Filed 3/13/17 Conservatorship of Chichetti CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

Conservatorship of the Person and Estate of ALBERT CHICHETTI, Deceased.	B267415 (Los Angeles County Super. Ct. No. BP116115)
WILLIAM O. GAMBLE et al., Petitioners and Respondents, v. CAROL CHICHETTI et al., Objectors and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Lesley C. Green, Judge. Reversed.

Law Offices of Barry P. King and Barry P. King for Objectors and Appellants.

Guzman Law Group, Carla B. Hoffman; E. Thomas Moroney for Petitioners and Respondents.

INTRODUCTION

Carol Chichetti Saldamando and Thomas Chichetti appeal from the trial court's order finding they acted in bad faith by filing objections to a final accounting of their father's co-conservators, William Gamble and Stuart Sherman. Because there is no substantial evidence to support a finding Carol and Thomas filed the objections in bad faith, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Parties*

Carol and Thomas are the children of Albert Chichetti and the heirs and beneficiaries of his estate and trust. Gamble and Sherman were appointed co-conservators of Albert, co-trustees of his trust, and co-executors of his will.

Toward the end of his life, Albert Chichetti suffered from dementia. According to Carol and Thomas, during the mid-2000's two persons identified as "Martin Martov and Jack Easum" managed Albert's finances. During that time Martov and Easum paid themselves hundreds of thousands of dollars in excessive fees and established a trust in 2007 that the court subsequently voided in 2009. Carol and Thomas claim the actions of Martov and Easum "caused [Albert's] finances to drop by an amount in excess of $500,000," and Albert's PVP attorney even "specifically stated that 'Mr. Chichetti has been a victim of financial elder abuse.'"[1]

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[1] "PVP denotes a Probate Volunteer Panel attorney [citation], who represents the conservatee's interests. (See Prob. Code, § 1470, subd. (a) [court may appoint private legal

B. *The Conservatorship Proceedings*

In August 2010 the court granted the PVP attorney's petition to appoint Gamble and Sherman co-conservators of the person and estate of Albert. The court at that time found, "Beginning in 2007, [Albert] became unable to resist undue influence of certain friends and [attorneys] in the Palm Desert area, where he was living [and,] [b]ut for the undue influence of these associates, [Albert] would have left his estate in equal shares to both of his children." The court ordered Gamble and Sherman as co-conservators to execute a pour-over will giving all of Albert's property to the "Trustee of The Albert G. Chichetti Living Trust Dated October 19, 2007, as Amended and Restated." Gamble and Sherman, who were also named co-trustees of the trust and co-executors of the will and co-conservators, signed the will on behalf of Albert. A summary of Albert's property beginning in 2009 listed his residence in Monterey Park, California, two properties in Coachella Valley, and cash and investment accounts of approximately $400,000.

C. *The Accountings and the Objections*

In August 2010 Gamble and Sherman filed their first accounting and report for the period from August 13, 2009 through June 30, 2010. The court approved this first accounting and report without objection.

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counsel for a conservatee if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests].)" (*Conservatorship of Gregory D.* (2013) 214 Cal.App.4th 62, 65, fn. 1.)

Albert died on December 18, 2010. In August 2011 Gamble and Sherman filed their second and final accounting for the period July 1, 2010 through December 18, 2010, and petitioned for court approval of the accounting and for discharge.

Carol and Thomas filed objections to the second accounting, claiming among other things the co-conservators had failed to pursue an elder abuse claim on behalf of their father "despite . . . assurances that [they] would do so." Carol and Thomas also claimed the statute of limitations for claims against Martov and Easum might have expired, which meant Carol and Thomas could be unable to sue their father's former financial advisors.

On April 30, 2012 the parties entered into a memorandum of understanding in which Carol and Thomas agreed to withdraw their objections to the second and final accounting, and Gamble and Sherman agreed to assign any claims for elder abuse to Carol and Thomas. The memorandum of understanding stated "Gamble and Sherman will Petition the Court for approval to assign the claim against Madruga [sic], Easom [sic] and any other persons who may have acted with them to Thomas and Carole [sic] and shall assign said claim upon approval of the Court."

After a hearing on May 1, 2012 the court approved the co-conservator's second and final accounting. The court approved payments to Gamble, Sherman, and their attorneys Sandra Kass and Joshua Rosen, and authorized distribution of the balance of the estate to Carol and Thomas. The court's May 24, 2012 order did not include approval of the assignment of the elder abuse claim from Gamble and Sherman to Carol and Thomas and did not discharge the co-conservators. Instead, the court set a hearing on an order to show cause for June 28, 2013.

In July 2012 Gamble and Sherman filed a second supplement to the second and final accounting covering the period January 1, 2012 through June 21, 2012. In this supplemental accounting Gamble and Sherman confirmed all the conservatorship funds had been distributed and they now sought discharge. They represented, "The parties reached an agreement and the Beneficiaries withdrew their Objections." They also noted that, although the court had approved their second accounting, the court had not discharged them as conservators.

In February 2013 Carol and Thomas again filed objections, claiming the conservators should be surcharged for their failure to pursue an elder abuse claim against the prior financial advisor and an attorney. Carol and Thomas also claimed they learned in early 2013 that taxes on the real property had not been paid during the period Gamble and Sherman were serving as co-conservators and co-trustees. Carol and Thomas also claimed that, because Gamble and Sherman had allowed the statute of limitations to run on claims against Martov and Easum, the estate and trust beneficiaries could not pursue the claims. Carol and Thomas claimed this conduct constituted a breach of the fiduciary duties Gamble and Sherman owed to the conservatee, Albert.

In response to these objections, Gamble and Sherman argued they "had considered whether elder abuse claims should have been pursued, and decided against doing so, with the concurrence of the conservatee's PVP counsel." They also noted they had entered into an agreement to assign the elder abuse claims to Carol and Thomas.

D. *The Trial*

On March 11, 2015 the court held a trial on the objections by Carol and Thomas. Counsel for Gamble and Sherman argued in their trial brief that, because the issue of the elder abuse claim had previously been resolved with court approval, the doctrine of res judicata barred Carol and Thomas from relitigating the issue. Gamble and Sherman stated in their trial brief, "Not only did the Co-Conservators Petition the Court for approval of the Second and Final Account, Objectors objected to the account based on the very same issue they raise here, alleged failure to pursue financial elder abuse claims. The Objectors withdrew these same objections almost three years ago pursuant to a settlement. As such, both the Objectors and the Court had knowledge of these Co-Conservators['] alleged failure to act over 3 years ago. However, the Court approved the Accounting, upon withdrawal of the Objections. The same parties with the same subject matter having been litigated in the Second and Final Account and resolved through a Settlement Agreement would act as res judicata on this issue." Gamble and Sherman also asked the court to find the objections by Carol and Thomas without reasonable cause and in bad faith, and requested permission to file a petition for fees and costs pursuant to Probate Code section 2622.5.[2]

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[2] Probate Code section 2622.5, subdivision (a), provides: "If the court determines that the objections were without reasonable cause and in bad faith, the court may order the objector to pay the compensation and costs of the conservator . . . and other expenses and costs of litigation, including attorney's fees, incurred to defend the account. The objector shall be personally

In their trial brief Carol and Thomas argued Gamble and Sherman should have pursued the elder abuse claim, and their failure to do so breached their fiduciary duties as conservators. Carol and Thomas also claimed Gamble and Sherman "were in charge of the *entirety* of the Conservatee's estate, including his Trust estate, but despite numerous written and oral requests, they have refused to provide an accounting for their activities as trustees, arguing that a formal accounting would be 'too burdensome,'" and "they have created a situation where they can deflect many of the Objectors' legitimate complaints about their actions by . . . [contending the objections are] outside the scope of this proceeding because it was 'Trust' property rather than the Conservatee's personal property." Carol and Thomas also contended they learned in early 2013 "that the property taxes on the [Monterey Park] property *had not been paid since 2009*, and . . . during almost the *entire period* that Gamble and Sherman were acting as conservators in this matter, they never bothered to pay the property taxes on this property, or apparently any of the other of the Conservatee's properties."

E. *The Ruling*

The trial court found "the Conservators and Objectors agreed to the assignment of these claims to Objectors [in the April 30, 2012 agreement]. In return, Objectors agreed to withdraw their Objections. The Objectors presumably then withdrew their objections. (The May 1, 2012, minute order is silent regarding a ruling on the objections, but the Court did

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liable to the . . . conservatorship estate for the amount ordered." Undesignated statutory references are to the Probate Code.

approve the Second Account as anticipated by the April 30 agreement, and there was no challenge filed by Objectors to that order, so the objections clearly were expressly or impliedly overruled.) The approval of the Second Account was documented by an attorney order dated May 24, 2012." The court concluded the May 24, 2012 order approving the second and final accounting released Gamble and Sherman "from any liability for their failure to act, including their alleged failure to file an elder abuse lawsuit."

The court ruled the doctrines of res judicata and collateral estoppel barred the objections by Carol and Thomas. "The Conservators' actions for the prior time period which ended December 31, 2011, had been approved by order dated May 24, 2012 (an order approved as to form and content by counsel for Objectors), and that order is final. Pursuant to . . . Section 2301(a), the Conservators were released from any liability for their failure to act, including their alleged failure to file an elder abuse lawsuit. [¶] The Objectors entered into a memorandum of understanding with Conservators. While no subsequent full settlement agreement has been presented to the Court and presumably was not prepared or finalized, the Objectors signed this memorandum and accepted the assignment of the elder abuse claims. [¶] From this record, the Court finds that the doctrine of res judicata and estoppel bar the Objections to the Petition." Therefore, the court approved the second supplemental accounting and discharged the conservators.

On the issue of attorneys' fees and costs under section 2622.5, the court found Carol and Thomas filed the objections without reasonable cause and in bad faith. The court ruled, "Because all of the above facts were fully known to Objectors when they filed the within Objections and indeed were further pointed out to them in the Conservators' responses, the Court finds that the Objections were without reasonable cause and in bad faith." Carol and Thomas timely appealed.

DISCUSSION

Carol and Thomas do not argue the trial court erred in overruling their objections to the accountings. They argue only "the trial court's determination that the objections were not filed in good faith is erroneous." Carol and Thomas contend they did not file their objections in bad faith because "many of the facts involved did not come to light until after the supplemental accounts and objections had been filed."

Gamble and Sherman contend the trial court properly awarded fees and costs under section 2622.5 because the objections were without reasonable cause and in bad faith. They argue Carol and Thomas chose "to relitigate the elder abuse issue, and . . . did so through an evidentiary hearing despite being told that the issue had been finally and completely resolved on the prior accounting," and "[r]elitigating a previously decided issue with no apparent justification other than wanting to revisit it, is a sufficient basis for finding bad faith." Gamble and Sherman also contend the claims by Carol and Thomas that the conservators failed to pay property taxes and failed to lease the properties to generate rental income were meritless because the

properties were assets of the trust and were not subject to the conservatorship.

A. *Standard of Review*

As noted, in conservatorship proceedings, a probate court "may order the objector to pay the compensation and costs of the conservator . . . and other expenses and costs of litigation, including attorney's fees, incurred to defend the account" if the objections are filed without reasonable cause and in bad faith. (§ 2622.5, subd. (a).) Whether objections are brought without reasonable cause is a legal issue we review de novo; whether objections were brought in bad faith is a factual determination we review for substantial evidence. (See *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 927 ["we independently review the trial court's finding on the existence of reasonable cause absent any factual dispute as to . . . knowledge at the time"]; see also *Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1226 [under Code of Civil Procedure section 1038 "good faith determination . . . involves a factual inquiry into the plaintiff's state of mind [and] is reviewed on appeal for sufficiency of the evidence"]; *Hall v. Regents of University of California* (1996) 43 Cal.App.4th 1580, 1586 ["'[b]ecause the good faith issue is factual, the question on appeal will be whether the evidence of record was sufficient to sustain the trial court's finding'"]; but see *In re Guardianship of K.S.* (2009) 177 Cal.App.4th 1525, 1533 [reviewing an award of fees and costs under section 2622.5 for abuse of discretion].)

B. *There Is No Substantial Evidence Carol and Thomas Acted in Bad Faith*

As noted, the trial court ruled the objections by Carol and Thomas were both without reasonable cause and in bad faith. Even if Carol and Thomas filed their objections without reasonable cause,[3] however, there is no substantial evidence they filed the objections in bad faith. Unlike lack of reasonable cause, bad faith concerns the objectors' subjective state of mind. As with the malice element of malicious prosecution, bad faith "cannot be inferred from the absence of probable cause alone." (*Uzyel v. Kadisha*, *supra*, 188 Cal.App.4th at p. 926, fn. 47.)[4] "[T]he conclusion that probable cause is absent logically tells the trier of fact nothing about the defendant's subjective state of mind. . . . Merely because the prior action lacked legal tenability, as measured objectively . . . *without more*, would not logically or reasonably permit the inference that such lack of probable cause was accompanied by the actor's subjective malicious state of mind." (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498.)

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[3] "The terms 'reasonable cause' and 'probable cause' are generally considered synonymous, with 'reasonable cause' defined under an objective standard as '"whether any reasonable attorney would have thought the claim tenable."' [Citations.] . . . '*Reasonable cause* is to be determined objectively, as a matter of law, on the basis of the facts known to the plaintiff when he or she filed or maintained the action.'" (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal.4th 851, 857.)

[4] *Uzyel* involved a request for attorneys' fees under section 17211, which, like section 2622.5, authorizes such an award

Here, the trial court found the objections were in bad faith because Carol and Thomas knew the procedural history of the case, which Gamble and Sherman "pointed out to them" in their response to the objections. This finding supports the absence of reasonable cause, but not the presence of bad faith. Knowing the procedural facts of the case (and having an adversary point them out in court papers) is not substantial evidence of bad faith. Nor, as Gamble and Sherman argue, is "[r]elitigating a previously decided issue with no apparent justification other than wanting to revisit it." Relitigating an issue a party lost may be evidence that there is no reasonable basis for raising the issue again, but it does not, without more, support a finding of bad faith.

And Gamble and Sherman did not submit evidence of any more. For example, they submitted no evidence of malice, hostility, or ill will towards them by Carol and Thomas. (Cf. *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 296 [defendant "physically threatened" the plaintiff, told the plaintiff he had sued her "to prevent her from making trouble for him in the future," and admitted in his deposition he had no witnesses to support his claims against her]; *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 54 [attorney admitted arguing a weak point in his appellate brief "'not because of any high hopes

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against a beneficiary who contests a trust accounting, or against a trustee who opposes a contest to a trust accounting, "without reasonable cause and in bad faith." (§ 17211, subds. (a), (b).) The court in *Uzyel* noted "[t]he same language, 'without reasonable cause and in bad faith,' is also found in other Probate Code sections providing for an award of attorney fees and litigation expenses in connection with objections to accounts by other fiduciaries," including section 2622.5. (*Uzyel v. Kadisha*, *supra*, 188 Cal.App.4th at p. 926, fn. 45.)

of [winning], but because I wanted to show the Appellate Court what a bastard Bertero was'"]; *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 618, 633, disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 531-532 [plaintiff submitted deposition testimony of a defendant who admitted certain facts were true that she had alleged were false]; *Sierra Club Foundation v. Graham* (1999) 72 Cal.App.4th 1135, 1157 [defendant acted with anger, made threats, and conducted an "adverse media campaign which relied on false fraud accusations"].) Gamble and Sherman submitted no evidence Carol and Thomas filed their objections for an improper purpose, such as running up costs and expenses on an estate they will one day inherit or causing unnecessary delay. Indeed, Gamble and Sherman did not submit any evidence at all on the issue of bad faith. There was an evidentiary hearing, at which the court invited both sides to present any evidence they wanted to present, but neither side presented any evidence.

DISPOSITION

The trial court's order awarding Gamble and Sherman fees and costs under section 2622.5 is reversed. Carol and Thomas are to recover their costs on appeal.

SEGAL, J.

We concur:

ZELON, Acting P. J. SMALL, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.