DOCKET NO. FST-CV-14-6023952-S	:	SUPERIOR COURT
CONNIE L. GRANT	:	JUDICIAL DISTRICT OF STAMFORD/NORWALK
v.	:	AT STAMFORD
THOMAS J. DREW, ESQ.	:	FEBRUARY 15, 2017

DEFENDANT'S POST-TRIAL REPLY MEMORANDUM

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PRELIMINARY STATEMENT

It is axiomatic that conclusions of fact are to be drawn exclusively from the testimony and exhibits admitted at trial. Instead of drawing a connection between the record evidence and applicable law, the arguments Plaintiff makes in her Post-Trial Brief disregard that basic principle. Presumably because she recognizes that the actual proof leaves no room for the positions she wants to take, Plaintiff resorts to making arguments on the basis of a make-believe set of "facts" that do not appear in the record, either because they were excluded for evidentiary reasons or because they were not even offered. What is notably missing from her presentation is any effort to reconcile the actual testimony and exhibits; Plaintiff draws unreasonable inferences from that evidence. Judgment should enter in favor of Attorney Drew in all respects.

I.

PLAINTIFF IMPROPERLY RELIES ON "EVIDENCE" THAT IS NOT A PART OF THE RECORD OF THE TRIAL

It is certainly the case that some liberties and leeway are accorded to *pro se* litigants to ensure that legitimate claims are not stymied by technicalities. *Morneau v. State*, 150 Conn.App. 237, 240 fn. 2, 90 A.3d 1003 (2014)("It is the established policy of the Connecticut courts to be solicitous of *pro se* litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the *pro se* party."); *Baker v. Whitnum-Baker*, 2014 Conn. Super. LEXIS 1259, *17 (JD Stamford-Norwalk May 21, 2014). However, that leniency has boundaries and cannot be the basis for a litigant to "entirely disregard the established rules of procedures."

Rodriguez v. Mallory Battery Co., 188 Conn. 145, 149 fn. 8, 448 A.2d 829 (1982); *see also Gaynor v. Hi-Tech Homes*, 149 Conn. App. 267, 282 fn. 3, 89 A.3d 373 (2014). The liberties Plaintiff has taken with her Post-Trial Brief extend far beyond the reasonable boundary of leeway accorded to her. Indeed, Plaintiff has seemingly forgotten that we have already tried her case -- most of the "facts" she uses as the predicate for her argument simply are not a part of the trial record. The desperate resort she makes to non-existent evidence demonstrates Plaintiff's complete failure to meet the burdens of proof that she bears.

A. Plaintiff References a Different Estate Even Though the Court Sustained an Objection When She Tried to Introduce Evidence Regarding It At Trial

Plaintiff uses a significant part of the Preliminary Statement to her Post-Trial Brief to make unfounded and bogus accusations regarding the work Attorney Drew has performed for a different estate. During trial, the Court sustained Attorney Drew's objection to any reference to any other estate on the grounds of hearsay and because any such evidence has no relevance to this case. Tr. II: 64-66. That portion of Plaintiff's Brief must be disregarded.

B. Plaintiff's Reliance on Judge Tobin's Decision is Improper and Misplaced

Plaintiff devotes much of her efforts to an attempt to use findings supposedly recited in Judge Tobin's decision, a ruling rendered in connection with her *unsuccessful* appeal of a Probate Court decision declining to remove Attorney Drew as executor. Those efforts are improper for three (3) principal reasons: (1) the subject memorandum of decision of Judge Tobin was not admitted (or even offered) as a full trial exhibit in this

case; (2) principles of collateral estoppel are inapplicable and do not provide a basis for using the findings here; and (3) the law of the case doctrine bars any use of the prior decision in the manner Plaintiff seeks.

Prior to the start of trial, Attorney Drew anticipated that Plaintiff would misconstrue and attempt to make improper use of Judge Tobin's decision. In response to Attorney Drew's motion *in limine*, the Court noted: "Probate appeal really is a different kind of case. So we can argue if it is offered. And if there is discussion, we can argue it at that time." Tr. I: 20. There was no further discussion or argument on the subject because, while Plaintiff marked the decision for identification purposes as Exhibit 61, she never offered it as a full exhibit and, of course, it was not admitted as such. References to that decision have no place in the post-trial briefing or argument.

In her Revised Complaint, Plaintiff alleged the applicability of the collateral estoppel doctrine as a way for her to meet evidentiary burdens. Even if she had offered the decision and overcome the objections to its admission, the findings made by Judge Tobin – on a different record and in a different context – would not support any findings here. The principles of collateral estoppel are well-established in Connecticut:

> To assert successfully the doctrine of issue preclusion, therefore, a party must establish the issue sought to be foreclosed actually was litigated and determined in the prior action between the parties or their privies, and that the determination was essential to the decision in the prior case.

Vanliner Ins. Co. v. Fay, 98 Conn App. 125, 132, 907 A.2d 1220 (2005) *quoted by Wiacek Farms, LLC v. City of Shelton*, 132 Conn. App. 163, 168, 30 A.3d 27 (2011), *cert*

denied, 303 Conn. 918, 34 A.3d 394 (2012); *Mierzcjewski v. Bromwell*, 152 Conn. App. 69, 81, 97 A.3d 61 (2014).

It is not enough that prior litigation involved the same parties or even that there is some overlap of issues between the prior case and the current one. *Wiacek Farms*, 132 Conn. App. at 171-72. The doctrine cannot be validly invoked unless the issues are "completely identical." *Corcoran v. Dept. of Social Services*, 271 Conn. 679, 691-94, 859 A.2d 533 (2004); *see also Crochiere v. Board of Education*, 227 Conn. 333, 345, 630 A.2d 1027 (1993); *Aetna Casualty & Surety Co. v. Jones*, 220 Conn. 225, 297, 596 A.2d 414 (1991). Accordingly, to have validly invoked the doctrine of collateral estoppel affirmatively, as Plaintiff is implicitly seeking to do with her use of it in the Post-Trial Brief, she bore the burden of satisfying three bedrock requirements: (1) the issue must have been fully and fairly litigated in the first action; (2) the issue must have been actually decided; and (3) the decision must have been necessary to the judgment. *Wiacek Farms*, 132 Conn. at 169 *quoting Busconi v. Dighello*, 39 Conn. App. 753, 767-68, 668 A.2d 716 (1995), *cert. denied*, 236 Conn. 903, 670 A.2d 321 (1996).

In this case, Plaintiff made no effort to establish those predicate conditions and she would have failed had she tried. Of primary importance is the need to identify what the actual issue presented in the earlier case was. The prior action before Judge Tobin presented the single discrete issue of whether Attorney Drew should be removed as Executor. What is significant is that Judge Tobin held that Plaintiff had not met the burden imposed on her to demonstrate that Drew should be removed from his position.

It is manifest that the Judgment associated with Judge Tobin's decision, dismissing her appeal, was not at all dependent on the findings to which Plaintiff now wants this Court to adopt. For that reason, such conclusions are properly considered to be dicta:

> Findings that are not necessary partake of the nature of obiter dicta and the reasons for the distinction between dictum and holding in applying the rule of stare decisis also favor denying collateral estoppel to unnecessary findings. Both are unlikely to receive the full judicial consideration with respect to either the premises or consequences that is given to the very grounds of decision.

Hansted v. Safeco Insurance Company of America, 19 Conn. App 515, 519, fn.3, 562 A.2d 1148 (1989) *quoting* F. James v. G. Hazard, Civil Procedure (2d Ed.) 11.19. Because the issues were different, there was no reason in the earlier case for Attorney Drew to recognize the issues associated with his fiduciary duty of care, which were not necessary to that case, as important. The best proof of the fact that the subject facts were not necessary to the judgment is that Judge Tobin denied the application for Attorney Drew's removal after hearing the matter on a *de novo* basis. Since that decision was not at all dependent on the determinations Plaintiff cites, her use of the decision in her Post-Trial Brief is improper.

In April 2016, the Honorable Robert Genuario held a hearing on Plaintiff's application for a prejudgment remedy. At such hearing, Plaintiff offered the Tobin decision as a part of her case-in-chief. Attorney Drew objected to the extent it was being offered as a basis for collateral estoppel or as a substitute for actual evidence. The Court

took judicial notice of the decision and left it to counsel to argue at the conclusion of the hearing its pertinence and whether it had a collateral estoppel effect. Those issues were specifically addressed both in the closing oral arguments and in the post-hearing briefs. Judge Genuario then ruled:

> The plaintiff also requested that the court take judicial notice of a decision of the Superior Court in *In re: Grant: Appeal from Probate*, Superior Court for the judicial district of Stamford/Norwalk at Norwalk, Docket# FST-CV-125013807-S (November 20, 2012 Tobin, J.) and a decision of the Darien-New Canaan Probate Court dated November 27, 2012. The court has not considered either decision for collateral estoppel purposes as it does not appear that it was necessary for either court to determine whether or not the defendant had breached his fiduciary duties in order for the courts to render their respective decision. See e.g. *Mierzejewski v. Brownell*, 152 Conn. App. 464-465 (2014) (sic) (In order for collateral estoppel to apply the decision must have been necessary to the judgment). Moreover, the court cannot consider the factual recitations and findings contained in the decisions. "Unless the judgment satisfies the preclusion requirements of *res judicata* or collateral estoppel, a judicial determination of fact in one case is not admissible in another case to prove the same fact." Tait and Prescott, Tait's Handbook of Connecticut Evidence, 5th ed, section 8.22.10 p. 589 (2013).

Because Judge Genuario has already decided against Grant's efforts to use the Tobin decision, it is appropriate to follow that decision under the principles of the law of the case doctrine:

> The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided.... When a matter has previously been ruled [on] ... the court...may treat that [prior] decision as the

> law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance.... A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge.

Total Recycling Services of Connecticut, Inc. v. Connecticut Oil Recycling Services, LLC, 308 Conn. 312, 322, 63 A.3d 896 (2013) *quoting Testa v. Geressy*, 286 Conn. 291, 306-07, 943 A.2d 1075 (2008) and *Breen v. Phelps*, 186 Conn. 86, 99-100, 439 A.2d 1066 (1982). In this case, there are no new or overriding circumstances or any other reason why the non-evidence should be considered. All of Plaintiff's references to any "findings" she thinks Judge Tobin made should be disregarded.

C. <u>Plaintiff Improperly Describes the Preceding Legal Proceedings</u>

Plaintiff makes numerous statements about "facts" that she implies derive from testimony or colloquy occurring during the hearings and proceedings that took place during the administration of the Estate. In particular, she characterizes *her* perspective of what Judge Murray, Judge Maronich, Judge Tobin and Judge Tierney were thinking about the matters over which they presided.[1] It is, of course, grossly improper to guess as to the unexpressed thinking of any person let alone of a judge. No transcripts of the earlier proceedings are a part of the record in this case. The accusation she makes that Attorney Drew testified falsely before any of those courts is false, insulting, unsupported and only reinforces the fact of her own lack of understanding of the proof. The Court

[1] As one example, she states, as if it were true, that "Judge Maronich was confused why the property was not in contract or on the market."

should therefore disregard in all respects her descriptions of the other cases, *all of which Plaintiff lost*, and base its decision solely on the record evidence admitted in this case.

D. Plaintiff's Citations to Cases Addressing Medical Evidence and Experts to Support an Unplead Claim of Intentional Infliction of Emotional Distress Involves "Proof" that is Not a Part of the Record

In her Post-Trial Brief, Plaintiff refers to case law regarding the purpose and value of medical reports and records created by medical experts. The discussion has no relevance inasmuch as Plaintiff's medical records were not admitted as trial exhibits and she did not offer the testimony of any medical professional who treated her.[2]

II.

ATTORNEY DREW HAD SPECIFIC AUTHORITY TO SELL THE OAKLAND TERRACE PROPERTY AND TO ENGAGE IN PROPERTY MANAGEMENT ACTIVITIES

Plaintiff devotes considerable attention to the proposition that the eviction proceeding somehow constituted vexatious litigation. Given the bogus positions she has taken and claims she has pursued in this case, the argument is ironic.[3]

The entire premise of Plaintiff's argument is that Attorney Drew lacked the authority to sell the Oakland Terrace property and therefore no good reason existed for her eviction. At page 30 of her Post-Trial Brief, Plaintiff states: "There was no

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[2] For some reason, Plaintiff also uses her Post-Trial Brief to complain that objections to questions about Attorney Drew's professional liability insurance were sustained but she offers no reason why any evidence on the subject would have been relevant or admissible at trial.

[3] It is also ironic that Plaintiff claims the loss of family "heirlooms" (as to which there has been no prior mention) in light of her brother's powerful testimony about missing jewelry and Plaintiff dropping off a duffel bag of photo albums without a single photo in any of them. Tr. II: 27-28.

authorization or directive in the Will of Julia Victoria Grant to sell her home at Five Oakland Terrace, Darien." Plaintiff is wrong and to make this argument she ignores the plain wording and legal effect of her mother's Will and the unmistakable authority it conferred.[4] In Article VIII, titled, "Fiduciary Powers", Julia Grant directed that her Executor (Attorney Drew) "***shall*** have the following powers with respect to administering my estate … exercisable in the discretion of the Executor." Such discretionary power included the right:

> A 2. ***To sell at public or private sale, wholly or partly for cash or on credit, contract to sell***, grant or exercise options to buy, convey, transfer, exchange, or lease (for a term within or extending beyond the term of the Trust) ***any real or personal property of the estate*** or Trust, subdivide, improve, and remodel, repair or raze buildings on any real property in such manner, for such prices, and ***on such terms and conditions as any individual might do as outright owner of the property***.

Julia Grant further provided to Attorney Drew the right:

> A 14. ***To perform all other acts necessary for the property management***, investment and distribution of the my (sic) estate or Trust property of any trust established herein.

Exhibit 1 (emphasis added).

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[4] It is clear that Plaintiff simply does not understand the reasons Attorney Drew described at trial as why he determined a sale of the property was necessary and how Plaintiff's actions required that she first be evicted from the premises, so that the property could be properly marketed and the highest possible price achieved for Plaintiff and her siblings. These points are addressed in Attorney Drew's initial post-trial memorandum, as is the fact that her accusations of collusion with a co-beneficiary fall wide of the mark. The simple fact is Plaintiff made the eviction necessary by her belligerent approach to the administration of the Estate and her insistence that she receive disproportionate benefits in the form of continued and indefinite rent-free residence at the expense of her brothers.

The cases Plaintiff cites in her Post-Trial Brief for the proposition that the Probate Court has the authority to direct the sale of property do not support the notion that a sale can be affected only if it is specifically authorized by the Probate Court. Moreover, Julia Grant indicated in Article VIII B of her Will that:

> ***The powers granted in this ARTICLE shall be in addition to those granted by law*** and may be exercised even after termination of my estate and all Trusts hereunder until actual distribution of all estate and Trust principal, but not beyond the period permitted by any applicable rule of law relating to perpetuities.

Ex. 1 (emphasis added). There is zero merit to the idea that Attorney Drew acted without proper authority.

Plaintiff wastes a significant portion of her Post-Trial Brief to argue that liability exists here because the eviction action was "vexatious." One of the fundamental elements of any claim of vexatious litigation is that the party who is asserting the claim demonstrate success in the underlying action, *i.e.*, that the earlier proceeding terminated in such person's favor. *See e.g. Rioux v. Barry*, 283 Conn. 338, 347, 927 A.2d 304 (2007). Inasmuch as the Housing Court matter did not terminate in Plaintiff's favor but, to the contrary, resulted in a judgment of eviction against her, it is impossible for Plaintiff to sustain a claim of vexatious litigation or abuse of process. It is outrageous for Plaintiff to state that Attorney Drew had no probable cause to evict her from the Oakland Terrace property when a court of proper jurisdiction, after hearing all of Plaintiff's arguments, ruled that the eviction was indeed proper. Had she attempted to plead a claim of vexatious litigation in her Revised Complaint, it would have been the subject of a motion

to strike. The fact that Plaintiff has managed to convince herself that Attorney Drew acted without authority and with malice finds no support in the evidence.

III.

PLAINTIFF MAKES NUMEROUS OTHER FALSE STATEMENTS IN HER POST-TRIAL BRIEF REGARDING THE EVIDENCE

Throughout her Post-Trial Brief, Plaintiff makes statements that have no support in the record evidence. For example, she continues to argue that Attorney Drew tried to coerce her into withdrawing her complaints against him in exchange for an advance of her inheritance to secure alternative housing. The evidence clearly shows – and Plaintiff admitted during cross-examination – that the only legal actions Attorney Drew sought to have withdrawn were the ones related to her efforts to remain in residence at the Oakland Terrace property. Ex. 12; Tr. II:105. Plaintiff's approach makes no sense and can be described as one of "heads I win and tails you lose." The inability to consider anything other than her own individual interests and not the interests of any of the other persons with legal interests in the Estate continue to cloud and confuse Plaintiff's positions. The sale of the property benefitted each of the children equally.

Plaintiff takes issue with Attorney Drew making payments on Julia Grant's home equity line of credit on the grounds that the Will specified that such expense was not to be paid. It is far from clear how she thinks that payment of a secured debt could have been avoided. As he explained to the Court, by paying the minimum monthly amount, Attorney Drew was able to conserve the Estate's limited cash resources while

avoiding the costs of a possible foreclosure action. This is an example of an Executor properly acting as a fiduciary on behalf of all the beneficiaries.

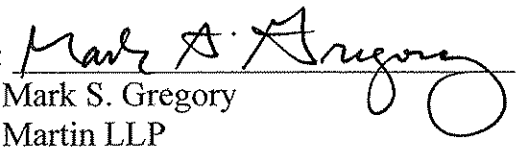
Plaintiff lists some of the liabilities of the Estate to support her argument that it was not insolvent based on the liquid assets. What is immediately apparent for a review of her list is the number of items, like the Probate Court fee, real estate taxes, and attorneys' fees, that she disingenuously omits. The record evidence from the Court-approved accountings and Plaintiff's own admissions, establishes with certainty that there was insufficient funds in the Estate at the time of Julia Grant's death to pay appropriate expenses and liabilities. Ex. G, I and J; Tr. III: 199-202.

Plaintiff lists a hodgepodge of e-mails and other forms of correspondence regarding her failed legal efforts to interfere with the administration of the Estate and her efforts with respect to Galaxy Cookies. All the listings establish is that Plaintiff presented all of her arguments previously and they were rejected by each and every court that heard them. For the reasons stated in Attorney Drew's initial brief, the evidence regarding the business owned by Plaintiff's friend indicates that it was a complete failure and such failure extended back years before Julia Grant's death – for her to label the business "flourishing" because she received a single test order from certain Fairway Market locations (and no follow-up business) is nothing short of astounding. That she was able to cherry pick from the more than one thousand e-mails her brother sent or received regarding the Estate (Tr. II: 31) to find evidence of him expressing frustration with her wasteful actions does not establish any fact indicative of a breach of fiduciary duty on the part of Attorney Drew.

CONCLUSION

While a *pro se* litigant will often lack an understanding of legal issues, Plaintiff's willful refusal to recognize that Attorney Drew acted fairly and appropriately with respect to the administration of the Estate and in a way designed to benefit all of its beneficiaries is egregious. Her anger is misplaced and fails to take into account all of the ways that she acted to her own detriment. She was given numerous opportunities to convince anyone involved with the Estate that her positions had validity and she failed each and every time, in no small part because she refused to recognize the significant authority conferred by Article VIII of the Will. In making her arguments, she stands alone, without even the support of her siblings and, most importantly, without the support of any evidence in the record. The proof at trial overwhelmingly demonstrates that Attorney Drew did not breach any fiduciary duties. Judgment should enter in favor of Attorney Drew in all respects.

THE DEFENDANT
THOMAS J. DREW, ESQ.

By: 

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CERTIFICATION

This is to certify that a copy of the foregoing Defendant's Post-Trial Memorandum is being served by electronic mail on this 15th day of February 2017 to:

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