

COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

_____)	
BAR COUNSEL,)	
Petitioner)	
vs.)	BBO File Nos. C2-22-00272665
)	
PHILIP M. ELIOPOULOS, ESQ.)	
Respondent)	
_____)	

**MEMORANDUM OF DECISION ON BAR COUNSEL’S MOTION FOR ISSUE
PRECLUSION**

Bar counsel has moved for an order of issue preclusion to establish certain allegations in the Petition for Discipline as true and uncontested. For the reasons below, the motion is allowed in part and denied in part.¹

Background

The bar discipline matter arises out of a long and complicated civil litigation. In 2008, the respondent, Attorney Philip M. Eliopoulos, represented Lawrence and Patricia DiBenedetto in a lawsuit against Navin Patel and the company he owned, The Prime Group, Inc. The lawsuit arose out of a home built by Patel and The Prime Group for the DiBenedettos. The purchasers alleged that the home and surrounding landscaping was deficient, and their lawsuit sought damages. When the defendants failed to appear, the DiBenedettos (represented by Eliopoulos) moved for entry of a default judgment and assessment of damages. In addition to compensatory

¹ The respondent also filed a “Cross Motion to Exclude the 2019 and 2022 Decisions,” decisions described in some detail below, asking me to exclude these from evidence at the hearing. In Bar Counsel’s Opposition to Respondent’s Cross-Motion to Exclude the 2019 and 2022 Decisions, bar counsel objected that the cross motion was, in effect, a premature motion in limine that should be decided by the hearing committee chair. I agree that the Board is not the appropriate forum to decide this motion. See BBO Rules, § 3.18. The respondent’s cross-motion is denied without prejudice.

damages, the judge found that Patel and The Prime Group had violated Mass. G.L. c. 93A and had failed to respond to a pre-suit demand letter sent pursuant to that statute. Accordingly, damages were multiplied and attorney's fees were awarded. Judgment entered for \$399,783.48. Upon learning of the judgment, Patel and The Prime Group unsuccessfully moved to set it aside. Eventually, the case was settled for a payment of \$200,000 by the defendants to the DiBenedettos.

After the settlement, Patel and The Prime Group brought a separate litigation against the DiBenedettos, seeking generally to set aside the judgment and for damages arising out of the alleged fraud on the court. In 2019, a different judge than the judge who had entered judgment in the 2008 case issued a decision in which she found that that the DiBenedettos and the respondent had misled the judge in the 2008 case. The respondent had not been a party to either case. He had represented the DiBenedettos in both. In her 2019 decision, the Superior Court judge found that the DiBenedettos and Eliopoulos had committed two distinct acts of fraud on the court in the 2008 assessment of damages proceeding: (1) false testimony that gave rise to treble damages under G.L. c. 93A; and (2) improper and duplicative damages submissions and the withholding of information from the judge. She vacated the earlier judgment and ordered a new damages hearing.² At a subsequent hearing, a different judge awarded the DiBenedettos damages of \$10,538.01, which she offset by the \$200,000 Patel and The Prime Group had paid in the earlier settlement.³

In 2021, Patel and The Prime Group filed a motion for sanctions against the respondent individually, his law firm, and his clients. Eliopoulos continued to represent his clients, but he

² In his Motion for Issue Preclusion, bar counsel refers to this decision as the "Fraud Case Findings and Rulings" or the "Fraud Case," which I will use as well.

³ This decision is referred to as the "2020 Damages Findings and Rulings" or the "2020 Case."

retained separate counsel to represent his independent interests. In 2022, the judge found, among other things, as follows: substantially all of the damages asserted in the original case were frivolous and not advanced in good faith; the original judgment was based on false and misleading information; the respondent had submitted false, duplicative, and misleading damages amounts; the judge was misled by the respondent's submission; the respondent's submission was not supported by the facts and applicable law; the respondent proffered false and misleading testimony from his client at the damages hearing; the respondent's argument that the defendants' response to the c. 93A demand letters was "meaningless" was frivolous; and the respondent's conduct warranted sanctions. The judge awarded sanctions jointly and severally against Eliopoulos and the DiBenedettos in the amount of \$243,770.00 in attorneys' fees and \$7,955.84 in costs.⁴

The DiBenedettos appealed the Fraud Case Findings and Rulings. Both the DiBenedettos and Eliopoulos appealed the Sanctions Findings and Rulings. While the appeals were pending, the parties entered into a global settlement, and the appeals were dismissed.

In the bar discipline case, bar counsel alleges that Eliopoulos and his clients submitted false information to the Superior Court in support of their asserted damages and that in reliance thereon the judge awarded damages. In addition, bar counsel alleges that Eliopoulos and his clients misled the judge when they falsely asserted that the defendants had failed to respond to the demand letter when, in fact, they had. Bar counsel asserts that the respondent violated the following Rules of Professional Conduct: 1.1 (competence); 1.3 (diligence); 1.4 (communication); 1.7 (conflict of interest with current client); 3.3 (candor toward the tribunal);

⁴ Referred to as the "Sanctions Findings and Rulings" or the "Sanctions Case."

8.4(c) (dishonesty, fraud, deceit or misrepresentation); 8.4(d) (interference with administration of justice); and 8.4(h) (other conduct that adversely reflects on fitness to practice).

In a Motion for Issue Preclusion, bar counsel asks the board to preclude Eliopoulos from contesting the “findings, rulings, and conclusions of law in the Fraud Findings and Rulings, 2020 Damages Findings and Rulings, and the Sanctions Findings and Rulings.” In addition, bar counsel specifically requests that the respondent be precluded from contesting the following paragraphs in the Petition for Discipline: paragraphs 100, 109-110, 112-115, 117-118, 126, 151-154; and 163-164.

Discussion

Issue preclusion may apply in bar discipline cases. Bar Counsel v. Board of Bar Overseers, 420 Mass. 6, 9-10 (1995). As in any case, issue preclusion may apply where there is “an identity of issues, a finding adverse to the party against whom it is being asserted, and a judgment by a court or tribunal of competent jurisdiction, ... as well as a full and fair opportunity to litigate the issue in the first action.” Matter of Cohen, 435 Mass. 7, 15-16 (2001). The judgment must be valid and final, and the issues for which preclusion is sought must have been essential to the judgment. Jarosz v. Palmer, 436 Mass. 526, 530-534 (2002). Even if all of the elements have been met, the moving party still must persuade the adjudicator that it would be fair to apply issue preclusion. Matter of Cohen, *supra*, at 16-17; Pierce v. Morrison Mahoney, 452 Mass. 718, 730 (2008). Bar counsel asserts that all elements are satisfied here.

In opposition to bar counsel’s motion, Eliopoulos makes two primary arguments. First, he claims that he was not a party to the underlying case and therefore did not have an adequate opportunity to defend against the charges. Second, he argues that the underlying judgment was

not final because the case was settled while on appeal and the parties stipulated to a dismissal with prejudice.

I agree with the respondent that, because he was not a party to the Fraud Case and the 2020 Damages Case, he should not be precluded from contesting those findings and rulings. In those matters, the only issue concerned the damages incurred by his clients. Although the judge in the Fraud Case found that the DiBenedettos had submitted false evidence and that Eliopoulos “participated in the presentation of that evidence,” she made no specific findings as to Eliopoulos. (Fraud Case, BC Ex. II, p. 21).

The same reasoning does not apply to the Sanctions Case. Although not a named party, Eliopoulos was the subject of a motion for sanctions filed by Patel and The Prime Group. He retained independent counsel. He was the only witness to testify at the three-day evidentiary hearing, and had a full and fair opportunity to dispute the accusations against him. In her findings, the judge referred to clear evidence that he had misled the tribunal. “When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated. . . .” Restatement (2d) Judgments, § 27, comment d (1982).

Eliopoulos next argues that issue preclusion should not apply against him because the underlying cases were settled while on appeal. In support of this argument, he relies on language from Jarosz, supra, suggesting that a judgment is not “final” for purposes of issue preclusion if the underlying case was resolved by settlement and a stipulation of dismissal with prejudice. Jarosz involved two lawsuits, one by Jarosz against his former partners and a corporation they had all acquired, and another by Jarosz against Palmer, the lawyer who had represented the parties in acquiring the corporation. A judge denied Jarosz’s motion to disqualify Palmer from

representing the parties in the first suit, finding that there had been no attorney-client relationship between Jarosz and Palmer. In the second suit, Palmer filed a motion for judgment on the pleadings, claiming that Jarosz was precluded from relitigating the attorney-client issue. The trial judge in the second suit granted the motion, finding that the three requirements for issue preclusion had been met.

While Jarosz's appeal from the suit against Palmer was pending, the parties in the first suit settled. In the appeal before it, the SJC concluded that it had been improper, in the circumstances, to apply the doctrine of issue preclusion. While it found that the issue of the attorney-client relationship had been actually litigated, it did not agree that that decision was essential to the judgment. Jarosz, 436 Mass. at 532-533. Nor was it final; the Court underscored the difficulty of having interlocutory disqualification orders reviewed before a judgment on the merits, observing that the opportunity for review of Jarosz's motion to disqualify "was so remote that we cannot say that the order is 'subject to review' for purposes of issue preclusion." Jarosz, 436 Mass. at 535.

Turning to the specific question of the effect of a stipulation of dismissal on the issue preclusion question, the Court wrote:

A party may have incentive to settle the underlying case even if that party believes that it has a meritorious issue on appeal. To accord a stipulation of dismissal issue preclusive effect would be to impose too burdensome a cost on settlement. The finality requirement of issue preclusion ensures that the losing party has the opportunity to appeal an unfavorable ruling that could be accorded preclusive effect in future proceedings. When a party settles, he loses both the opportunity and incentive to appeal. When the losing party foregoes the right to challenge the ruling because a settlement is in his best interest, it would be unfair to bar the party from relitigating the determination in subsequent proceedings against different parties. Thus, where a case ends by stipulation of dismissal, interlocutory orders entered before the stipulation of dismissal will not be accorded preclusive effect.

Jarosz, 436 Mass. at 536.

While the Court in Jarosz used expansive language about the importance of encouraging settlements, there are three reasons why I do not think Jarosz precludes the limited application of issue preclusion in the case before me. First, the Court’s words about settlements were technically dicta; it had already determined that the application of issue preclusion was improper, having found that the issue of the attorney-client relationship between Jarosz and Palmer was not essential to the merits of the underlying case, and that the decision denying the motion to disqualify was not final and appealable. Jarosz, 436 Mass. at 533, 534. Next, while the Court’s language about settlements is fairly broad, it would not be sensible to wrest it from its context, which involved the particular treatment, and general lack of finality, of interlocutory orders. Looked at this way, the Court’s final words are highly discrete and specific, i.e., that “where a case ends by stipulation of dismissal, *interlocutory* orders entered before the stipulation of dismissal will not be accorded preclusive effect.” Jarosz, 436 Mass. at 536 (emphasis supplied). This lens leads me to the conclusion that Jarosz does not control my decision, since the case before me does not involve any interlocutory or non-appealable orders.

Perhaps most compelling, it has long been the case in the Commonwealth that “a trial court judgment is final and has preclusive effect regardless of the fact that it is on appeal.” TJR Servs. LLC v. Hutchinson, 495 Mass. 142, 145-146 (2024), quoting O’Brien v. Hanover Ins. Co., 427 Mass. 194, 201 (1998). The 2022 Sanctions Case resulted in a final judgment that supported an appeal. Having achieved finality for collateral estoppel purposes, the judgment did not thereafter lose finality once the respondent appealed, or once he settled the case.

The key concern here is fairness. Matter of Cohen, *supra*; Bar Counsel v. Board of Bar Overseers, *supra*. I find nothing unfair about giving collateral estoppel effect to those facts in the Petition for Discipline that were either explicitly determined by Judge Kazanjian in the Sanctions

Case, or essential to her judgment. These are to be found at paragraphs 151, 152, 153, 154, 163 and 164. The respondent had every incentive to contest the facts underlying these findings, and in fact did so strenuously, over the course of a three-day evidentiary hearing. There is no unfairness in giving them preclusive effect. Contrast Matter of Dillon, 20 Mass. Att’y Disc. R. 575, 578 (2004) (upholding refusal to apply issue preclusion against prosecutor in bar discipline matter based on trial court’s allowance of criminal defendant’s motion for new trial, allegedly allowed because of prosecutorial misconduct; “[a]lthough issue preclusion may be invoked in bar discipline cases . . . the use of offensive issue preclusion against someone who was not a party to the earlier proceedings must be carefully considered, focusing primarily on whether it would be fair to the person against whom preclusion is now being sought”).

Conclusion

Bar counsel’s Motion for Order of Issue Preclusion is allowed as to Paragraphs 151, 152, 153, 154, 163 and 164 of the Petition for Discipline. It is otherwise denied.

Dated: March 25, 2025

R. Michael Cassidy, Esq.
Chair, Board of Bar Overseers