STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-21-208

MARTINA SULLIVAN

Plaintiff – Appellant

v.

OWEN HASKELL, INC. LAND SURVEYING COMPANY
SAMUEL KILBORN
NATHANIEL WARREN-WHITE and ELIZABETH WARREN-WHITE
SEBAGO TECHNICS LAND SURVEYING COMPANY

Defendants – Appellees

ON APPEAL FROM A JUDGMENT OF THE MAINE SUPERIOR COURT

BRIEF FOR APPELLEES NATHANIEL WARREN-WHITE and ELIZABETH WARREN-WHITE

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I. STATEMENT OF THE CASE

The subject matter of this appeal has been tirelessly re-litigated by Appellant/Plaintiff Martina Sullivan ("Ms. Sullivan") over the course of a number of years. In fact, the issues relevant to the instant Complaint and her appeal have been before this Court four times in the past five years, most recently addressed by this Court in July of this year.

Only one week after this appeal was docketed, this Court recognized the long history of Ms. Sullivan's attempts to reverse earlier court decisions concerning the boundary line in dispute, and in so doing, went so far as to enter a *Spickler* order against Ms. Sullivan. Specifically, this Court stated that:

> given the history of this case, which has now come before us for decision four times in recent years, and given Sullivan's evident and expressed unwillingness to accept the settled judicial resolution of the boundary line between the parties' properties, we grant the Warren-Whites' motion for a *Spickler* order requiring Sullivan to obtain prior approval by a Superior Court justice for subsequent filings in the trial court relating to these parties and the subject matter of previous litigation between them.

Sullivan v. Warren-White, 2021 Me. Unpub. LEXIS 43, at *1-2, Mem 21-62.

This seven-year dispute commenced in 2014, when Appellee/Defendant Owen Haskell, Inc. ("Owen Haskell") conducted a land survey for Appellees/Co-Defendants Nathaniel and Elizabeth Warren-White (together, the "Warren-Whites"), who are Ms. Sullivan's neighbors. *See* Appendix ("R.A.") 11-12. In 2015, the Warren-Whites filed a lawsuit seeking a determination of the location of

the common boundary line between the southern end of their property and the northern end of Ms. Sullivan's property, asserting they had acquired title to the contested plot by adverse possession (hereafter referred to as the "First Case"). *See* R.A. 52; *see also Warren-White v. Sullivan*, 2017 Me. Super. LEXIS 168, at *1 (Me. Super. Ct. Aug. 17, 2017).

After a two-day trial and post-trial briefings, the Superior Court (Walker, J.) entered judgment in favor of the Warren-Whites, finding that the Warren-Whites had indeed established adverse possession-based ownership of the disputed property, and the Superior Court consequently determined the shared boundary line's location between the Warren-White and Sullivan properties. *See id.* Ms. Sullivan appealed the trial court's decision concerning the boundary line's location to this Court, and this Court affirmed the trial court's order. *See* R.A. 52; *see also Warren-White v. Sullivan*, Mem. Dec. 18-38, available at 2018 Me. Unpub. LEXIS 36.

In 2018, Ms. Sullivan sued the Warren-Whites claiming, among other things, that "the boundary line determined by the judgment [in the First Case] ha[d] been mismarked." *Sullivan v. Warren-White*, 2019 Me. Super. LEXIS 120, at *2 (Me. Super. Ct. Aug.23, 2019) (hereafter referred to as the "Second Case"). The Warren-Whites moved for summary judgment. *See* R.A. 12. In support of their motion for summary judgment, the Warren-Whites submitted evidence in the

form of an affidavit from surveyor John Schwanda of Owen Haskell, opining, among other things, that "surveyors under his supervision correctly marked the boundary line determined by the judgment in [the First Case]." *Sullivan*, 2019 Me. Super. LEXIS 120, at *4.

In 2019, the trial court (Warren, J.) granted the Warren-Whites' motion for summary judgment, dismissed Ms. Sullivan's claims in their entirety, and declared that "the boundary line set on the face of the earth by the Owen Haskell land surveying firm . . . is consistent with the boundary established by the judgment entered . . . in [the First Case]." *Id*. at *10. This Court recently affirmed the judgment in the Second Case, and further remanded the matter "for entry of an order enjoining Sullivan from further trial court filings relating to these parties and the subject matter of previous litigation between them without prior approval by a Superior Court justice." *Sullivan*, 2021 Me. Unpub. LEXIS 43, at *2.

While Ms. Sullivan's appeal of the Second Case pended, Ms. Sullivan filed her instant Complaint in December, 2020, again naming the Warren-Whites as defendants, but also including additional defendants Owen Haskell (the White-Warren's surveying firm), attorney Samuel Kilbourn (the White-Warren's attorney) and Sebago Technics (purportedly Ms. Sullivan's own surveying firm). *See* R.A. 2; 26-35.

Despite the Complaint's inclusion of additional defendants, and new causes of action, Ms. Warren-White again sought to relitigate the issue of the shared boundary line, attacking the credibility and integrity of the Defendants and Maine's legal process on a whole. *See* R.A. 26-35.

Mr. and Mrs. Warren-White and the other Defendants moved to dismiss the Complaint pursuant to M.R. Civ. P. 12(b)(6). *See* R.A. 3-4. The trial court (Kennedy, J.), ultimately granted the Defendants' Motion to Dismiss on June 14, 2021. R.A. 11-22.

Ms. Sullivan's appeal of the motion to dismiss followed.

A. Procedural History

On December 31, 2020, Ms. Sullivan filed a six-count complaint in Cumberland County Superior Court, alleging fraud, statutory fraud pursuant to 32 M.R.S.A. § 11206, material misrepresentation, negligent misrepresentation, negligence, and punitive damages against the Warren-Whites and others. R.A. 6; 26-34.

On different dates in early 2021, the named Defendants moved to dismiss the Complaint. *See* R.A. 3-4. Ms. Sullivan opposed those Motions to Dismiss.

On June 14, 2021, the trial court (Kennedy, J.), after conducting a hearing, dismissed Ms. Sullivan's Complaint with prejudice. R.A 6-7.

On June 28, 2021, Ms. Sullivan filed a motion seeking reconsideration of the Superior Court's June 14, 2021, which was denied by the trial court on August 10, 2021. R.A. 8, 10.

II. STATEMENT OF THE ISSUES ON APPEAL

1. Did the Superior Court err in dismissing Ms. Sullivan's Complaint in accordance with the doctrine of res judicata, where her Complaint alleged that a land survey misrepresented the location of a disputed boundary line, despite the survey and boundary line already being found accurate by a previous final judgment on the merits in Ms. Sullivan's earlier lawsuit?

2. Did the Superior Court err in alternatively dismissing Ms. Sullivan's fraud claim against the Warren-Whites as failing to meet the heightened pleading standard required by Maine Rule of Civil Procedure 9(b)?

3. Is the fact that the trial judge dismissed Ms. Sullivan's Complaint, standing alone, sufficient evidence of judicial impartiality, such as to require this Court to vacate the trial court's dismissal Order?

III. SUMMARY OF THE ARGUMENT

Ms. Sullivan's Complaint fails as a matter of law and the trial court correctly dismissed it as barred by the doctrine of res judicata. The factual issues presented by Ms. Sullivan's current Complaint – the accuracy of a disputed boundary line as evidenced by a 2017 survey conducted by Owen Haskell after the trial court's ruling in the First Case – were adjudicated by a final judgment entered by the trial court in the Second Case. Moreover, the evidence upon which Ms. Sullivan seeks to anchor her current Complaint in her attempt to circumvent the First and Second Case decisions is the same evidence previously presented to the Superior Court.

In granting dismissal, and barring vague and conclusory allegations concerning fraud and other misrepresentations, the trial court followed settled Maine law, including this Court's precedent.

Allegations of fraud must be pled with greater particularity consistent with M. R. Civ. P. 9(b), which Ms. Sullivan's Complaint failed to do. Rule 9(b)'s mandate applies with equal force to *pro se* litigants such as Ms. Sullivan.

Finally, Ms. Sullivan's baseless, utterly unsupported claims of judicial bias should be rejected as waived. These serious allegations are meritless. The record on appeal plainly reveals the trial judge's fair, considered analysis of Ms. Sullivan's position as a *pro se* litigant, and the trial judge's comprehensive and

well-reasoned Order fairly and impartially applied settled legal principles to dismiss the case.

IV. STANDARD OF REVIEW

A. Motion to Dismiss

The Law Court reviews "*de novo* the legal sufficiency of a complaint . . . challenged by a motion to dismiss." *Savage v. Maine Pretrial Servs.*, 2013 ME 9, ¶ 6, 58 A.3d 1138, 1140. In reviewing a motion to dismiss under Rule 12(b)(6), courts "consider the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123, 127. The Law Court then "examine[s] the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Napieralski v. Unity Church of Greater Portland*, 2002 ME 108, ¶ 4, 802 A.2d 391, 392 (citation omitted).

B. Judicial Bias

When, as here, "a litigant asserts that a judge's comments indicate bias and a denial of due process, if the litigant does not move for a recusal of the judge," the Law Court reviews "the contentions for obvious error." *See Rinehart v. Schubel*, 2002 ME 53, ¶ 13, 794 A.2d 73. "Only when such statements appear in extraordinary circumstances that demonstrate deep-seated favoritism or

antagonism that would make fair judgment impossible," has the Law Court "detected even the risk of substantial injustice." *See In re Children of Melissa F.*, 2018 ME 110, ¶ 15, 191 A.3d 348, 355.

V. ARGUMENT

A. The Superior Court's Dismissal Must be Affirmed Because Ms. Sullivan's Complaint is Barred by the Doctrine of Collateral Estoppel

The trial court correctly found that all of Ms. Sullivan's claims are barred by the doctrine of res judicata, and specifically collateral estoppel.

The doctrine of res judicata "prevents the relitigation of matters already decided." *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 7, 940 A.2d 1097. "Its application is justified by concerns for judicial economy, fairness to litigants, and the stability of final judgments." *Conn. Nat'l Bank v. Kendall*, 617 A.2d 544, 546 (Me. 1992). "Under its umbrella are two applications: issue preclusion, or collateral estoppel, and claim preclusion." *Pearson v. Wendell*, 2015 ME 136, ¶ 23, 125 A.3d 1149. The first application, collateral estoppel, applies here.[1]

[1] In reaching its decision, the trial court did not err in considering prior pleadings and judgments from the earlier proceedings. *See Warren v. Waterville Urban Renewal Authority*, 290 A. 2d 362, 367 (Me. 1972) ("It is well settled that a court will take judicial notice of its own records in the case before it, including all prior pleadings and adjudications in the same case when they are pertinent to the immediate issue under consideration").

"Collateral estoppel is the issue preclusion component of the principle of res judicata." *Gray v. TD Bank, N.A.*, 2012 ME 83, ¶ 10, 45 A.3d 735, 739. It "prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment, and … the party estopped had a fair opportunity and incentive to litigate the issue in a prior proceeding." *Penkul v. Matarazzo*, 2009 ME 113, P 7, 983 A.2d 375 (quotation marks omitted). Collateral estoppel "applies not only to determinations of law . . . but also to determinations of fact made in resolving issues of law," *see Pollack v. Reg'l Sch. Unit 75*, 886 F.3d 75, 85 (1st Cir. 2018) (discussing Maine law), and "even where the two proceedings offer different remedies." *Gray*, 2012 ME 83, ¶ 10, 45 A.3d 735, 739.

Collateral estoppel "precludes courts from revisiting factual matters that meet this test, even when a second action seeks a different remedy than the initial litigation." *Miller v. Nichols*, 586 F.3d 53, 60 (1st Cir. 2009) (interpreting Maine law). *See also In re Children of Bethmarie R.*, 2018 ME 96, ¶ 16, 189 A.3d 252 ("[T]he party sought to be barred or estopped from litigating the claim or issue" must have been "a party or privy to a party in the earlier case").

In this case, the factual issues underpinning Ms. Sullivan's claims against the Warren-Whites, and her Complaint generally, are predicated on factual matters that lay at the heart of the prior legal proceedings. As described above, in the First

Case, the trial court concluded that the Warren-Whites had established ownership over the area in dispute, and in so doing, set the parcels' boundary line at a location proferred by the White-Warrens; a location for which Ms. Sullivan, still to this day, does not agree. *See* R.A. 11-12.

Following the completion of the First Case, the White-Warrens installed a fence adjacent to the court-established boundary line location. Ms. Sullivan's complaint in the Second Case alleged, *inter alia*, that boundary line marked as a result of the First Case (as evidenced by the 2017 Owen Haskell survey) was wrong. *See* R.A. 12. Thereafter, in the Second Case, the trial court granted summary judgment to the Warren-Whites, reaffirming the boundary line's location and ruling against Ms. Sullivan that the boundary line—on the face of the earth—had been mismarked. *See* R.A. 12. *See also Sullivan*, 2019 Me. Super. LEXIS 120, at *12 ("The boundary line set on the face of the earth by Owen Haskell land surveying firm on or about October 5, 2017 is consistent with the boundary established by the judgment entered" in the First Case).

Against this backdrop, the trial court correctly determined that Ms. Sullivan's most recent allegations concerning the disputed boundary line were barred by collateral estoppel because:

> The basis of Ms. Sullivan's fraud argument is that the Defendants colluded to submit mismarked surveys and inaccurate property descriptions to the Court in the second lawsuit in order to prove that the allegedly mismarked 2017 Owen Haskell survey is accurate.

> Accordingly, the evidence underlying Ms. Sullivan's fraud claim in this third lawsuit, is the same evidence that has previously been submitted and ruled upon by this court on summary judgment. Moreover, it has been shown that the location of the "old abandoned road" was not material to the location of the Warren-White's new boundary line because the Warren-Whites acquired title to the entire old abandoned road by virtue of adverse possession.

R.A. 15 (quotations omitted). *See also Gray*, 2012 ME 83, ¶ 13, 45 A.3d 735, 740 (affirming Superior Court's determination that plaintiff's contract claim was barred by collateral estoppel, explaining that "Gray's claim of a contractual ownership interest in his mother's checking account was squarely presented to and resolved by the Probate Court. That court was presented with the same evidence that Gray cites in his present complaint ….").

Ms. Sullivan had a full and fair opportunity to litigate these issues in the prior proceedings. "Under Maine law, '[a] party has a fair opportunity to litigate an issue if that party either controls the litigation, substantially participates in that litigation, or could have participated in the litigation had they chosen to do so.'" *Miller*, 586 F.3d at 63 (quoting *State v. Hughes*, 2004 ME 141 ¶ 5, 863 A.2d 266).

Ms. Sullivan had every opportunity throughout the proceedings associated with the First and Second Cases (and the subsequent appeals), to raise all of the issues identified within the instant case.

Simply put, each of Ms. Sullivan's causes of actions against the Warren-Whites and other Defendants in this third lawsuit, are premised on the underlying

notion that the location of the boundary line is incorrect and that the survey and documents and testimony upon which the Superior Court relied in the previous proceedings were erroneous. Those matters have already been considered extensively and repeatedly, with the courts ruling in favor of the Warren-Whites on all issues.

Indeed, the trial court here correctly isolated the issue with Ms. Sullivan's Complaint, stating thusly:

> The factual issue presented here, whether the 2017 Owen Haskell survey was accurate, was decided by final judgement in the second lawsuit. Although Ms. Sullivan now alleges that these surveys and descriptions were fraudulently inaccurate, Ms. Sullivan is nonetheless arguing again that the 2017 Owen Haskell survey, and documents submitted in support, are inaccurate. There has been a final judgment on the accuracy of the surveys and descriptions at issue in this case and res judicata prevents the relitigation of the very same factual issue.

R.A. 16.

As a result, Ms. Sullivan cannot establish the one crucial, necessary element to both her fraud and material misrepresentation claims against the Warren-Whites and the other Defendants: That the boundary line previously set was false.

Accordingly, as a matter of law, collateral estoppel bars Ms. Sullivan from again re-litigating these same issues, even if now asserting different claims and adding new defendants (such as Owen Haskell). *See Johnson v. Samson Constr. Corp.*, 1997 ME 220, ¶ 7, 704 A.2d 866 ("Judicial economy, fairness to litigants, and the strong public interest favoring finality in judicial proceedings demand that

a plaintiff present all relevant aspects of his cause of action in a single lawsuit") (citations and quotation marks omitted). Dismissal of her Complaint in its entirety was proper.

B. Ms. Sullivan Failed to Allege Fraud Against the Warren-Whites with Sufficient Particularity, and the Superior Court Correctly Held That Her Failure to Do So Was An Independent and Adequate Basis to Dismiss Counts I and II of Her Complaint

The Superior Court also found that Ms. Sullivan's claims regarding fraud and fraudulent misrepresentation were subject to dismissal for Ms. Sullivan's failure to allege specific circumstances constituting fraud as required by M.R. Civ. P. 9(b). R.A. 18.

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." M.R. Civ. P. 9(b) "This standard means that a complaint 'must specify the time, place, and content of an alleged false representation.'" *Fire Tech & Safety of New Eng. v. Scott Techs.*, 2009 Me. Super. LEXIS 154, at *9 (Me. Super. Ct. October 7, 2009) quoting (*United States ex rel. Gagne v. City of Worcester*, 565 F.3d 40, 45 (1st Cir. 2009)). "Maine's … 9(b) [is] practically identical to the comparable federal rules." *Bean v. Cummings*, 939 A.2d 676, 680 (Me. 2008).

There are strict pleading requirements for litigants who wish to file a fraud claim. *See Bean*, 930 A. 2d at 681 (Rule 9(b)'s pleading requirements are "stringent"). Those strict pleading requirements apply with equal force to *pro se*

litigants, such as Ms. Sullivan. *See Stewart v. Atlantic Pump & Eng'g Inc*., 1998 Me. Super. LEXIS 121, at * 4-5 (Me. Super. May 7, 1998) ("The plaintiff has brought this action and appears *pro se.* Maine law is clear that a *pro se* party is subject to the same standards as a party represented by counsel, particularly in areas so fundamental as … the statement of a claim") (quotations omitted).

As the trial court explained when reviewing Ms. Sullivan's fraud claims:

> Here, Ms. Sullivan cannot use allegations of fraud as a means to re-litigate issues that have previously been decided. Instead, Ms. Sullivan's "third lawsuit" Complaint must allege specific acts or circumstances of fraud with greater particularity. However, the only allegation of fraud here is Ms. Sullivan's general assertion that the Defendants colluded to commit fraud by inspecting the location of the "old abandoned road" on various surveys and property descriptions … Under the circumstances, M. Sullivan's Complaint falls short of the particularized pleading requirements for fraud allegations.

R.A. 18.

This defect in Ms. Sullivan's fraud claims remains uncured: her allegations, in her Complaint and in her appellate brief, are vague and conclusory statements, and under any fair reading fail to meet the heightened pleading standard set forth under M.R. Civ. P. 9(b). *See, e.g., Wayne M. Johnson & Royal River Corp. v. Gahagan*, 2001 Me. Super. LEXIS 53, at *8 (Me. Super. Ct. April 5, 2001) (dismissing fraud claims that were "extremely vague and do not allege the time, place and content of the alleged fraudulent acts").

Not only does Ms. Sullivan not allege anywhere in her Complaint the "time, place, and content" of the alleged falsities, her allegations are "wholly conclusory" and "lacking in specifics" and therefore "too vague to meet the Rule 9(b) benchmark." *Powers v. Bos. Cooper Corp.*, 926 F.2d 109, 111 (1st Cir. 1991). *See also Nisbet v. Harp Invs., LLC*, 2018 Me. Super. LEXIS 89, at *7-8 (Me. Super. Ct. April 26, 2018) (dismissing fraud and deceit claims where the plaintiff did "not allege any specific false representation attributed to" the defendant, because the plaintiff "ha[d] not adequately identified the time, place, or content of any alleged false representation made by" the defendant).

In sum, Ms. Sullivan's fraud claims fail to meet the heighten pleading standards required by M.R. Civ. P. 9(b) and the trial court correctly concluded that this failure represented separate and adequate grounds upon which to dismiss Count I and Count III of her Complaint against Owen Haskell.

C. No Judicial Bias

Ms. Sullivan makes a passing reference in her brief by which she suggests bias on the part of the trial judge in dismissing her Complaint. Ms. Sullivan states that "[i]f the handling of the second case – or anything else – does cause a judge to develop some bias or prejudice, we expect that judge to recuse." *See* Sullivan Appeal Court Brief ("Sullivan Brief"), at p. 7.

In short, Ms. Sullivan failed to articulate any colorable claim of judicial bias.

Nor did the trial judge exhibit any judicial bias in her rulings, and no judicial bias can be demonstrated simply from the fact that the trial court ruled against Ms. Sullivan. *See, e.g.*, *Estate of Lipin*, 2008 ME 16, ¶ 6, 939 A.2d 107, 109 ("The fact that a court has decided disputed issues of law and fact against a party is not, without more, evidence of impartiality"). "And without a firm foundation upon which accusations of personal bias, prejudice, or impropriety can stand, baseless charges of misconduct are patently inappropriate." *Dalton v. Dalton,* 2014 ME 108, ¶ 25, 99 A.3d 723, 729. So it is here.

The record on appeal demonstrates that the trial judge treated Ms. Sullivan impartially and with respect, recognizing and taking into consideration at every turn Ms. Sullivan's status as a *pro se* litigant. The trial judge was patient and understanding, offering Ms. Sullivan a full and fair opportunity at the motion to dismiss hearing to plead and explain her case. The trial judge's comprehensive and well-reasoned Order fairly adjudicated the issues of law and fact in this case. There is no evidence of judicial bias or impartiality here, and Ms. Sullivan's fleeting statements to the contrary offer this Court no tenable grounds upon which to vacate the Superior Court's Order dismissing her Complaint.

VI. CONCLUSION

Based on the foregoing, the Court should affirm the trial court's June 14, 2021 Order dismissing all claims in the Complaint against Defendants/Appellees Mr. and Mrs. Warren-White.

Dated at South Portland, Maine, this 23rd day of November 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Appellees' Brief were served this day on the parties listed below by causing the same to be mailed, postage prepaid, through the U.S. Postal Service, and by electronic mail, addressed as follows:

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