INDEX TO APPENDICES

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements
1. This petition for Writ of Certiorari complies with the type-volume limitation of Rules of the Supreme Court because this brief contains 2,000 words
2. This brief complies with the typeface requirement Century at Font Size 12 with double spacing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served upon counsel for all parties to this proceeding as identified below pursuant to Rule 29 through first class mail along with the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Declaration as follows:

Kenneth Allan Krohn
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This 30th day of September 2018. Respectfully submitted by

Juliette Fairley
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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 17, 2018
Lyle W. Cayce
Clerk

No. 18-50069
Summary Calendar

JULIETTE FAIRLEY, Daughter of James E. Fairley and Beneficiary of James E. Fairley,

Plaintiff - Appellant

v.

ATTORNEY DON D. FORD, III; ATTORNEY KENNETH KROHN; FORD BERGNER, L.L.P.,

Defendants - Appellees

Appeals from the United States District Court
for the Western District of Texas
USDC No. 5:17-CV-1067

Before WIENER, DENNIS, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Pro se Plaintiff-Appellant Juliette Fairley seeks reversal of the district court's Order of January 24, 2018, granting Defendant-Appellee Kenneth Krohn's Motion to Dismiss for Lack of Jurisdiction, dismissing Fairley's claims without prejudice to refiling in state court, and denying all other pending

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

motions as moot. We have now reviewed the record on appeal, including without limitation the briefs of the parties and the record excerpts which contain, *inter alia,* the said January 24, 2018 Order of the district court, and we are satisfied that the district court's rulings are proper in all respects. For essentially the reasons expressed by the district court, its said Order is, in all respects,

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JULIETTE FAIRLEY,

Plaintiff,

v.

DON FORD, FORD BERGNER LLP, and KENNETH KROHN,

Defendants.

Civil No. 5:17-CV-1067-OLG

ORDER

This case is before the Court on Plaintiff's Motion to Amend Order and Judgement (docket no. 73). The Court finds that the motion should be DENIED.

Plaintiff, a resident of New York who is proceeding *pro se*, filed this complaint against Defendants, Texas residents and attorneys whom she retained from July 2015 to February 2017 to represent her in connection with a guardianship proceeding involving her father in Texas state courts. Plaintiff asserted various state-law claims against Defendants. This Court dismissed Plaintiff's claims for lack of subject matter jurisdiction, finding that the amount in controversy requirement of 28 U.S.C. § 1332 had not been satisfied. Docket no. 65. Plaintiff now moves pursuant to Fed. R. Civ. P. 52(b), 59(e), and 60 to correct what she contends are errors in the prior Order. Docket no. 73.

Most of the issues that Plaintiff now raises, such as the identity of the counsel who had represented her in April 2017 proceedings before the Texas Supreme Court and evidence regarding her state of residence in the years preceding her filing of this case and a similar case in the U.S. District Court for the Southern District of Texas, do not go to the amount in controversy and are thus immaterial to the Court's judgment. Docket no. 73 at 1-3. The remaining errors that

Plaintiff alleges go to amounts that she claims she paid Defendants that were not reflected in her billing statements or the exhibits submitted by Defendants in their briefing on the motions to dismiss, including a $10,000 retainer, "payments made in billing statements that are missing" and charges for administrative work at the hourly rate for an attorney that Plaintiff contends should have been charged at a lower rate. Docket no. 73 at 3-4. The Court noted in its previous Order that, although the record reflects that Plaintiff paid Defendants an amount that exceeds $75,000, this does not satisfy the amount in controversy requirement because the majority of that amount was payment for services that Plaintiff does not dispute were rendered. Docket no. 65 at 6-8. As before, Plaintiff "alleges that she is entitled to forfeiture of the entire fee amount that she paid to Defendants because they violated their fiduciary duties to her"—but Plaintiff's pleadings state a claim only for attorney malpractice, falling short of the showing of "self-dealing, deception, or misrepresentation . . . necessary to substantiate a claim for breach of fiduciary duty" and warrant a total fee forfeiture. Docket no. 65 at 7. The Court's previous analysis did not overlook Plaintiff's argument regarding charges at the lawyer rate for administrative and clerical work. *See* docket no. 65 at 7-8 (finding that this issue "affects only a relatively small portion of Plaintiff's claimed entitlement to relief, and is insufficient to transform what is essentially a malpractice claim into a claim for breach of fiduciary duty, or to establish an entitlement to forfeiture of the entirety of the legal fees that she paid Defendants.").

The Court therefore concludes that Plaintiff has not shown the existence of "a manifest error of law or fact" or other circumstances warranting relief under Fed. R. Civ. P. 59 (e). *See generally Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 182 n.2 (5th Cir. 2012) (noting that a request to reconsider a prior ruling is construed as a motion under Rule 59(e) if filed within 28 days after the entry of judgment).

Conclusion and Order

It is therefore ORDERED that Plaintiff's Motion to Amend Order and Judgment (docket no. 73) is DENIED.

SIGNED this 6 day of March, 2018.

ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JULIETTE FAIRLEY,

Plaintiff,

v.

DON FORD, FORD BERGNER LLP, and KENNETH KROHN,

Defendants.

Civil No. 5:17-CV-1067-OLG

ORDER

This case is before the Court on Defendant Kenneth Krohn's Motion to Dismiss for Lack of Jurisdiction (docket no. 30); Defendant Don Ford's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(5) (docket no. 43); Plaintiff's Motion for Default Judgment (docket no. 40); Defendant Krohn's Motion for Extension of Time to File Answer and Rule 12(b)(6) Motion to Dismiss and Motion for Leave to File Motion in Excess of Twenty Pages (docket nos. 35, 37); and Defendant Krohn's Motion to Strike exhibits submitted by Plaintiff with her opposition to the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) (docket no. 60). The Court finds that Defendant Krohn's motion to dismiss for lack of subject matter jurisdiction should be granted, and the remaining motions should be denied as moot.

Background

Plaintiff, a resident of New York who is proceeding *pro se*, filed this complaint against Defendants, Texas residents and attorneys. Plaintiff alleges that she retained Defendants from July 2015 to February 2017 to represent her in connection with a guardianship proceeding involving her father in Texas state courts, including appeal proceedings before the Texas Fourth Court of Appeals and the Texas Supreme Court. *See, e.g.*, *Matter of Guardianship of Fairley*, 04-

16-00096-CV, 2017 WL 188103, at *2 (Tex. App.—San Antonio Jan. 18, 2017, pet. denied). Plaintiff now asserts claims for Breach of Fiduciary Duty; violations of Tex. Civ. Prac. & Rem. Code § 134.002(2); violations of the Texas Deceptive Trade Practices Act (DTPA), Tex. Bus. & Com. Code § 17.46(b)(16); and negligence. She seeks disgorgement of the fees she paid to Defendants; damages in connection with legal expenses incurred after Defendants failed to promptly return her case file or provide it to successor counsel; damages for "emotional harm from having lost time with her father"; and punitive damages and statutory attorney's fees under Tex. Civ. Prac. & Rem. Code §§ 134.002(2) and 134.005(a)(1) and in connection with her claims of negligence and breach of fiduciary duty. Docket no. 26 at ¶¶ 16, 41-44, 55-56, 59-61. Plaintiff alleges that she "paid $75,000 to the Defendant" and also "experienced damages that include but are not limited to $75,000 for loss of time with her elderly father" and "was caused to hire successor counsel to the tune of $21,000 to date[.]" Docket no. 26 at 20.

Plaintiff previously asserted substantially the same claims in a separate complaint filed in the U.S. District Court for the Southern District of Texas on May 31, 2017, but her complaint was dismissed by that Court on August 16, 2017, for lack of subject matter jurisdiction—a ruling based in part upon that court's determination that her pleading did not show an amount in controversy exceeding $75,000. *Fairley v. Ford*, CV H-17-1639, 2017 WL 3507015, at *3 (S.D. Tex. Aug. 16, 2017) (the Southern District case).[1]

[1] The materials that Plaintiff has submitted with her Amended Complaint refer to litigation between the parties before the U.S. District Court for the Southern District of New York, docket no. 26-1 at 71, but the dates given for that litigation correspond to those of the *Fairley v. Ford* litigation before the District Court for the Southern District of Texas, and a search of court records reveals no litigation in New York-based federal courts between the parties. Additionally, Plaintiff's filings suggest that litigation is also ongoing between the parties in the Harris County District court and the Bexar County Probate Court. Docket no. 26-1 at 71-94.

Legal Standards and Analysis

Unlike state courts, which generally have jurisdiction over cases regarding their citizens, federal courts are courts of limited jurisdiction, with authority to decide cases only as provided by the Constitution or by statute. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). As the party seeking to bring a case into federal court, the Plaintiff bears the burden of establishing that this Court has subject matter jurisdiction to decide this case. *Howery*, 243 F.3d at 916. Congress has established that federal courts may decide cases between citizens of different states, where the amount in controversy "exceeds the sum or value of $75,000, exclusive of interest and costs[.]" 28 U.S.C. § 1332(a).

In evaluating the existence of subject matter jurisdiction, the Court may consider the complaint alone, the complaint supplemented by undisputed facts, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Robinson v. TCI/US W. Commc'ns Inc.*, 117 F.3d 900, 904 (5th Cir. 1997). A dismissal or remand for lack of subject matter jurisdiction is appropriate only if it appears certain that the plaintiff cannot prove any set of facts in support of her claim that would entitle plaintiff to relief. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. May 1981). In determining whether Plaintiff has satisfied her burden of establishing an amount in controversy that exceeds $75,000, the Court "must first examine the complaint to determine whether it is facially apparent that the claims exceed the jurisdictional amount[,]" and, if it is not, the Court "may then rely on 'summary judgment' type evidence." *Hartford Ins. Group v. Lou-Con Inc.*, 293 F.3d 908, 910 (5th Cir. 2002). Although a pleading that makes it "facially apparent" that the claims exceed the jurisdictional amount will often preclude consideration of summary judgment-type evidence, the party invoking federal subject matter jurisdiction cannot

satisfy their burden by conclusory allegations alone. *Larremore v. Lykes Bros. Inc.*, 454 Fed. App'x. 305, 307 (5th Cir. 2011); *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995) ("Where the plaintiff has alleged a sum certain that exceeds the requisite amount in controversy, that amount controls if made in good faith" but "[r]emoval . . . cannot be based simply upon conclusory allegations."). Where the Court is faced with a pleading that alleges "a sum certain that exceeds the requisite amount in controversy," it may only refuse subject matter jurisdiction if it "appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." *Allen*, 63 F.3d at 1335.

In order to conserve judicial resources and minimize the risk of inconsistent decisions, federal courts will, in certain circumstances, avoid considering issues or claims that have already been litigated and decided, or could have been raised, in previous litigation between the same parties. "The idea is straightforward: Once a court has decided an issue, it is 'forever settled between the parties.'" *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1302 (2015) (quoting *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525 (1931)). In some circumstances, previous litigation will bar repeated litigation of claims that were raised or could have been raised in previous litigation—a concept referred to as claim preclusion or *res judicata*. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). In other circumstances, an issue of fact or law that is more narrow that a party's claim might be precluded from future litigation if decided by a court and necessary to the court's judgment—a concept sometimes referred to as issue preclusion or collateral estoppel. *Allen*, 449 U.S. at 94; *B & B Hardware, Inc.*, 135 S. Ct. at 1303 (summarizing the general rules of issue preclusion).

Issue preclusion applies to determinations of subject matter jurisdiction, including determinations of the amount in controversy. "[A] dismissal for lack of subject-matter jurisdiction, while 'not binding as to all matters which could have been raised,' is, however,

conclusive as to matters actually adjudged." *Equitable Tr. Co. v. Commodity Futures Trading Comm'n*, 669 F.2d 269, 272 (5th Cir. 1982). Therefore, when a federal district court has found that it lacks power to hear a case and dismissed it for lack of subject matter jurisdiction, the plaintiff whose case was dismissed may not bring their claims in a second federal district court. *Darlak v. Bobear*, 814 F.2d 1055, 1064 (5th Cir. 1987) ("A dismissal for want of jurisdiction bars access to federal courts and is *res judicata* . . . of the lack of a federal court's power to act." (internal quotation marks omitted)). However, that plaintiff's claims are not extinguished entirely, and may still be brought in any court that does not lack subject matter jurisdiction, such as a state court. *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1348 (5th Cir. 1985).

In this case, the U.S. District Court for the Southern District of Texas found, in litigation involving almost all[2] of the same parties in this case in which Plaintiff asserted the same claims arising from the same alleged misconduct and sought the same damages, that the federal district court lacked subject matter jurisdiction, in part because "[t]he legal fees in dispute are $20,000.00"; "[t]here is no basis to infer any damages amount for the apparently relatively short delay in transferring the files to Ms. Fairley's new attorney"; and "[e]ven taking into account the claims for punitive or statutory damages and the attorney's fees reasonably incurred in this suit, the record does not support a finding that the amount in controversy exceeds $75,000." *Fairley*, 2017 WL 3507015, at *4. Notably, the Southern District Court also found that subject matter jurisdiction was lacking because Plaintiff "has not met the burden of showing that she is a New York domiciliary[,]" and the court described its amount-in-controversy finding as "an

[2] In the Southern District case, the defendants were Don D. Ford and Ford Bergner, LLP. Both Ford and Ford Bergner, LLP are Defendants in this case, and Kenneth Krohn, who is named as a Defendant in this case but was not in the Southern District case, was the named counsel for the defendants in the Southern District case. This is sufficient to satisfy the mutuality requirements for the application of issue preclusion. *See, e.g.*, *Russell v. SunAmerica Sec., Inc.*, 962 F.2d 1169, 1173 (5th Cir. 1992) (quoting 18A Fed. Prac. & Proc. Juris. § 4449 (2d ed.)).

independent reason to find that diversity jurisdiction is not established." *Fairley*, 2017 WL 3507015, at *3-*4. At least one of these findings was necessary to the Southern District court's judgment, and either one of them requires that this Court dismiss or remand this case for lack of subject matter jurisdiction.

Plaintiff is proceeding *pro se*, and pro se filings should be held to "less stringent standards than formal pleadings drafted by lawyers[.]" *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Notwithstanding the generally more lenient standards applicable to litigation involving pro se parties, principles of preclusion still apply, *see, e.g.*, *Tu Nguyen v. Bank of Am., N.A.*, 516 Fed. App'x. 332, 334, 335-36 (5th Cir. 2013) (unpublished), and the Court remains obligated to establish its subject matter jurisdiction before proceeding. And, even setting aside the foregoing preclusion analysis, the result would be the same. Plaintiff asserts claims for Breach of Fiduciary Duty, theft in violation of Tex. Civ. Prac. & Rem. Code § 134.002(2), DTPA violations, and negligence, and seeks disgorgement of attorney's fees, damages for expenses incurred with successor counsel (including legal costs related to Defendants' delayed return of her case file), emotional distress damages, and punitive damages and attorney's fees. The calculation of the amount in controversy for purposes of Section 1332 includes damages, potential attorney's fees, penalties, and statutory and punitive damages, but not interest or costs. *St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1253 & n.7 (5th Cir. 1998). Plaintiff's Amended Complaint alleges that "Plaintiff not only paid $75,000 to the Defendant[s] but also experienced damages that include but are not limited to $75,000 for loss of time with her elderly father and was caused to hire successor counsel to the tune of $21,000 to date[.]" Docket no. 26 at 3.

However, Plaintiff may not recover loss of consortium damages in connection with the claims that she asserts here, because that claim is premised not on any personal injury suffered by her father, but upon her own emotional damages. Docket no. 57 at 5; *compare Reagan v.*

Vaughn, 804 S.W.2d 463, 467 (Tex. 1990), *on reh'g in part* (Mar. 6, 1991) ("A cause of action for loss of consortium is derivative of the parent's claim for personal injuries. In order to recover, the child must prove that the defendant is liable for the personal injuries suffered by her parent[.]" (internal citation omitted)). And, although the record does reflect that Defendants charged Plaintiff more than $75,000 for their services, this alone does not establish an amount in controversy that exceeds $75,000. The record reflects that, of the amounts Defendants charged her, Plaintiff paid approximately $63,000 for the legal services she does not dispute were rendered. Docket no. 53 at 2 & n.1. The remaining unpaid amount, which remains in dispute, is approximately $26,000. Docket nos. 26-1 at 61; 53 at 2 & n.1. Plaintiff alleges that she is entitled to forfeiture of the entire fee amount that she paid to Defendants because they violated their fiduciary duties to her. Docket no. 34 at 4 (citing *Burrow v. Arce*, 997 S.W.2d 229, 232 (Tex. 1999)). However, Texas courts distinguish between the self-dealing, deception, or misrepresentation allegations necessary to substantiate a claim for breach of fiduciary duty and the negligence allegations that state only a claim for attorney malpractice. *Goffney v. Rabson*, 56 S.W.3d 186, 194 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). The gist of the allegations supporting Plaintiff's purported breach of fiduciary duty claim is that Defendants failed to exercise the degree of care, skill, or diligence as attorneys of ordinary skill or knowledge commonly possess—that they "fail[ed] to pursue action to remove 82 year old Sophie Fairley as guardian of Plaintiff's father, (b) fail[ed] to pursue action to appoint Plaintiff as her father's guardian (c) [failed to] not follow[] up on setting a hearing to expand visitation with Plaintiff's father denying Plaintiff time with her elderly father (d) [chose] to argue outdated estate code instead of due process rights in appellate briefs (e) [filed] appellate briefs without allowing Plaintiff to review the work (f) [and lost] client's case file[.]" Docket no. 26 at ¶ 57. The remaining allegation—that Defendants charged Plaintiff an attorney rate for some administrative

duties that could have been charged at a lower—affects only a relatively small portion of Plaintiff's claimed entitlement to relief, and is insufficient to transform what is essentially a malpractice claim into a claim for breach of fiduciary duty, or to establish an entitlement to forfeiture of the entirety of the legal fees that she paid Defendants. *Deutsch v. Hoover, Bax & Slovacek, LLP*, 97 S.W.3d 179, 189 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (discussing the "rule against dividing or fracturing a negligence claim"); *Trousdale v. Henry*, 261 S.W.3d 221, 228 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (same).

This Court concludes—consistent with the District Court for the Southern District of Texas in the prior litigation involving the same parties and claims as this case—that the remaining relief that Plaintiff seeks is not sufficient to satisfy the amount in controversy requirement of 28 U.S.C. § 1332(a), and therefore lacks subject matter jurisdiction.

Conclusion and Order

It is therefore ORDERED that Defendant Krohn's Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction (docket no. 30) is GRANTED, and that Plaintiff's claims are DISMISSED without prejudice to refiling in state court.

It is further ORDERED that all motions pending in this case at the time of this Order, including Defendant Don Ford's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(5) (docket no. 43); Plaintiff's Motion for Default Judgment (docket no. 40); Defendant Krohn's Motion for Extension of Time to File Answer and Rule 12(b)(6) Motion to Dismiss and Motion for Leave to File Motion in Excess of Twenty Pages (docket nos. 35, 37); and Defendant Krohn's Motion to Strike exhibits submitted by Plaintiff with her opposition to the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) (docket no. 60) are DENIED AS MOOT.

The Clerk of the Court shall close this case upon entry of this Order.

SIGNED this 24 day of January, 2018.

ORLANDO L. GARCIA
CHIEF UNITED STATES DISTRICT JUDGE