

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2020-P-0813

KATHLEEN HORNIBROOK & another
Plaintiff/Appellee

v.

CHERILYN RICHARD & another
Defendant/Appellant

On Appeal From Order
Of The Suffolk Superior Court

BRIEF OF DEFENDANT-APPELLANT
CHERILYN RICHARD

Allen N. David/BBO No. 115000
Kristyn M. Kelley/BBO No. 693787
Peabody & Arnold LLP
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 951-2100
adavid@peabodyarnold.com
kkelley@peabodyarnold.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3

ISSUE PRESENTED..... 5

STATEMENT OF THE CASE..... 5

 1. The Probate Proceedings..... 6

 2. Superior Court Proceedings..... 7

STATEMENT OF FACTS..... 10

SUMMARY OF THE ARGUMENT..... 16

ARGUMENT..... 17

I. IT IS UNDISPUTED THAT CONSERVATORS ARE ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY..... 17

II. RICHARD WAS ACTING WITHIN THE SCOPE OF HER DUTIES AS A CONSERVATOR..... 21

 A. The Complaint Does Not Allege That Richard Acted Outside Her Role As Conservator..... 22

 B. Richard Is Entitled To Immunity Under A Functional Analysis..... 24

III. ALLOWING DISCOVERY UNDER THE CIRCUMSTANCES PRESENTED BY THIS CASE WOULD DEFEAT THE PURPOSE OF QUASI-JUDICIAL IMMUNITY..... 27

CONCLUSION..... 30

RULE 16(k) CERTIFICATION..... 31

CERTIFICATE OF SERVICE..... 32

ADDENDUM..... 33

TABLE OF AUTHORITIES

CASES

Brum v. Town of Dartmouth, 428 Mass. 684 (1999)..... 10

Butz v. Economou, 438 U.S. 478 (1978)..... 28

Carlson v. Mayer, 2012 WL 2335298 (Mass. Super. Ct. April 6, 2012)..... 19

Clapp v. Cohen, 2019 WL 5864752 (D. Mass. Nov. 8, 2019)..... 23

Cok v. Cosentino, 876 F.2d 1 (1st Cir. 1989)..... 19, 28, 29

Farber v. Sherman, 2018 Mass. App. Div. 46 (Dist. Ct. 2018)..... 23

Forrester v. White, 484 U.S. 219 (1988)..... 26

Gross v. Rell, 304 Conn. 234, 40 A.3d 240 (2012).... 29

Iannacchino v. Ford Motor Co., 451 Mass. 623 (2008)..... 6

Kutner v. Suttell, 2016 WL 3636977 (U.S. D. Mass. June 30, 2016)..... 19

LaLonde v. Eissner, 405 Mass. 207 (1989)..... 18, 25

Lynch v. Crawford, 483 Mass. 631 (2019)..... 29

Marr v. Maie Dep't of Human Servs., 215 F. Supp. 2d 2611 (D. Me. 2002)..... 23, 27

Nystedt v. Nigro, 700 F.3d 25(1st Cir. 2012).... 21, 28

R.J.L. v. Mayer, 87 Mass. App. Ct. 1137, 2015 WL 4494386 (2015)..... 21, 24

Sarkisian v. Benjamin, 62 Mass. App. Ct. 741 (2005)..... 18

Schaer v. Brandeis Univ., 432 Mass. 474 (2000)..... 6

Siegel v. Mayer, 2012 WL 5288786 (Mass. Super. Ct. Sept. 17, 2012)..... 18, 19, 23, 28, 29

STATUTES

G.L. c. 190B..... 30
G.L. c. 190B, §5-419..... 25
G.L. c. 190B, §5-428 (d) 28
G.L. c. 190B, §5-429..... 28

RULES

Mass. R. Civ. P. 12 (b) (6) 8
Mass. R. Civ. P. 60..... 8

ISSUE PRESENTED

Did the Superior Court err in denying the defendant court-appointed conservator's motion to dismiss tort claims on grounds of absolute quasi-judicial immunity where the complaint does not allege that the defendant committed acts or omissions outside of the scope of the conservatorship and where the plaintiff has conceded that the defendant was at all times acting as a conservator?

STATEMENT OF THE CASE

Although the issue presented on appeal is straightforward, the procedural history is anything but straightforward. It begins in the Probate Court and ends up in the Superior Court. The case involves a dispute between the plaintiff Kevin Hornibrook, who was the guardian of his mother Kathleen Hornibrook¹ and the eventual personal representative of her estate, and Cherilyn Richard ("Richard"), who was Kathleen's court appointed conservator. The dispute dealt with the manner of caring for Kathleen, who was in her early nineties and had Alzheimer's disease. Richard

¹ Because Kevin and Kathleen Hornibrook have the same last name, they will be referred to by their first names.

paid for Kathleen's care at a skilled nursing facility, but Kevin wanted to renovate the family home in South Boston, rent out two of the three units, and provide 24-hour nursing care for Kathleen in the third unit.

1. The Probate Proceedings

Richard was appointed Kathleen's temporary conservator by the Suffolk Probate Court on September 29, 2014 (A. 0055-56).^{2, 3} She was appointed permanent conservator on December 11, 2014 (A. 0056, 0085). Kevin was appointed Kathleen's guardian on December 16, 2014. (A. 0056). On October 18, 2016, Kevin filed a petition to have Richard removed as conservator (A. 0113). The Probate Court dismissed the petition on March 15, 2017 and assessed \$850 against Kevin for causing the estate to incur attorneys' fees (A. 0086, 0119).

² All references are to the Appendix (A.) or the Addendum (Add.).

³ In ruling on a motion to dismiss, the court can "take into consideration 'the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account.'" Iannacchino v. Ford Motor Co., 451 Mass. 623, 632 n.14 (2008), quoting Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000).

On February 5, 2018, Kevin, as Kathleen's guardian, filed an equity complaint against Richard in Norfolk Probate Court (A. 0100). The complaint contained four counts, which are the same four counts that are in the complaint involved in this appeal: (1) breach of fiduciary duty; (2) legal malpractice; (3) conversion; and (4) fraud (A. 0102-0110). The complaint sought only money damages (A. 0110). Richard moved to dismiss the complaint on two grounds (A. 0111). First, she argued that the Probate Court had no subject matter jurisdiction over tort claims seeking money damages (A. 0111). Second, she argued that as a court appointed fiduciary she was entitled to absolute quasi-judicial immunity (A. 0111). On April 30, 2018, the Probate Judge (Gorman, J.) agreed that the Probate Court had no subject matter jurisdiction, but rather than dismissing the case outright, she ordered that it be transferred to Suffolk Superior Court (A. 0120).

2. Superior Court Proceedings

The case was Richard was entered in the Superior Court on February 5, 2019 (A. 0006).

Richard served a motion to dismiss on March 14, 2019 (A. 0022). She argued that the complaint should

be dismissed because she was entitled to quasi-judicial immunity and that the substantive claims failed to state a claim under Mass. R. Civ. P. 12(b)(6) (A. 0022). Kevin did not oppose the motion, and the Court allowed it on April 5, 2019 (A. 0022). Judgment entered in Richard's favor on April 9, 2019 (A. 0008).

On April 15, 2019, Kevin moved for relief from judgment pursuant to Mass. R. Civ. P. 60, arguing that Kathleen had died on January 19, 2019, that her death ended his guardianship, and because of that he had no authority to oppose the motion to dismiss (A. 0024-0028). If Kevin had no authority to oppose the motion to dismiss, he likewise had no authority to move for relief from judgment because he had not yet been appointed personal representative. On June 19, 2019, the Superior Court denied the motion without prejudice "until and unless the 'estate' has duly appointed counsel" (A. 0024).

Kevin was appointed Kathleen's personal representative in August 2019 (A. 0060). He filed a renewed motion for relief from judgment on October 22, 2019 (A. 0029-0049). The renewed motion sought relief from judgment, opposed the motion to dismiss, and

sought to amend the complaint by substituting parties (A. 0029-0049). The Court allowed the renewed motion for relief from judgment and substitution of parties on February 28, 2020; however, did not rule on the motion to dismiss, but requested pleadings be resubmitted and set a further hearing date (A. 0050-0051). Thereafter, on March 23, 2020, Kevin filed another motion to amend to add further substantive allegations (A. 0052-0053). Hearings on Richard's motion to dismiss and Kevin's motion to amend were held on May 28 and June 3, 2020 (A. 0009). The Court allowed Kevin's motion to amend on June 3, 2020 (A. 0071). The Court issued its decision on Richard's motion to dismiss on June 4, 2020 (A. 0072-0080; Add. 034-042). It dismissed the legal malpractice and fraud counts for failure to state a claim on which relief can be granted (A. 0078, 0079; Add. 040, 041). It refused to dismiss the counts for breach of fiduciary duty and conversion, but noted that the claims alleged in those counts were "paper thin" (A. 0077, 0078; Add. 039, 040). The Court's ruling relevant to this appeal is its refusal to dismiss the complaint based on quasi-judicial immunity. Although the Court acknowledged that a conservator acting

within the scope of her duties as conservator enjoys absolute quasi-judicial immunity, it ruled that discovery "may" show that Richard was acting outside of the scope of her duties (A. 0077; Add. 039).

Denials of motions to dismiss based on immunity are immediately appealable under the doctrine of present execution. See Brum v. Town of Dartmouth, 428 Mass. 684, 688 (1999) ("orders denying immunity from suit enjoy the benefit of the present execution rule").

Richard timely filed her notice of appeal on June 16, 2020 (A. 0081-0082).

STATEMENT OF FACTS

In April 2014 Ethos Elder Services ("Ethos") filed an emergency protective services petition in Suffolk Probate Court to remove Kathleen Hornibrook from her home to the Blue Hill Rehabilitation Center in Stoughton (A. 0055). Kathleen was then 87 years old. She lived with her son Francis Hornibrook in a three-family house that she owned in South Boston (A. 0054). She was suffering from Alzheimer's-type progressive dementia and needed care (A. 0054). Francis was supposed to be her care giver, but Ethos

had received reports that he was unable or unwilling to assist Kathleen with basic grooming and hygiene and that he was abusing her, financially and otherwise (A. 0055). Ethos had been sending home care aids but stopped in April 2014 because of Francis' emotional outbursts and threats (A. 0055). The Probate Court granted the petition and Kathleen was removed from the home (A. 0055).

Kathleen's other son, the plaintiff Kevin Hornibrook, was appointed temporary guardian and conservator in June 2014 (A.0055). Kevin eventually became permanent guardian, but did not become permanent conservator because his brother Francis had objected (A. 0055, 0056). The Probate Court appointed the defendant Cherilyn Richard as temporary conservator on September 29, 2014,⁴ and made her permanent conservator on December 11, 2014 (A. 0055-0056).

When Richard was appointed conservator, Kathleen was in a nursing facility where she was receiving the

⁴ The Complaint states Cherilyn Richard was appointed temporary conservator on September 29, 2014; however, from the docket it appears this is incorrect and David Aptaker, Esq. was appointed as temporary Conservator/Receiver on September 18, 2014 (A. 0085).

care she needed. Richard, as conservator, was seeing that the bills for Kathleen's care were paid. In this lawsuit, Kevin claims that he had devised a plan for Kathleen's care that required her to be moved back to the house in South Boston (A. 0056). Under Kevin's plan, the top two floors of the house would be renovated so that they could be rented to tenants. The rental income would be used to pay Kathleen's expenses, which included round the clock nursing care (A. 0056).

Several points need to be emphasized about this plan. First, it is not clear when Kevin developed it. Second, it is not clear what the time frame was for the renovations, how they were to be paid for - there was a reverse mortgage on the house from which Francis had been withdrawing large sums of money (A.0055) - or where Kathleen would stay during the renovations. Third, although Kevin alleges that Richard was "made aware" of his plan, the use of the passive voice speaks volumes (A. 0056). He does not say who told Richard, when she was told, or what she was told. Fourth, there is no allegation in the complaint that Kevin as guardian ever asked the Probate Court to approve or help him implement his plan. A review of

the Probate Court docket sheet, however, shows that in October 2016 Kevin attempted to have Richard removed as conservator on essentially the same grounds that he is advancing in this case (A. 0096-0098). The Probate Court denied Kevin's petition and assessed costs against him of \$850 (A. 0119).

The final point is that Kevin's plan required that the house in South Boston remain in Kathleen's name. It is blindingly obvious that without the house there would be nothing to renovate and nowhere for Kathleen to return to. Because the house was essential to Kevin's plan, one would assume that he would object to any effort to sell it. But that is not what happened.

Richard listed the property for sale in the spring of 2016. To prepare the house to be shown, Richard engaged a company called Clean Out Your House, which did just that (A. 0059, 0094). Richard filed a motion with the Probate Court seeking permission to enter the house on a specific date for the purpose of cleaning the debris out of the house (A. 0092-0094). On August 5, 2016, Richard applied to the Probate Court for a license to sell the property for \$1,120,000 (A. 0059, 0085). Kevin objected to the

proposed sale on the ground that the price was inadequate (A. 0060, 0086). He found a buyer who was willing to pay \$1,220,000 (A. 0060). The original buyer then increased the offer to \$1,285,000 (A. 0060). On December 1, 2016, the Probate Court allowed Richard's motion to amend the petition to sell to reflect the highest offer (A. 0086). Kevin did not object. The Court issued a license to sell on November 28, 2016 (A. 0086). Again, Kevin did not object. The property sold for \$1,285,000 (A. 0060).

Kevin is seeking about \$1.9 million in damages from Richard (A. 0020-0021). The damages include such items as \$480,000 for "unnecessary nursing home care," as if Kathleen's round the clock nursing care under Kevin's plan would have been free (A. 0021). He also wants about \$31,000 for the material the house cleaners removed from the house pursuant to Richard's request of the Probate Court (A. 0021). Finally, he is looking for \$312,000 in lost rental income and \$1.1 million in lost profit, which he claims he would have netted if the house had been sold as a three-unit condominium (A. 0021). These latter two items ignore the fact that the Probate Court had granted a license

to sell the house in the condition it was in, and that Kevin did not object.

Kevin's two surviving claims are for conversion and breach of fiduciary duty. The conversion claim is based on the allegation that Richard "deprived Kathleen of her home and the value thereof by forcing an unnecessary sale," and allowing Clean Out Your House to clean out Kathleen's house (A. 0062). The breach of fiduciary duty claim is based on the allegation that Richard failed to follow Kevin's plan for Kathleen's care (A. 0061). The thread running through all these allegations is that Richard, in her role as Kathleen's conservator, took actions that Kevin did not like. Indeed, Kevin has admitted that everything Richard did or failed to do was as Kathleen's conservator (A. 0067). Rather than pursue whatever remedies he may have in the Probate Court - he has no meritorious claims, but at least the Probate Court would be the appropriate forum for such claims - he has brought a tort claim for money damages. As will be shown, Richard is immune from these claims.

SUMMARY OF THE ARGUMENT

1. Cherilyn Ricard is immune from this tort claim for money damages money damages because she is a court-appointed conservator. It is a well settled principle that a conservator performs a quasi-judicial role, which entitles the conservator to absolute quasi-judicial immunity when acting within the scope of her duties. (pp. 17-21).

2. Richard is immune from suit because it is clear from the Complaint that she was acting within the scope of her duties as conservator. The claims against Richard all relate to her duties as a court-appointed conservator, a fact the plaintiff concedes. The plaintiff does not allege that Richard was acting outside the scope of her role of conservator in connection with any of the substantive claims of the Complaint. (pp. 21-24).

3. Even if the plaintiff had alleged that Richard was acting outside the scope of her duties, a functional analysis of her actions demonstrates that she was acting within the scope of her duties, which are defined by statute. The things the plaintiff complains of -- evicting a tenant from Kathleen Hornibrook's house, cleaning the house in anticipation

of a sale, and the ultimate sale of the house -- are all directly related to the management of Kathleen's property. Significantly, the Probate Court granted Richard a license to sell the house and approved the sale. (pp. 24-27).

4. Allowing the plaintiff to do discovery to see if Richard may have been acting outside the scope of her duties would abrogate the doctrine of absolute quasi-judicial immunity. Quasi-judicial immunity is immunity from suit, not just from liability. Allowing discovery under these circumstances, where the Complaint does not clearly allege that Richard was acting outside the scope of her duties, would deprive her of the protection to which she is entitled. Immunity should be assessed at the earliest possible time, usually by a motion to dismiss, to protect the conservator and to avoid the chilling effect the threat of a lawsuit may have on the conservator's carrying out her court-appointed duties. (pp. 27-30).

ARGUMENT

I. IT IS UNDISPUTED THAT CONSERVATORS ARE ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY

It is a well-settled principle that judges enjoy absolute immunity. "The doctrine of absolute judicial

immunity which first arose under the common law has been extended to persons, other than judges, performing judicial or quasi-judicial functions.... Courts have expanded the doctrine of absolute judicial immunity to include these 'quasi-judicial' officers because they are involved in an integral part of the judicial process and thus must be able to act freely without the threat of a lawsuit." LaLonde v. Eissner, 405 Mass. 207, 210-11 (1989). Stated another way:

[q]uasi-judicial officers assist the courts, at their behest, with professional judgment, efforts and expertise. The immunity is intended to remove the disincentive to service that the prospect of lawsuits presents and to prevent the chilling effect that the prospect of lawsuits might otherwise have on the exercise of their judgment. Siegel v. Mayer, 2012 WL 5288786 *2 n. 4 (Mass. Super. Ct. Sept. 17, 2012).

The critical inquiry is "the function [the individual] performed and its essential connection to the judicial process." LaLonde, 405 Mass. at 212. Quasi-judicial immunity has been extended to a wide range of court-appointed fiduciaries, including conservators, guardians, and guardians ad litem. See Sarkisian v. Benjamin, 62 Mass. App. Ct. 741, 745 (2005) (guardian

ad litem); Cok v. Cosentino, 876 F.2d 1, 3 (1st Cir. 1989) (conservator and guardian ad litem); Siegel, 2012 WL 5288786 *3 (guardian ad litem); Kutner v. Suttell, 2016 WL 3636977 *4 (U.S. D. Mass. June 30, 2016) (guardian, social worker, and psychologist); Carlson v. Mayer, 2012 WL 2335298 *7 (Mass. Super. Ct. April 6, 2012) (court appointed partition commissioners). Specifically, conservators have been found to “function[] as agents of the court and have absolute quasi-judicial immunity for those activities integrally related to the judicial process.” Cok, 876 F.2d 1, 3.

Indeed, the Superior Court in its decision acknowledged, consistent with the caselaw cited above, that “[c]onservators act in quasi-judicial roles and are entitled to judicial immunity,” citing Cok, 876 F.2d at 3 (A. 0077; Add. 039). Further, the Superior Court agreed that “Richard is entitled to quasi-judicial immunity in her role as conservator while performing duties associated with that role.” (A. 0077; Add. 039).

Despite acknowledging that conservators are entitled to absolute quasi-judicial immunity, and that Richard was entitled to such immunity in her role as

conservator, the Superior Court did not dismiss any of the claims pending against Richard based on immunity. Rather, it dismissed two counts - legal malpractice and fraud -- for failure to state a claim. It refused, however, to dismiss the breach of fiduciary duty and conversion claims, although it noted that both claims were "paper-thin." (A. 0077, 0078; Add. 039, 040). With respect to the breach of fiduciary duty claim, it held that "the Complaint sufficiently alleges conduct that may fall outside the quasi-judicial immunity afforded to Richard as conservator. . . Following narrowly tailored discovery, the court will consider further motion practice regarding this claim at the summary judgment stage." (A. 0077; Add. 039) (emphasis added). As for the conversion claim, the Superior Court held that the allegations "are just sufficient to survive the motion to dismiss. As with the breach of fiduciary duty claim, the court will consider further motion practice at the summary judgment stage." (A. 0078; Add. 040). There was no specific ruling in connection with the conversion claim that the Complaint alleges conduct that may fall outside of the quasi-judicial immunity Richard would otherwise enjoy. The Superior Court got the law

right, but its failure to apply it properly defeated the immunity to which Richard was entitled.

II. RICHARD WAS ACTING WITHIN THE SCOPE OF HER DUTIES AS A CONSERVATOR

The Superior Court is correct in its recitation of the law: a conservator is entitled to absolute quasi-judicial immunity when acting within the scope of the conservatorship. The converse of this is that a conservator is not entitled to immunity when she acts outside of the scope of the conservatorship. A conservator is not acting within the scope of the conservatorship when her action is non-judicial or when an action "though judicial in nature," is "taken in the complete absence of all jurisdiction." Nystedt v. Nigro, 700 F.3d 25, 31 (1st Cir. 2012). See R.J.L. v. Mayer, 87 Mass. App. Ct. 1137, 2015 WL 4494386 *2 (2015) (unpublished opinion) (guardian ad litem denied immunity on summary judgment because there was a question of fact as to whether he "exceeded his role as guardian and guardian ad litem and assumed the role of attorney"). An example of a non-judicial act would be a conservator getting into a car crash while on the way to visit the protected person's property. In such a case, there is a causal connection between the fact

that the person is a conservator and the crash, but the crash is a non-judicial act. An example of a judicial act that would be outside the conservator's jurisdiction would be a conservator changing the care plan or location of a protected person. The care plan and location of a protected person is a judicial act, but it is within the jurisdiction of a guardian, not a conservator.

There are two ways a court can determine whether a conservator is entitled to immunity. The first, and simplest, is to examine the complaint. If the complaint alleges that the defendant is a conservator but does not allege that the defendant was clearly acting outside of the scope of the conservatorship, then immunity applies. The second is to perform a functional analysis: was the person doing things that are closely related to the duties of a conservator? Under either approach, Richard is entitled to immunity.

A. The Complaint Does Not Allege That Richard Acted Outside Her Role As Conservator

Here, the Complaint alleges that Richard was Kathleen's conservator, but does not allege that Richard at any time acted outside the scope of the

conservatorship. It alleges only that as a conservator Richard was dealing with Kathleen's property. There is no allegation of a non-judicial action - evicting tenants, preparing a house for sale, and selling a house under the auspices of the Probate Court are all judicial actions - and there is no allegation that Richard was acting outside of the jurisdiction of conservator. All the allegations against her are in her capacity as a conservator, and all involve Kathleen's property. See Siegel, 2012 WL 5288786, at *2 (granting motion to dismiss based on absolute quasi-judicial immunity because "[a] reading of the Complaint make[s] clear that all of the allegations of the complaint [were] against the defendants in their respective capacities"); Marr v. Maine Dep't of Human Servs., 215 F. Supp. 2d 261, 271 (D. Me. 2002) (granting motion to dismiss because complaint did not allege any facts indicating the defendant acted beyond the scope of his duties.); Farber v. Sherman, 2018 Mass. App. Div. 46 (Dist. Ct. 2018) (determining applicability of quasi-judicial immunity on a motion to dismiss); Clapp v. Cohen, 2019 WL 5864752, at *3 (D. Mass. Nov. 8, 2019) (same). Indeed, the plaintiff did not contest, and even

conceded, that all the allegations in the Complaint arise from Richard's role as a conservator (A. 0067) ("Richards is correct that 'There is nothing in the complaint or proposed amendments that allege Richard was anything more than a court-appointed conservator.'")

Accordingly, the Court erred in failing to dismiss all the claims against Richard based on the applicability of absolute quasi-judicial immunity. There is no reasonable question based on the pleadings that Richard was acting outside the scope of her duties as conservator, and the plaintiff has not pointed to any.

B. Richard Is Entitled To Immunity Under A Functional Analysis

If the Complaint were not clear enough, a functional analysis yields the same result. Massachusetts applies a functional approach to determine whether quasi-judicial immunity applies to an individual's conduct. "[T]o determine whether an individual is acting in a quasi-judicial capacity we consider 'the function [the individual] performed and its essential connection to the judicial process.'" R.J.L., 2015 WL 4494386 *2, quoting

LaLonde, 405 Mass. at 212.

Richard was a court appointed conservator, a role defined by statute. According to the Decree and Order of Appointment of Conservator, Richard "has all the powers and duties authorized to a conservator for a protected person under G.L. C. 190B § 5 Part IV. . . ." (A. 0088-0089). In general, a conservator's role is to deal with the property of a protected person. A conservator takes title to the protected person's property as fiduciary for the protected person. See G.L. c. 190B, §5-419.

The allegations in the Complaint relate to Richard's actions with respect to Kathleen Hornibrook's house in South Boston. The plaintiff appears to take issue with the fact that the Probate Court granted Richard a license to sell the house and that she sold it under the authority the license to sell gave her. He also objects to the timeliness of the eviction of Francis Hornibrook from the premises and the cleaning out of the house in preparation of the sale. It is clear from the allegations in the Complaint and the Probate Court docket sheet that all the plaintiff's claims arise from Richard's actions as a conservator.

With respect to the sale of the house, Richard applied for and was granted a license to sell the real property (A. 0085-0086). She applied for the license on August 5, 2016 (A. 0085). The plaintiff objected on October 14, 2016 (A. 0086). Thereafter, on October 20, 2016 and November 28, 2016, Richard amended the motion for the license to sell to reflect the increased price of the property (A. 0086). No further objection was filed. The Probate Court issued the license to sell on November 28, 2016 (A. 0086). Any issue the plaintiff has with the sale itself, or the price for which the house sold, are based on acts that are explicitly within the scope of Richard's work as a conservator as shown by, among other things, the Probate Court's approval.⁵

In the conversion claim, the plaintiff alleges that Richard mishandled Kathleen's personal property. As conservator, Richard held title to Kathleen's

⁵ The plaintiff's action amounts to an inappropriate collateral attack on probate's order of approval of the sale. See Forrester v. White, 484 U.S. 219, 225 (1988) ("Besides protecting the finality of judgments or discouraging inappropriate collateral attacks, . . . judicial immunity also protected judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants").

property. Any action she took with respect to the property would necessarily have been in her role as conservator. She had no interest in the property otherwise. Even though she was not required to, Richard applied for permission to clean the house prior to the sale to the Probate Court.

Finally, with respect to the allegation that Richard failed to timely remove Francis from the home, the eviction of a tenant through judicial process is precisely the function of a conservator.

III. ALLOWING DISCOVERY UNDER THE CIRCUMSTANCES PRESENTED BY THIS CASE WOULD DEFEAT THE PURPOSE OF QUASI-JUDICIAL IMMUNITY

The plaintiff's Complaint boils down to his dissatisfaction with the way Richard performed her quasi-judicial duties as conservator. Dissatisfaction, however, is not enough to remove the protections of quasi-judicial immunity. See Marr, 215 F. Supp. 2d at 269 ("Dissatisfaction with the manner in which the GAL performed his delegated duties does not remove the protections of quasi-judicial immunity."). Indeed, even if Richard performed her duties as conservator in an imperfect or even unethical way, which she did not, it still would not remove the protections of absolute quasi-judicial

immunity. Nysted, 700 F.3d at 31 (“The fact that a court-appointed discovery master performs a judicial function in an imperfect (or even unethical) way does not, by itself, dissolve his quasi-judicial immunity.”) Even in the most extreme cases, “[t]his immunity applies no matter how erroneous the act may have been, how injurious its consequences, how informal the proceeding, or how malicious the motive.” Cok, 876 F.2d at 2.⁶

These protections are reasonable given the purpose of absolute quasi-judicial immunity. “This doctrine is rooted in the wise idea that those who perform adjudicative functions ‘require a full exemption from liability.’” Nystedt, 700 F.3d at 30, quoting Butz v. Economou, 438 U.S. 478, 508 (1978). “The immunity is intended to remove the disincentive to service that the prospect of lawsuits presents and to prevent the chilling effect that the prospect of lawsuits might otherwise have on the exercise of their judgment.” Siegel, 2012 WL 5288786, at *2 n.4.

⁶ Absolute quasi-judicial immunity does not shield a conservator from statutory remedies available in the Probate Court that are specifically applicable to conservators, such as an accounting, surcharge, or removal. See G.L. c. 190B, §§5-428(d) and 5-429.

Because conservators act as agents of the Probate Court, they get the same protection as a probate judge. See Gross v. Rell, 304 Conn. 234, 251, 40 A.3d 240, 253 (2012).

Absolute quasi-judicial immunity is immunity from litigation, not just liability, and it should be determined at the earliest possible time in order to protect the conservator from harassment. Lynch v. Crawford, 483 Mass. 631, 635 (2019) (interpreting immunity for government officials as “provid[ing] protection from suit, not merely from liability”).

In this case, where the allegations of the Complaint do not plainly indicate conduct outside the scope of the conservatorship, and where a functional analysis shows that the acts were clearly within the scope of the conservatorship, allowing a plaintiff to conduct discovery to see if conduct might have been outside the scope of the conservatorship would erode the purpose of immunity. See Siegel, 2012 WL 5288786, at *2 (granting motion to dismiss based on absolute quasi judicial immunity because “[a] reading of the Complaint make[s] clear that all of the allegations of the complaint [were] against the defendants in their respective capacities”); Cok, 876 F.2d at 3

(upholding grant of motion to dismiss, holding “that Cok's pleadings fail to show that their actions were taken in clear and complete absence of authority.”).

Even if discovery were to proceed, it would provide no assistance to the Court in conducting a functional analysis. The role of a conservator is defined by statute. See G.L. c. 190B. Because this case is at the motion to dismiss stage, the Court must take every fact alleged as true and view it in the light most favorable to the plaintiff. With that deferential standard, there are no further facts to be discovered that would aid the Court in determining whether Richard was acting outside the scope of her duties. The Court can and must assume that she was doing precisely what was alleged in the Complaint. As there is no allegation that Richard was acting outside the scope of her duties, and it is clear that her actions are within the scope of her duties, the motion to dismiss should have been granted.

CONCLUSION

For the above reasons, the defendant Cherilyn Richard requests that this Court hold that all the acts and omissions the plaintiff alleges were in her role as the conservator for Kathleen Hornibrook and

that she is entitled to absolute quasi-judicial immunity.

Cherilyn Richard,
By her attorneys,

/s/ Allen N David

Allen N. David/BBO No. 115000

Kristyn M. Kelley/No. 693787

PEABODY & ARNOLD LLP

Federal Reserve Plaza

600 Atlantic Avenue

Boston, MA 02210-2261

(617) 951-2100

adavid@peabodyarnold.com

kkelley@peabodyarnold.com

RULE 16(k) CERTIFICATION

I, Allen N. David, hereby certify pursuant to Mass. R.A.P. 16(k) that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs), Mass R.A.P. 18 (appendix to the briefs); and Mass R.A.P. 20 (form of briefs, appendices, and other papers).

/s/ Allen N. David

Allen N. David

CERTIFICATE OF SERVICE

I, Allen N. David, hereby certify that I caused a true copy of the within document to be filed through the CM/ECF system and to be sent electronically to the registered participants identified on the NEF and by electronic mail on August 31, 2020:

/s/Allen N. David

1773020
16110-201722

ADDENDUM

1. Memorandum of Decision and Order on
Defendant Richard's Motion to Dismiss
(June 10, 2020)Add. 0034

Noting
✓ 6/5

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2019-0395

KATHLEEN HORNIBROOK¹

vs.

CHERYLYN RICHARD & another²

Notice
Sent
6/10/2020

FM&G
C.M.S.

MEMORANDUM OF DECISION AND ORDER ON
DEFENDANT RICHARD'S MOTION TO DISMISS

AL
E.C.S.

P & A
S.D.
A.N.D.
K.M.K.
WTH&F
B.R.C.
C.C.V.D.B.

Kevin Hornibrook, as guardian and next friend of his mother, Plaintiff Kathleen Hornibrook, filed this action alleging breach of fiduciary duty, legal malpractice, conversion, and fraud against Defendant Cherylyn Richard, who was previously appointed as conservator for Kathleen.³ Plaintiff has also asserted a claim for surety liability against Defendant NGM Insurance. This action is before the court on Richard's motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(6). For the following reasons, Richard's motion is **DENIED** in part and **ALLOWED** in part.

(sc)

BACKGROUND

Kathleen owned a three-family home located at 92 G Street in South Boston. In 2013, she was living in that home with her son Francis Hornibrook, who purported to be her caretaker, as Kathleen was diagnosed with Alzheimer's-type progressive dementia in 2012. In December 2013, Ethos Elder Services received a report that Francis was financially exploiting Kathleen and neglecting to care for her. An Ethos representative visited Kathleen and Francis in January and

¹ By her guardian and next friend Kevin Hornibrook

² NGM Insurance Company

³ Because the plaintiffs share a last name, the court will refer to them by their first names to avoid confusion.

February 2014. The representative found that Francis was unable or unwilling to assist Kathleen with her ordinary grooming and hygienic needs. Additionally, the representative found that Francis was making regular cash withdrawals and other depletions from Kathleen's bank accounts. Ethos worked with an agency to send home care aides for Kathleen to the home. In March and early April 2014, the agency refused to send aides to care for Kathleen as a result of Francis' emotional outbursts and threats toward them. In April 2014, Ethos filed an emergency protective services petition in the Suffolk Probate Court. Kathleen was moved from the home to Blue Hills Rehabilitation Center in Stoughton. Ethos proposed to the court that Kevin be appointed as Kathleen's temporary guardian and conservator. Kevin was appointed temporary guardian and conservator on June 3, 2014.

Kevin's temporary guardianship and conservatorship over Kathleen were to become permanent on September 11, 2014. However, Francis objected to Kevin's appointment as permanent conservator. Richard, an attorney licensed in the Commonwealth, was appointed by the Probate Court as temporary conservator on September 29, 2014. Richard's appointment as conservator became permanent on December 11, 2014. Kevin remained Kathleen's guardian and his appointment became permanent on December 16, 2014.

Kevin learned that Kathleen was eligible for round-the-clock care in her home from MassHealth and Medicaid. In conjunction with Ethos, he devised a plan for Kathleen to live in the South Boston home on the first floor. As part of the plan, Kevin would renovate and rent out the second and third floor units to cover Kathleen's expenses. Much renovation work was completed. When Richard was appointed conservator, she was informed of the plan to return Kathleen to her home and agreed to pursue that plan. In order for Kathleen to return home, Francis had to be removed from the home. Richard took responsibility for evicting Francis.

On December 19, 2014, Richard attempted to change the locks at 92 G Street without notifying Francis. Richard had not filed a summary process complaint to evict Francis or sought a 209A restraining order against Francis. Francis confronted Richard and the locksmith she hired at the home and forced them to leave. In late December 2014, Richard re-submitted a Medicaid application that Kevin had prepared for Kathleen. The application indicated that Kathleen's stay in a nursing home was temporary. Throughout 2015, Kevin contacted Richard to ask about the status of the eviction proceedings. Richard replied with "vague indications that she was doing something." Kevin inquired about the status of the proceedings in November 2015 and January 2016. In January, Richard responded, informing Kevin that she was having a realtor go to the home to prepare it for sale. Kevin objected to the sale of the house, wanting Kathleen to return to the home. Richard informed Kevin that, as Kathleen's guardian, he could move Kathleen back into the home and that her role was strictly a financial one. Richard did not take action to evict Francis from the home until she hired counsel in early 2016 to pursue the eviction process. Richard never sought a restraining order against Francis on Kathleen's behalf. Throughout 2015, Francis continued to reside in the home and caused damage to the renovations Kevin had previously done.

Kathleen had a reverse mortgage on the home. In late 2015, the lender issued a notice of foreclosure because Kathleen had not lived in the home for twelve months as required by the terms of the mortgage and the underlying federal reverse mortgage rules. In January 2016, Kevin learned that the home was in foreclosure and being advertised for auction. Kevin informed Richard, who was unaware of the foreclosure. Richard hired counsel to bring an equity action to temporarily enjoin the foreclosure proceedings.

On March 25, 2016, Richard and counsel she had hired to handle the eviction of Francis from the home obtained an execution for possession of the property. After Francis left the property, cleanup and repairs were required to restore the home to its condition prior to Kathleen's removal. Richard listed the home for sale with Christopher Howard of Salt Marsh Realty in Swansea. Richard hired a company, Clean Out Your House, Inc., to clean up the house and remove items from the home. Clean Out Your House took possession of all items of personal property inside the home. Neither Kevin nor his sister were given an opportunity to take items from the home.

Howard listed the home on MLS on May 2, 2016. He indicated that the house could not be shown until one week after the listing entered. Howard further indicated that there would be one open house for one-and-a-half hours on May 14, 2016, and all offers had to be submitted by May 16. The property was taken off the market on June 23, 2016, after Richard accepted the only offer that had been received for 1.12 million dollars from ALP Kantar. Richard filed for a license to sell the property with the Probate Court. Meanwhile, Kevin found another buyer, Bromfield Development, who submitted an offer of 1.22 million dollars. Richard refused to consider the offer until Kevin filed an objection to her motion for a license to sell. As a result of the offer submitted by Bromfield Development, ALP Kantar raised its offer to 1.285 million dollars. The Probate Court issued a license to sell for that amount, and the sale closed on December 8, 2016. When Richard sought a license to sell the property, she filed a bond in the amount of 1.12 million dollars, and NGM Insurance issued a bond in that amount. In conjunction with the sale, Richard paid Salt Marsh Realty \$32,500 in commission. She also paid Howard \$775 for unspecified reasons and an additional \$2,185 for his changing out the locks at the property.

Kathleen never returned to live in the home. A substantial portion of Kathleen's assets were taken by Medicaid to pay for her care in the nursing facility. Kathleen died on January 19, 2019. Kevin was appointed personal representative of Kathleen's estate on August 5, 2019.⁴

DISCUSSION

To survive a motion to dismiss under Mass. R. Civ. P. 12(b)(6), a complaint must contain "allegations plausibly suggesting (not merely consistent with) an entitlement to relief" *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-557 (2007). A plaintiff is required to present "more than labels and conclusions" and must raise a right to relief "above the speculative level." *Id.* The court accepts as true all well-pleaded factual allegations and reasonable inferences. *Id.* At the pleading stage, the question is "whether all the facts alleged, when viewed in the light more favorable to the plaintiff, render the plaintiff's entitlement to relief plausible." *Ocasio-Hernandez v. Fortunoburset*, 640 F.3d 1, 14 (1st Cir. 2011).

I. Quasi-Judicial Immunity

The doctrine of absolute judicial immunity extends to persons, other than judges, performing judicial or quasi-judicial functions. *LaLonde v. Eissner*, 405 Mass. 207, 210 (1989). "Courts have expanded the doctrine of absolute judicial immunity to include [] 'quasi judicial' officers because they are involved in an integral part of the judicial process and thus must be able to act freely without the threat of a lawsuit." *Id.* at 211, citing *Robichaud v. Ronan*, 351 F.2d 533, 535-538 (9th Cir. 1965). If a court finds that a non-judicial person fulfills quasi-judicial functions intimately related to the judicial process, that person "[has] absolute immunity for

⁴ The Complaint alleges that Kevin was appointed personal representative of Kathleen's estate on August 5, 2020. As this is not possible and Kathleen died in January 2019, the court infers that the appointment occurred on August 5, 2019.

damage claims arising from their performance of the delegated functions.” *Id.* at 212 n.8.

However, if a person acting in a quasi-judicial role performs acts clearly outside the scope of their jurisdiction, absolute immunity does not attach. *Cok v. Consentino*, 876 F.2d 1, 3 (1st Cir. 1989). Conservators act in quasi-judicial roles and are entitled to quasi-judicial immunity. *Id.*

II. Count I – Breach of Fiduciary Duty

“A fiduciary relationship is one founded on the trust and confidence reposed by one party in the integrity and fidelity of another.” *Estate of Moulton v. Puopolo*, 467 Mass. 478, 492 (2014), citing *Locator Servs. Group, Ltd. v. Treasurer & Receiver Gen.*, 443 Mass. 837, 853-855 (2005). “To establish a breach of fiduciary duty, there must be a duty owed to the plaintiff by the defendant and injury to the plaintiff proximately caused by the breach.” *Id.*, citing *Zimmerman v. Bogoff*, 402 Mass. 650, 660 (1988).

As conservator, Richard had a fiduciary relationship with and duty to Kathleen. G.L. c. 190B, § 5-416(a). The Complaint alleges that Richard failed to preserve Kathleen’s property and estate in breach of that fiduciary duty. Richard is entitled to quasi-judicial immunity in her role as conservator while performing duties associated with that role. See *LaLonde*, 405 Mass. at 212 n.8. While the allegations pertaining to a breach of fiduciary duty are paper-thin, the Complaint sufficiently alleges conduct that may fall outside the quasi-judicial immunity afforded to Richard as conservator to survive a motion to dismiss. Following narrowly tailored discovery, the court will consider further motion practice regarding this claim at the summary judgment stage.

III. Count II – Malpractice

To prove a claim of legal malpractice, a plaintiff must show that the defendant owed him a duty of care arising from an attorney-client relationship. *Cacciola v. Nellhaus*, 49 Mass. App. Ct. 746, 750 (2000). The Complaint does not allege that an attorney-client relationship existed

between Richard and Plaintiff. Rather, the Complaint plainly states that, “[d]uring late 2014 through 2015 and into 2016, Richard represented Kathleen as conservator and *herself* as legal counsel” (emphasis added). There is no allegation that Richard at any time acted as counsel for Kathleen or any member of Kathleen’s family. As there is no allegation of an attorney-client relationship between Richard and Plaintiff, the claim of legal malpractice must be dismissed.

IV. Count III – Conversion

To establish conversion, a plaintiff must prove a right to immediate possession of personal property, over which the defendant exercised dominion inconsistent with the plaintiff’s rights. *Grand Pacific Finance Corp. v. Brauer*, 57 Mass. App. Ct. 407, 412 (2003). Kathleen had an immediate right to possession of the items inside her home. The Complaint alleges that Richard exercised control over Kathleen’s personal property when she hired a company to clean out the home in preparation for sale and that cleaning out the home without allowing the family to remove items first was inconsistent with Kathleen’s rights. The factual underpinnings of the conversion claim are also paper-thin. However, they are just sufficient to survive the motion to dismiss. As with the breach of fiduciary claim, the court will consider further motion practice at the summary judgment stage.

V. Count IV – Fraud

Mass. R. Civ. P. 9(b) requires that the circumstances constituting fraud be stated with particularity. “At a minimum, a plaintiff must particularize the identity of the person(s) making the representation, the contents of the misrepresentation and where and when it took place.” *Equipment & Sys. for Indus. v. Northmeadows Constr. Co.*, 59 Mass. App. Ct. 931, 931-932 (2003). Additionally, the plaintiff should specify the materiality of the misrepresentation, his reliance and resulting harm. *Id.* at 932. See *Friedman v. Jablonski*, 371 Mass. 482, 488-489

(1976). “Mere allegations of fraud . . . averments to conditions of mind, or referrals to plans and schemes are too conclusional to satisfy the particularity requirement, no matter how many times such accusations are repeated.” *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985).

Plaintiff avers in the Complaint that Richard “made statements [] during 2015 that she was actively pursuing an eviction action against Francis” and that “[t]hese statements were false and were made with an intent to deceive,” as “she took no meaningful action during 2015 to force Francis’ removal from the home.” The allegations contained within the Complaint do not support those conclusions. Plaintiff cites to several text messages sent by Richard in support of the fraud allegation. However, the cited text messages are far too general and not representative of what Plaintiff alleges. For example, on July 20, 2015, Richard responded to a text from Kevin stating that Francis needed to be evicted by stating, “I’m scheduled to be [in Housing Court] on the 8th and the 30th...I’ll let you know how it goes.” Kevin sent multiple text messages to Richard asking about the status of the eviction in September and October 2015. On October 5, 2015, Richard texted Kevin stating, “I’ll call you as soon as I have the paperwork in hand.” Kevin asked how long it would be. Richard told him, “Not sure but I’ll be checking weekly.” There is no allegation that the content of Richard’s messages was false; Plaintiff does not allege, for example, that Richard did not plan to be in Housing Court on August 8 and 30, 2015. Richard’s statements, as alleged in the Complaint, are not sufficient to sustain a claim of fraud.

ORDER

For the foregoing reasons, Richard’s motion to dismiss is **ALLOWED** as to Count II (malpractice) and Count IV (fraud). Richard’s motion to dismiss is **DENIED** as to Count I (breach of fiduciary duty) and Count III (conversion). The parties are to conduct and complete

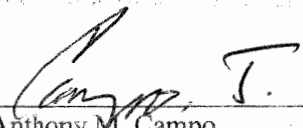
Notice sent
6/10/2020

(sc)

discovery within sixty (60) days of the date of this order, and return for a **Status Hearing** on August 11, 2020.

As Defendant NGM Insurance is not liable to Plaintiff, if Richard is not found liable, the proceedings against NGM Insurance are hereby **SEVERED** and **STAYED**, pending resolution of the claims against the defendant, Richard. See Mass. R. Civ. P. 42(b).

So Ordered.



Anthony M. Campo
Justice of the Superior Court

Dated: June 4, 2020