustee of Bernard's trust and Shiela's Estate. As such, Sulzberger was sued under the trust statutory scheme to invalidate the trust amendments on the basis of fraud and undue influence. (App. II).

Nowhere in the Petition in the Trust Action are there claims for legal malpractice, breach of fiduciary duty, fraud or misrepresentation against Sulzberger *as an attorney*. Rather, the claims in the Trust Action, of necessity, were pursued in his capacity as a trustee.

STANDARD OF REVIEW

The standard of review of a summary judgment involving collateral estoppel and/or res judicata is de novo. *Fernandez v. Cruz*, 341 So. 3d 410 (Fla. 3d DCA 2022).

SUMMARY OF ARGUMENT

This Court must reverse both summary judgment orders. The partial summary judgment predicated upon Florida Statute § 733.103 must be reversed because it has no applicability to the legal issues and facts to be resolved by the trier of fact in this case. The claims against Sulzberger here are for actions and/or inactions on his part *as an attorney* that caused damage to his client, Shiela. This is not a “collateral action” nor a “proceeding relating to devised property.” Even if Bernard had capacity and was not unduly influenced in the development and implementation of his estate plan, Sulzberger would still be at fault because, given his conflict of interest, he should not have been involved in anything that would negatively affect his client, Shiela, in the first place.

Neither the partial nor final summary judgment, in any way, adjudicated the actual legal malpractice and attorney malfeasance raised in this case. First, these claims were not raised in either adversary proceeding and, second, Sulzberger was only a party to the Trust Action. The trial court expressly recognized that it would be unusual for the probate court to address a legal malpractice action. This statement is correct but does not go far enough. This is because the probate court would not and did not have jurisdiction to resolve Shiela's legal malpractice claims. Collateral estoppel and res judicata are both wholly inapplicable and have no preclusive effect in this case. Accordingly, both summary judgments were improper and must be vacated.

ARGUMENT

I. Summary Judgment Final Judgment must be reversed because none of the claims raised in Plaintiff's Amended Complaint were raised in the Trust Action and Sulzberger was not a party to the Probate Action.

The trial court's ruling is erroneous for a number of reasons and must be reversed. The most glaring reason is that the trial court's finding that Sulzberger was a party to both the Probate and Trust Actions. This is incorrect. Sulzberger was not a named party in the Probate Action. (App. III). Sulzberger was, in fact, a named party in the Trust Action in his capacity as Trustee of Bernard's estate. (App. III). While the Trust Action mentions that Sulzberger is an attorney, the Trust Action does not state causes of action for which Sulzberger was sued in this particular case.

These include legal malpractice, breach of fiduciary duty, fraud, and misrepresentation.

A. Collateral Estoppel Does Not Apply.

1. Sulzberger was not sued for legal malpractice in the Trust Action.

Clearly, there is no basis upon which to hold that the Probate and Trust Actions preclude this malpractice action (and other claims) against Sulzberger. There can be no collateral estoppel from the Probate Action because Sulzberger was not a party. With regard to the Trust Action, collateral estoppel does not apply.

In *Selim v Pan Am Airways Corp.* 889 So.2d 149 (Fla. 4th DCA 2000), the Court set forth the four-prong test for the application of collateral estoppel to require the following:

- a. The issue at stake is *identical* to the one involved in the prior proceeding;
- b. The issue was *actually litigated* in the prior proceeding;
- c. The determination of the issue in the prior litigation must have been *critical and necessary* part of the Judgment in the first action; and
- d. The party against whom collateral estoppel is asserted must have had a *full fair opportunity to litigate* the issue in the prior proceeding.

(emphasis added).

A plain reading of these four prongs confirms that the instant case as compared to the Trust Action do not satisfy the test set forth in *Salim*. Simply put, these were separate cases involving different claims. A plain reading of the Trust Action confirms that the only thing raised was Sulzberger's failings as a Trustee, which is a different issue from that of his failings as an attorney. This is why no claim for Sulzberger's legal malpractice was articulated in the Trust Action. The potential use of some of the same evidence in both the Trust Action and this lawyer malfeasance case is irrelevant. This is particularly true because the Trust Action was resolved on a Motion to Dismiss without a trial ever having taken place.

A reading of the probate proceedings confirms that Sulzberger was never party to the Probate Action and was solely sued in his capacity as a Trustee in the Trust Action. This is precisely the reason why Florida's Trust Statutes are mentioned throughout the Petition in the Trust Action. (App. II). Indeed, Shiela is in the best position to know how and why Sulzberger was party to the Trust Action as the Plaintiff bringing the action against Sulzberger.

In the order granting summary judgment, the trial court also goes on to state that in the Motion to Stay dated January 24, 2013, Shiela states that "resolution of the Probate issues may materially affect the pending malpractice case in terms of both liability of the Defendants and the damages suffered by the Plaintiffs." This is still true because the legal malpractice action may not have ripened if the underlying

trust documents were set aside. In addition, the trial court failed to appreciate that even if the probate actions were successful this would not obviate a legal malpractice claim but could only serve to mitigate any damage that could be sought by Shiela against her attorney, Sulzberger.

Finally, in the order granting summary judgment, the trial court incorrectly held the Probate Court's dismissal were a final resolution of the issues that were or could have been brought against Sulzberger. This could not be so by the collateral estoppel test set forth in *Salim*. The elements mentioned above make clear that collateral estoppel is a much more difficult and stringent standard than the trial court set forth in its Order(s).

B. Res Judicata Does Not Bar the Legal Malpractice Actions.

While the words "res judicata" were not used by the trial court, the summary judgment order states: "unfortunately for Plaintiff in this cause, the conduct for which Sulzberger's liability would flow from has been adversely adjudicated against her and affirmed on appeal." (R.5399). This is not true. As stated, Sulzberger's malpractice and other malfeasance in his capacity as an attorney were not raised in the Trust Action.

Florida law provides that the doctrine of *res judicata* applies where four elements are present: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality

of the persons for or against whom the claim is made. *Professional Roofing and Sales, Inc. v. Flemmings*, 138 So. 3d 524, 527 (Fla. 3d DCA 2014). A defendant's failure to meet all four of these elements is fatal to a res judicata defense. *See e.g., id.*; *United Auto. Ins. Co. v. Law Offices of Michael I. Libman*, 46 So. 3d 1101, 1103 (Fla. 3d DCA 2010) (*res judicata* did not apply as neither the parties nor the cause of action were the same). Importantly, a defendant's failure to meet all four of these elements is fatal to a res judicata defense. *See e.g., id.* Here, this matter is not barred by *res judicata* because the instant case does not share an identity of cause(s) of action nor identity in the thing sued for in the Trust Action. In the Probate Action, there is not even the identity of parties.

Sheila acknowledges that the presence of identity of cause of action is a question of "whether the facts or evidence necessary to maintain the suit are the same in both actions." *Accardi v. Hillsboro Shores Imp., Ass'n, Inc.*, 944 So. 2d 1008, 1012 (Fla. 4th DCA 2005); *Gold v. Bankier*, 840 So. 2d 395, 397 (Fla. 4th DCA 2003) ("identity of the causes of action is established where the facts which are required to maintain both actions are identical"). Although similar allegations may arise in relation to the prior lawsuit, "the mere reference to a prior controversy is insufficient to raise the *res judicata* issue." *United Auto. Ins. Co. v. Law Offices of Michael I. Libman*, 46 So. 3d 1101, 1104 (Fla. 3d DCA 2010).

This Court recently faced this issue in the case of *Fernandez v. Cruz*, 341 So. 3d 410 (Fla. 3d DCA 2022). In reversing the trial court’s grant of summary judgment, this Court held that res judicata would not apply where the same party appeared in cases in different capacities. This is precisely what happened in this matter, and it is even more compelling because Shiela’s causes of action are different.

Importantly, the Trust Action did not sanitize nor evaluate whether Sulzberger committed legal malpractice. What was sought in the Trust Action, where Sulzberger was sued for his actions as Trustee, was an invalidation of trust amendments and related damages for breach of trust. An action was not brought in the Trust Action against Sulzberger for his malpractice and other attorney malfeasance.

1. The Probate Court had no jurisdiction to resolve legal malpractice and other attorney malfeasance claims.

Florida law provides that probate matters are “in rem proceedings.” Fla. Stat. § 731.105. Typically, “in rem” is merely the adjudication of rights to a piece of property. “A circuit court, sitting in its probate capacity, has inherent jurisdiction to monitor the administration of an estate and to take such appropriate action as it may deem necessary to preserve the assets of the estate for the benefit of the ultimate beneficiaries.” *Delbrouck v. Eberling*, 177 So. 3d 66, 70 (Fla. 4th DCA 2015). This

is precisely why Eric Sulzberger was not named in the Probate Action and it has no preclusive effect upon this matter.

The same logic applies to the Trust Action. A close reading of the Petition in the Trust Action (case number 11-4254) confirms that Sulzberger was not sued in his capacity as an attorney nor was a claim legal malpractice articulated. While the Petition in the Trust Action names Mr. Sulzberger, he is party to only two (2) counts therein: (1) breach of duty of trust, breach of fiduciary duty, breach of duty of loyalty, breach of impartiality, and failure to account; and (2) tortious interference with expectancy. Contrary to the trial court's evaluation of the Trust Action, the salient counts do not specifically mention Mr. Sulzberger in his capacity as Sheila's attorney. Rather, these counts in the Trust Action are specifically directed to Mr. Sulzberger's role *as trustee*. See Counts IV and V of the Petition in the Trust Action. Throughout these counts there is reference to Mr. Sulzberger (and Aaron Edelstein) as having breached duties relative to trust administration. In fact, the counts within the Petition it makes specific reference to various sections of Chapter 736, Florida Statutes, which is the Florida Trust Code. Thus, the claims therein were directed to Mr. Sulzberger relative to his violation of statutory provisions in his capacity as trustee. This is also important because the trust code at Chapter 736.0201, Florida Statutes, specifically delineates the types of proceedings a circuit court is permitted

to resolve relative to trust administration. As this Court is aware, this section of statute confirms that circuit courts are permitted to resolve the following:

- (a) Determine the validity of all or part of a trust;
- (b) Appoint or remove a trustee;
- (c) Review trustees' fees;
- (d) Review and settle interim or final accounts;
- (e) Ascertain beneficiaries; determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments; instruct trustees; and determine the existence or nonexistence of any immunity, power, privilege, duty, or right;
- (f) Obtain a declaration of rights; or
- (g) Determine any other matters involving trustees and beneficiaries.

The trust administration statute does not provide jurisdiction for resolution of disputes between parties and their attorneys for malpractice. Again, this is precisely why the malpractice lawsuit was separately and simultaneously filed and stayed by the trial during the pendency of the Trust Action.

Succinctly stated, based upon the limited jurisdiction afforded by the Probate and Trust Code(s), the Probate Action (which Sulzberger was not party to) and the Trust Action pending before Judge Muir could not, as a matter of law, resolve whether Sulzberger's legal/professional conflict of interest – *as an attorney* – results in legal malpractice. And, it has always been Sheila's position (and confirmed by

Florida law) that Sulzberger had an un-waivable conflict under Florida's Rules of Professional Responsibility and his initiation of any estate planning advice for Bernard, which benefited his other clients (i.e. Aaron Edelstein and other family members), and was detrimental to his other client Sheila, constitutes *legal malpractice* which could not be resolved by the probate court.

II. The Partial Summary Judgment Must be Reversed Because Florida Statute § 733.103 is not a defense to legal malpractice and other attorney malfeasance.

The trial court has seemingly forgotten the maxim that “no wrong shall be without a remedy.” *See DeWitt v. Duce*, 408 So. 2d 216 (Fla. 1981). Contrary to this maxim, however, the trial court's ruling effectively permits an attorney to commit legal malpractice yet there would be no remedy if probate completes its exercise. This is both factually and legally incorrect. *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 586 So. 2d 1221 (Fla. 3d DCA 1991)(legal malpractice claim by estate permitted even though will went through probate).

First, contrary to Sulzberger's position and the trial court's determination, this malpractice action is not collateral to the trust/will, but instead, a completely separate and independent action that could not have been remedied by the probate court. This is precisely the reason why it was simultaneously but separately filed by Sheila. “An attack is considered collateral if there would have been adequate relief in the probate proceedings.” *Ebeling v. Voltz*, 454 So. 2d 783, 785 (Fla. 4th DCA 1984). This is

precisely why the legal malpractice action is not a collateral attack on Bernard's testamentary instruments relative to the beneficiaries' interests. Rather, the instant case is an independent action for, among other things, Sulzberger's legal malpractice arising from their breaches of legal, fiduciary, and ethical duties to Plaintiff. (R.4063, which is the affidavit of Thomas M. Lynch, IV).

The trial court's order granting partial summary judgment cites no authority standing for the specific proposition that a claim for legal malpractice is barred by Section 733.103, Florida Statutes. No authority is cited because the applicable cases are inapposite. *See Neumann v. Wordock*, 873 So. 2d 502 (Fla. 2d DCA 2004)(reversal of summary judgment because tortious interference could not be resolved in probate proceeding). Moreover, applicable law is clear that *inter vivos* transfers cannot be resolved in probate as well. *See Martin v. Martin*, 687 So. 2d 903 (Fla. 4th DCA 1997)(reversal of summary judgment because *inter vivos* transfers could not be resolved in probate proceeding). In the case *sub judice*, immediately prior to his demise, Bernard also made certain *inter vivos* transfers which had a value in excess of \$17,000,000.00, which could not have been addressed by the probate court. (R.3405-3406).

CONCLUSION

For all of the foregoing reasons, Sheila respectfully requests that this Court reverse both the order of final summary judgment and the order granting partial summary judgment.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was filed through eDCA and served on all counsel of record, as shown below, by e-mail service, this 29th day of May 2024:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with Rule 9.210, Florida Rules of Appellate Procedure, and is prepared in Times New Roman 14-point font.

/s/Adam G. Rabinowitz
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