STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
BUSINESS AND CONSUMER COURT
LOCATION: PORTLAND
DOCKET NO. BCD-CV-17-11

PAMELA W. GLEICHMAN, et al.,

Plaintiffs,

v.

ROSA SCARCELLI, et al.,

Defendants.

ORDER ON PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION OF SUMMARY JUDGMENT ORDER

Plaintiffs Pamela W. Gleichman ("Gleichman") and Karl S. Norberg ("Norberg") have moved for partial reconsideration of this Court's summary judgment decision entered November 2, 2017. Defendants Rosa Scarcelli ("Scarcelli") and Preservation Holdings, LLC (collectively, the "Scarcelli Defendants") and Defendants Stanford Management, LLC ("Stanford") and Acadia Maintenance, LLC ("Acadia") (collectively, the "Entity Defendants") oppose the motion. The Court heard oral argument on the motion on February 15, 2018. John Campbell, Esq. appeared for Plaintiffs, G. Toby Dilworth, Esq. appeared for the Scarcelli Defendants, and James Wagner, Esq. appeared for the Entity Defendants.

PROCEDURAL HISTORY

On November 2, 2017, this Court entered a combined order (the "Combined Order") granting in part and denying in part the Scarcelli Defendants' and the Entity Defendants' (collectively, "Defendants"[1]) motions for partial summary judgment. The Combined Order awarded summary judgment for the Defendants on Count X (Declaratory Judgment as to GN Holdings) and Count VII (Rescission, Nullification and Avoidance of Transfer to Scarcelli of

[1] Norman, Hanson & DeTroy, LLC, is also a named defendant in this matter. The instant motion does not concern it.

Membership Interests in Stanford Management, LLC). Plaintiffs do not move the Court to reconsider those awards in the instant motion. The Court's disposition as to the remaining counts on which Defendants moved for summary judgment was more complex. Relevant here, the Court granted summary judgment in favor of all Defendants as to the claims brought by Norberg as trustee of the Scarcelli-Norberg Holdings ("SNH") Trust in Count IV (Breach of Fiduciary Duty-Derivative Action), Count V (Oppression and Breach of Fiduciary Duties- Owed to Pam, Karl, and SNH Trust), and Count VI (Injunction and/or Dissolution of Stanford, etc.).[2]

STANDARD OF REVIEW

"A motion for reconsideration of the judgment shall be treated as a motion to alter or amend the judgment." M.R. Civ. P. 59(e). Courts should order relief pursuant to M.R. Civ. P. 59(e) when it is "reasonably clear that prejudicial error has been committed or that substantial justice has not been done." *Cates v. Farrington*, 423 A.2d 539, 541 (Me. 1980). "Under Rule 59(e), the trial court is free . . . to alter or amend its judgment when convinced it was erroneous, and substitute the proper judgment in its place." *Most v. Most*, 477 A.2d 250, 258 (Me. 1984). A trial court's ruling on a motion for reconsideration is reviewable for an abuse of discretion. *Shaw v. Shaw*, 2003 ME 153, ¶ 12, 839 A.2d 714.

DISCUSSION

The issue the Court must decide on this motion for reconsideration is superficially simple: what causes of action were before the Court on Defendants' motions for partial summary judgment?

The Combined Order granted summary judgment in favor of Defendants by applying the

[2] The Court also awarded summary judgment to the Defendants as to the claims brought by Gleichman in these counts as they relate to Stanford based on its conclusion that Gleichman lacks standing to bring these claims. Plaintiffs do not ask the Court to reconsider that ruling in the instant motion.

doctrine of claim preclusion, one of the two branches of *res judicata*. (Combined Order at 11-16.) *See Pearson v. Wendell*, 2015 ME 136, ¶ 23, 125 A.3d 1149. Claim preclusion prevents relitigation of claims if: "(1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action." *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 8, 940 A.2d 1097. "[A] voluntary dismissal with prejudice constitutes a valid final judgment for purposes of claim preclusion." *Darney v. Dragon. Products Co.*, 592 F. Supp. 2d 180, 184 n.3 (D. Me. 2009) (citing *United States v. Cunan*, 156 F.3d 110, 114 (1st Cir. 1998)).

These same parties were involved in a prior action. Scarcelli sued Gleichman and Norberg in 2011, and on June 17, 2013, these Plaintiffs filed an amended counterclaim and third-party complaint (the "Counterclaim") in that lawsuit against Scarcelli, naming Stanford as a third-party defendant. The Counterclaim was in many respects virtually identical to the Plaintiffs' Second Verified Amended Complaint (the "Complaint") filed in this case, alleging *inter alia* breaches of fiduciary duty on the part of Scarcelli and seeking judicial dissolution of Stanford. The Counterclaim was disposed of in a mutually executed stipulation of dismissal filed on October 30, 2013 (the "Stipulation of Dismissal"). Gleichman's claims were dismissed without prejudice. Norberg's claims—both individually and as trustee of the SNH Trust—were dismissed with prejudice.

The Stipulation of Dismissal was the prior judgment on which Defendants based their claim preclusion argument in their motions for partial summary judgment. The Scarcelli Defendants' motion for partial summary judgment requested that the Court grant summary judgment in their favor on Counts IV, V, and VI of the Complaint on that ground. (Scarcelli's Mot. Summ. J. at 19.)

Pursuant to M.R. Civ. P. 7(b)(3)(2), the Scarcelli Defendants included with their motion a draft order which specifically stated the relief to be granted by the motion: "Judgment is entered in favor of Rosa Scarcelli and Preservation Holdings, LLC on Counts IV, V, VI, VII, and X of Plaintiff's Second Verified Amended Complaint." However, the Scarcelli Defendants narrowed the scope of their requested relief in the body of their memorandum of law in support of their motion, writing that "Plaintiffs are barred from relitigating any claims arising from Ms. Scarcelli's alleged breach of fiduciary duties owed to Stanford, Acadia, and Plaintiffs *up until the date of the Stipulation of Dismissal . . . .*[3]" (Scarcelli's Mot. Summ. J. at 16 (emphasis added).)

In their oppositions to Defendants' motions for summary judgment, Plaintiffs' main argument was that the Stipulation of Dismissal was not a "valid judgment" and therefore claim preclusion did not bar their claims. (Pl's Opp. Scarcelli Mot. Summ. J. at 8-12, 14-17; Pl's Opp. Stanford Mot. Summ. J. 2-16.) This argument was unavailing because it did not apply any of the recognized exceptions to the general rule that a final judgment is a valid judgment. *N.E. Bank N.A. v. Crochere*, 438 A.2d 266, 268, 268 n. 7 (Me. 1981). However, Plaintiffs also raised the argument that *res judicata* could not preclude claims as to continuing wrongs, because claims based on conduct that post-dated the entry of the Stipulation of Dismissal could not have been litigated in the first action.[4] *Portland Water Dist*, 2008 ME 23, ¶ 8, 940 A.2d 1097. (Pl's Opp. Scarcelli Mot.

[3] Plaintiffs suggest that the Court should instead use June 17, 2013—the date of the filing of the Counterclaim—as the date for determining the scope of claim preclusion, because Plaintiffs were not required to add claims that arose after the Counterclaim was filed. The Court rules that October 30, 2013—the date of the entry of the Stipulation of Dismissal—is a more appropriate bar date. That was the date on which the parties voluntarily negotiated a release of the relevant claims. *But cf. Darney*, 592 F. Supp. 2d at 188.

[4] The Court notes that it accepts this proposition because it went unchallenged by Defendants in their reply memoranda to Plaintiffs' opposition to their motions for partial summary judgment and again in their oppositions to the instant motion. *But see Barth v. Town of Sanford*, 2001 U.S. Dist. LEXIS 17934, No. 01-CV-208-P-C *11-14 (D. Me. Nov. 26, 2001) (claim preclusion barred subsequent nuisance claim despite new allegations that post-dated prior judgment). *Cf. Darney*, 592 F. Supp. 2d at 185-88 (claim preclusion did not bar subsequent nuisance claim where plaintiffs made a "broad[] effort to restrict their [ ] complaint to claims that arose since [the voluntary dismissal with prejudice of their prior suit]").

Summ. J. 13-14.) This aspect of Plaintiffs' argument went unchallenged in the Scarcelli Defendants' reply brief, which concerned itself exclusively with parrying Plaintiffs' collateral attack on the prior judgment.[5]

The issue before the Court thus comes into sharper focus. Even if the Defendants were moving for summary judgment on Counts IV-VI *in toto* when they filed their motion, based on the concession in their memoranda[6] and their silence on the issue in their reply brief, did the Plaintiffs waive the argument that summary judgment could not be awarded on *res judicata* grounds to the extent that those counts state claims based on Scarcelli's conduct after the entry of the Stipulation of Dismissal. Based on the transcript of the oral argument on the motions for summary judgment, it is apparent that they were not asking the Court to rule on any causes of action that may have accrued after the filing of the Stipulation of Dismissal:

> THE COURT: Isn't there some post-November 2013 conduct that is at issue in this case though? (Mot. Tr. 12 (Sep. 14, 2017).)
>
> * * *
>
> MR. DILWORTH: Now, after November 12th, 2013, they may have a claim that there was another thing that Rosa Scarcelli did that gave rise to a new cause of action.
>
> THE COURT: Right.
>
> MR. DILWORTH: That may be the case, but if you grant this motion, everything up to that day is out of the case.
>
> THE COURT: And your position would be that the she would—that the plaintiffs would have to file a new action to—a new cause of action to argue that Ms. Scarcelli did something actionable after November 2013?

[5] The prior judgment in the 2011 case consisted of both the Stipulation of Dismissal and the court's order on Scarcelli's motion for partial summary judgment. The court's partial summary judgment order implicated only Count X of the Complaint, which Plaintiffs are not asking the Court to reconsider in the instant motion.

[6] The Entity Defendants' motion for partial summary judgment incorporated the Scarcelli Defendants' memorandum of law in support of their own motion.

MR. DILWORTH: *I don't think they have to restart the case*, but they have to identify to us what it is after—

THE COURT: What the cause is.

MR. DILWORTH: —November 12th, because I think John will tell you that he has alleged things. I think—the reason why we brought this case is—*brought this motion at this time is for discovery purposes. It's going to limit discovery tremendously. We think we're going to save a lot of time and effort, and further litigation about issues that happened before November of 2013*.

THE COURT: Okay. Understood.

MR. DILWORTH: *But we don't think that it will necessarily kick out everything*. Now, there may be issues of claim—excuse me—of issue preclusion that will extend beyond, but that's—

THE COURT: That's not before me now.

MR. DILWORTH: *That's not before you now, because that needs to be developed a little bit more on the—*

THE COURT: Understood.

MR. DILWORTH: —discovery.

THE COURT: Okay. (Mot. Tr. 13-14 (Sep. 14, 2017) (emphasis added).)

* * *

MR. DILLWORTH: Mr. Campbell says that *none of the arguments—or none of the issues after 2013 are barred. That may be true for some issues*, but if issue preclusion applies, then obviously he's already litigated those issues. Those issues have been resolved. *We're not asking you to make an order on that at this point*.

THE COURT: Okay. (Mot. Tr. 28 (Sep. 14, 2017) (emphasis added).)

As to Norberg's claims, the Combined Order granted summary judgment to the Defendants in full on Counts IV-VI.[7] This Court ruled that Plaintiffs had failed to establish a prima facie case that anything Scarcelli did after the entry of the Stipulation of Dismissal in the prior action could

[7] See n.2 at p.2 of this Order, *supra*.

state a claim under those Counts. Here, on reconsideration, this Court determines that this ruling was prejudicial error.

"[A] party seeking summary judgment always bears the initial responsibility of informing the . . . court of the basis for its motion." *Corey v. Norman, Hanson, & DeTroy*, 1999 ME 196, ¶ 9, 742 A.2d 933 (alteration in original) (quoting Celotex *Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "A defendant moving for a summary judgment has the burden to assert those elements of the cause of action for which the defendant contends there is no genuine issue to be tried." *Id*. The rationale for this rule sounds in basic fairness: a party resisting summary judgment is entitled to notice of the grounds on which the movant is relying, so that it knows for which issues it is obligated raise a genuine issue of material fact. *See id.*

Here, the only ground on which the Defendants moved for summary judgment on Counts IV-VI was claim preclusion. Plaintiffs replied that claim preclusion could not encompass those Counts to the extent that they rely on conduct after the entry of the Stipulation of Dismissal. As noted above, Defendants generally accepted this proposition, and at the very least raised no argument to rebut it in reply or at oral argument. Logically, the Court must on reconsideration here rule that Defendants did not move for summary judgment on the causes of action stated in Counts IV-VI that may have accrued after the entry of the Stipulation of Dismissal. The Court must further rule that as a result, Plaintiffs were not required to establish a prima facie case as to those causes of action in defense of the summary judgment motion. *See id.* It was thus prejudicial error to award summary judgment to Defendants on the grounds that Plaintiffs did not do so.

Defendants argue that their damaging statements about causes of action based on conduct occurring after the entry of the Stipulation of Dismissal related to other counts of the Complaint. It is true that Defendants did not move for summary judgment as to all counts, and that some counts

are based exclusively on allegations of post-Stipulation of Dismissal activity. However, as noted above, it was the Defendants' burden "to assert those elements of the cause of action for which the defendant contends there is no genuine issue to be tried." *Id*. The issue is not whether Defendants "admit[ted] or concede[d] that Plaintiffs created a dispute of fact as to 'continuing wrongs' that would preclude summary judgment as to Counts IV, V, and VI." (Scarcelli's Mot. Summ. J. at 4.) Rather, it is whether Defendants met their burden to assert that there was no genuine material factual issue that the post-Stipulation of Dismissal conduct could not form a basis for those Counts. The Court rules that they did not.

At oral argument, Defendants suggested that Plaintiffs' motion for reconsideration should be denied based on Plaintiffs' failure to move for a continuance or seek other relief under M.R. Civ. P. 56(f). "M.R. Civ. P. 56(f) . . . states that a party opposing summary judgment must be allowed adequate opportunity to conduct discovery or otherwise develop evidence in opposition to the summary judgment motion." *Angel v. Hallee*, 2012 ME 10, ¶ 13, 36 A.3d 922 (citing *S. Portland Police Patrol Ass'n v. City of S. Portland*, 2006 ME 55, ¶¶ 11-12, 896 A.2d 960). Because M.R. Civ. P. 56(b) allows a party to move for summary judgment before discovery is complete, Rule 56(f) "protects a party opposing a summary judgment motion who for valid reasons cannot by affidavit . . . present facts essential to justify the adverse party's opposition to the motion." *S. Portland Police Patrol Ass'n*, 2006 ME 55, ¶ 11, 896 A.2d 960. Under some circumstances, our Law Court has affirmed summary judgment where the party resisting summary judgment failed to avail herself of the protection of Rule 56(f). *See Bangor Sav. Bank v. Richard*, 2014 ME 20, ¶ 3, 86 A.3d 1167.

Rule 56(f) has no bearing on the argument presented by Plaintiffs and adopted by the Court in this order. Motions under Rule 56(f) presuppose fair notice of the issues for which the party

resisting a summary judgment motion must raise a genuine material issue of fact. The Court is now ruling that Plaintiffs were not obligated to raise a genuine material fact as to causes of action which accrued after the entry of the Stipulation of Dismissal because the Defendants were not moving for summary judgment as to those causes of action. Plaintiffs could not have been expected to request more time for discovery on issues that were not before the Court on the summary judgment motion.

The Court is satisfied that it is "reasonably clear that prejudicial error has been committed or that substantial justice has not been done." *Cates*, 423 A.2d at 541. Plaintiffs' motion for partial reconsideration is therefore GRANTED.

CONCLUSION

Based on the foregoing it is hereby ORDERED:

That Plaintiffs' motion for partial reconsideration of summary judgment order is GRANTED.

The Combined Order is hereby modified to strike the language from the first full paragraph of page 15 through the end of the second full paragraph on page 16, found in Part III.A. of that order.

Paragraphs 3(a) and 4 of the conclusion of the Combined Order (p. 21) must also be modified as follows:

(3) The Scarcelli Defendants' motion for partial summary judgment is GRANTED IN PART AND DENIED IN PART as to Count IV, Count V, and Count VI.

a. As to Plaintiff Karl Norberg's claims in Counts IV, V, and VI, the Scarcelli Defendants' motion is GRANTED IN PART AND DENIED IN PART. To the extent that those counts state causes of action based on activity that predates the entry of the Stipulation of Dismissal, the motion is GRANTED. To the extent that those counts state causes of action based on activity that postdates the entry of the Stipulation of Dismissal, the motion is DENIED.

(4) The Entity Defendants' motion for partial summary judgment is GRANTED IN PART AND DENIED IN PART as to Defendant Stanford on Counts IV, V, and VI. To the extent that those counts state causes of action based on activity that predates the entry of the Stipulation of Dismissal, the motion is GRANTED. To the extent that those counts state causes of action based on activity that postdates the entry of the Stipulation of Dismissal, the motion is DENIED.

The Clerk is instructed to enter this Order on the docket for this case incorporating it by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: March, 2018

/s
Michaela Murphy, Justice
Business and Consumer Court