UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-81298-CIV-MARRA/MATTHEWMAN

JULIAN BIVINS, as personal representative
of the ancillary estate of Oliver Wilson Bivins,

Plaintiff,

vs.

CURTIS CAHALLONER ROGERS, JR. as
former guardian, et al,

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART SUMMARY JUDGMENT

This cause is before the Court upon Defendants Keith B. Stein, Law Offices of Keith B. Stein, PLLC n/k/a Stein Law, PLLC, and Beys Liston Mobargha & Berland, LLP f/k/a Beys Stein Mobargha & Berkland, LLP's ("Stein Defendants") Motion for Final Summary Judgment (DE 225) and Defendants, Stephen M. Kelly, as Successor Guardian, Brian O'Connell, Ashley N. Crispin and Ciklin Lubitz & O'Connell's ("CLO Defendants") Motion for Final Summary Judgment (DE 227). The Motions are fully briefed and ripe for review. The Court has carefully considered the Motions and is otherwise fully advised in the premises.

I. Background

The facts, as culled from affidavits, exhibits, depositions, answers, answers to interrogatories, and taken in the light most favorable to the non-moving party, are as follows:

Oliver Wilson Bivins, Sr. ("Oliver Sr.") was married twice. His first marriage produced one son, Julian Bivins ("Julian"). Oliver Sr. Was married to his second wife for 49 years and adopted a son, Oliver Bivins, Jr. ("Oliver Jr"). In 2010, Oliver Sr. and his second wife divorced,

and she passed away in 2011. On May 10, 2011, Oliver Sr. was adjudicated incapacitated and professional guardian, Curtis Rogers ("Rogers") was appointed as permanent guardian. Mr. Rogers eventually resigned and Brian Kelly became successor guardian of Oliver Sr. The CLO Defendants appeared as counsel for Mr. Rogers and then Mr. Kelly. At some point in 2012, the guardian retained the Stein Defendants to handle matters relating to real property located in New York City.

Oliver Sr. died on March 2, 2015. According to his last will and testament, Julian is the sole heir and executor of Oliver Sr.'s estate. Julian, as personal representative of the estate of the Oliver Sr., is Plaintiff. Julian filed this action against the Guardians, the CLO Defendants, and the Stein Defendants alleging negligence, professional negligence and breach of fiduciary duty in handling the guardianship proceedings.

Kelly, as successor guardian, and the CLO Defendants move for summary judgment on all claims against Plaintiff. They claim that no breach of duty can be established because the guardians acted only upon approval of the guardianship court for each action complained of here. Moreover, they assert that Plaintiff, as the estate, cannot escape the preclusive effect of various settlements and un-appealed guardianship court orders.

The Stein Defendants contend they were retained to represent the guardians of Oliver Sr. in a limited capacity to protect Oliver Sr.'s interest in real estate located on Lexington Avenue in New York City. The Stein Defendants argue that Plaintiff is barred from bringing claims under the doctrines of judicial estoppel and res judicata. Moreover, the Stein Defendants contend there can be no malpractice because the actions were approved by the guardian court. Lastly, the Stein Defendants argue that Plaintiff's claims exceed the scope of the retainer agreement.

Plaintiff responds that the guardian and the guardian's attorneys violated the "prudent investor" standard of care through mismanagement of the Ward's estate. Plaintiff also states that the Estate is not bound by Julian Bivins' actions prior to his appointment as personal representative because Oliver Sr. had not yet died. With respect to preclusion, Plaintiff states that the Estate seeks damages for other relief than in the previous action, he sues under different causes of action, and he did not consent to be bound by the earlier proceedings.

II. Summary Judgment Standard

The Court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The stringent burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The Court should not grant summary judgment unless it is clear that a trial is unnecessary, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should be resolved against the moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(a), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574,

586 (1986). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by citing to particular parts of materials in the record . . . or showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) and (B).

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party "is merely colorable, or is not significantly probative, then summary judgment may be granted." Anderson, 477 U.S. 242, 249-50.

III. Discussion[1]

The parties agree that multiple orders and settlement agreements were entered in the guardianship case. The issue before the Court is the preclusive effect of those orders and agreements upon the parties before the Court in the instant case.

The Court begins its analysis with a discussion of relevant Florida preclusion law. Under Florida law, collateral estoppel will preclude relitigation of an issue when the (1) the identical issue; (2) has been fully litigated; (3) by the same parties or their privies and (4) a final decision has been rendered by a court of competent jurisdiction. See Wingard v. Emerald Venture Florida LLC, 438 F.3d 1288, 1293 (11th Cir. 2006); Quinn v. Monroe County, 330 F.3d 1320, 1329 (11th

[1] In a diversity case, the Court applies Florida law. See Pendergast v. Sprint Nextel Corp., 592 F.3d 1119, 1132–33 (11th Cir. 2010); Royal Ins. Co. of America v. Whitaker Contracting Corp., 242 F.3d 1035, 1040 (11th Cir. 2001).

Cir. 2003). Under res judicata, a final judgment issued by a court of competent jurisdiction bars a subsequent suit between the same parties based upon the same cause of action. Felder v. State, Dept. of Management Services, Div. of Retirement, 993 So. 2d 1031, 1034 (Fla. Dist. Ct. App. 2008). Res judicata precludes consideration not only of issues that were raised but also of issues that could have been raised, but were not raised in the prior case. Fla. DOT v. Juliano, 801 So.2d 101, 105 (Fla. 2001). The doctrine of res judicata applies under Florida law when the following conditions 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 quality in persons for or against whom claim is made." Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324, 1332 (11th Cir. 2010) (citing Fla. Bar v. Rodriguez, 959 So. 2d 150, 158 (Fla. 2007)); Bloch v. Home Mortgage, No. 14-cv-80464, 2014 WL 12580434, at * 1 (S.D. Fla. July 23, 2014).

The Court finds that res judicata applies to the claims brought against the guardian Defendant. In so finding, the Court relies upon Kaplan v. Kaplan, 624 F. App'x 680 (11th Cir. 2015). In that case, the plaintiff sued the defendant personally for acts arising out of the defendant's duties as personal representative. Id. at 681. The Court found that the federal proceeding was precluded by res judicata under Florida law because the plaintiff had the opportunity to object to the final accounting in the probate proceeding, but failed to raise any claims for breach of fiduciary duty or failure to mitigate the estate's losses or claims relating to the personal representative's settlement of a wrongful death action. Id. at 683. The Court also concluded there was an identity of parties even though the probate proceeding was against the personal representative of the estate and the federal proceeding was against the individual. Id. at 682.

Here, as in Kaplan, Plaintiff seeks damages for various acts entered into by the guardian and addressed by the guardianship court, and for which Plaintiff had an opportunity to object to during the guardianship proceeding. For this reason, the Court finds that the claims against the guardians are barred under res judicata. The Court, however, finds otherwise with respect to the claims against the Defendant attorneys.

These claims are not barred by either res judicata or collateral estoppel for the simple reason that the Defendant attorneys were not parties or in privity with any party before the guardianship court. In Keramati v. Schackow, the court held that res judicata did not bar bringing a legal malpractice case against attorneys who had represented the plaintiffs in an earlier case even though the earlier case was settled and the clients certified that the settlement was "fair and just." Keramati v. Schackow, 553 So.2d 741 (Fla. Dist. Ct. App. 1989). The court observed that, in the first case, "the adequacy of the amount settled for was not litigated." Id. at 744. Here, Plaintiff did not have an opportunity to bring its legal malpractice and breach of fiduciary duties against the Defendant attorneys before the guardianship court.[2]

In so finding, the Court rejects the Defendant attorneys' argument that they are "joint tortfeasors" with the guardians and that there is no way to distinguish the alleged harm by the Defendant attorneys from the alleged harm by the guardians. To the contrary, the Defendant

[2] For the same reason, the Court finds unpersuasive the Stein Defendants' argument that judicial estoppel bars Plaintiff's claims. See Blumberg v. USAA Cas. Ins. Co., 790 So. 3d 1061, 1067 (Fla. 2001) (judicial estoppel normally requires mutuality of parties, unless special fairness or policy considerations appear to compel otherwise). Moreover, there is authority in Florida that when prior claims were resolved by settlement, as with the Stein Defendants, the alleged prior inconsistent position cannot be viewed as having been successfully asserted, a requirement for judicial estoppel to apply. Brown & Brown, Inc. v. School Bd. of Hamilton County, 97 So. 3d 918, 921 (Fla. Dist. Ct. App. 2012); Zeeuw v. BFI Waste Systems of N. Am., Inc., 997 So. 2d 1218, 1220-21 (Fla. Dist. Ct. App. 2008).

attorneys owe duty of care to the ward as well as to the guardian. Fla. AGO 96-94, 1996 WL 680981 (Fla. A.G. Nov. 20, 1996); see Saadeh v. Connors, 166 So. 3d 959, 964 (Fla. Dist. Ct. App. 2015) (finding that the ward is an intended third-party beneficiary of the attorney for the guardian and that therefore the attorney owed the ward a duty of care).[3]

Next, in arguing that summary judgment should be granted on the claims against the Defendant attorneys for malpractice and breach of fiduciary duty, Defendants contend that the guardianship court already determined that all the actions being complained of were made in the best interest of the ward. The Court rejects this argument. As discussed supra, the guardianship court never considered whether the Defendant attorneys engaged in malpractice or breached their fiduciary duties. As such, the Court will not grant summary judgment on these claims on the basis of the guardianship court's rulings.

Equally unpersuasive is Defendants' argument that the Estate is bound by pre-appointment agreements of Julian prior to his appointment as personal representative of the Estate. In making this argument, Defendants rely upon Florida Statute § 733.601 which provides:

> The duties and powers of a personal representative commence upon appointment. The powers of a personal representative relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment. A personal representative may ratify and accept acts on behalf of the estate done by others when the acts would have been proper for a personal representative.

Florida Statute § 733.601.

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[3] The case relied upon by Defendants does not address malpractice by attorneys. It merely discusses joint liability of board members. Acadia Partners, L.P. v. Tompkins, 759 So. 2d 732 (Fla. Dist. Ct. App. 2000).

Plaintiff, however, correctly points out that any relation back does not apply to acts preceding the death of the testator. Richard v. Richard, 193 So. 3d 964, 969 (Fla. Dist. Ct. App. 2016); see Roughton v. R.J. Reynolds Tobacco Co., 129 So. 3d 1145, 1150 (Fla. Dist. Ct. App. 2013) (quoting comment to Uniform Probate Code § 3-701 which states "This section codifies the doctrine that the authority of a personal representative relates back to death from the moment it arises"). Thus, any actions by Julian prior to the death of Oliver Sr. on March 2, 2015 do not relate back.[4]

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the Stein Defendants' Motion for Final Summary Judgment (DE 225) is **DENIED** and the CLO Defendants' Motion for Final Summary Judgment (DE 227) is **GRANTED IN PART AND DENIED IN PART.**

The Court will separately issue Judgment on behalf of Defendant Stephen Kelly.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 1st day of June, 2017.

KENNETH A. MARRA
United States District Judge

[4] The Court also declines to find, as a matter of law, that malpractice and breach of fiduciary duty occurred by allowing Oliver Sr.'s assets to be used to satisfy an alleged usurious rate of interest on the mortgage on the Lexington Avenue property. Whether the rate was usurious under New York law requires a factual inquiry into whether any of the fees charged were a pretext for higher interest rates. See Lloyd Capital Corp. v. Pat Henchar, Inc., 603 N.E. 2d 246, 397 (N.Y. 1992). Likewise, the Court declines to find, as a matter of law, that the scope of the Stein retainer agreement did not encompass the duties of the Stein Defendants or that the Stein Defendants did not assume additional duties. Finally, the Court will address at trial whether Plaintiff should be barred from offering evidence on several areas of damages as a sanction for non-compliance with discovery.