2013 IL App (1st) 121682-U

SECOND DIVISION
September 17, 2013

No. 1-12-1682

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

DANIEL A. DANHAUER and DEBORAH SUPIS, Individually, and on Behalf of All other Persons Entitled to Receive Funds from Morgan Stanley Smith Barney, LLC,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	No. 10 L 014604
v.	)	Honorable Raymond W. Mitchell,
MORGAN STANLEY SMITH BARNEY, LLC,	)	Judge Presiding.
Defendant-Appellee.	)	

JUSTICE PIERCE delivered the judgment of the court.

Presiding Justice Quinn and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied plaintiff's motion to strike defendant's affidavit in support of its section 2-619(a)(9) motion to dismiss (735 ILCS 5/2-619) (West 2010)) where it complied with supreme court rule 191 (Ill. S. Ct. R. 191) (eff. July 1, 2002). Plaintiffs' second contention, that the circuit court erred in granting the section 2-619(a)(9) motion to dismiss, was forfeited on appeal for failing to satisfy the requirements of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008).

¶ 2 Plaintiffs appeal the dismissal, with prejudice, of their second amended complaint against Morgan Stanley Smith Barney, LLC. Defendant filed a combined motion to dismiss the second

amended complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615, 2-619, 2-619.1 (West 2010). The second amended complaint was dismissed with prejudice pursuant to section 2-619(a)(9) of the Code. Plaintiffs argue that the affidavit filed in support of defendant's motion to dismiss failed to comply with Supreme Court Rule 191 and should have been stricken by the circuit court. Plaintiffs also argue the trial court erred in dismissing the second amended complaint with prejudice. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The following facts are taken from the second amended complaint and the record. On December 2, 2008, Daniel J. Danhauer, Sr., now deceased, entered into two individual retirement account (IRA) agreements with Morgan Stanley & Co., Inc. (Morgan Stanley). Mr. Danhauer named the Daniel J. Danhauer Trust as the primary beneficiary to one IRA account. The plaintiffs, Daniel A. Danhauer and Deborah Supis, along with three other siblings, are beneficiaries of the trust. Mr. Danhauer named the plaintiffs, along with his other three children, as beneficiaries of the second IRA account.

¶ 5 On February 19, 2010, Daniel J. Danhauer, Sr. died. Thereafter, plaintiffs executed "Inherited IRA Adoption Agreements" with defendant, Morgan Stanley Smith Barney, LLC (MSSB) in order to receive distributions from the two IRA accounts.

¶ 6 Plaintiffs allege that on December 15, 2010, they requested from defendant a required minimum distribution, from one of the decedent's IRA accounts. On December 16, 2010, defendant advised plaintiffs that in order to make the requested distribution, plaintiffs needed to complete and execute defendant's standard IRA distribution form. The distribution form

contained an indemnity provision that reads "I hereby indemnify and hold harmless Morgan Stanley Smith Barney LLC and its affiliates for any tax consequences of this distribution request and the elections made above." Plaintiffs refused to execute the IRA distribution form because it contained the indemnification provision. The distribution was not made and plaintiffs' filed this action. The basis of this lawsuit is that defendant wrongfully withheld the distribution from plaintiffs. The second amended complaint alleged claims for conversion (pled for appeal purposes only), breach of contract, specific performance and breach of fiduciary duty. Attached to the second amended complaint were the two IRA adoption agreements executed by the decedent in November of 2008 and a blank IRA distribution form.

¶ 7 Defendant filed a hybrid section 2-619.1 motion to dismiss the second amended complaint on January 12, 2012. Defendant's section 2-619 motion to dismiss was based on section 2-619(a)(9) of the Code. Defendant argued that an indemnification provision in the IRA plan booklets barred Counts II, III, and IV of plaintiffs' second amended complaint. Specifically, the IRA agreements incorporated the decedent's and plaintiffs' acceptance of terms included in the IRA plan booklets. The booklets contained provisions limiting defendant's liability relating to making required minimum distributions under the IRA agreements absent gross negligence or willful misconduct. Defendant argues the second amended complaint does not contain allegations that defendant's refusal to make the requested distribution amounts to gross negligence or wilful misconduct, and, therefore, affirmative matter bars plaintiffs' claims.

¶ 8 Attached to the defendant's motion was the "Declaration of Chastity Peterson." Ms. Peterson avers that as a Senior Registered Associate employed previously by Morgan Stanley and

currently by the defendant, her responsibilities include assisting in the opening, processing and operational aspects of defendant's IRA accounts, including the decedent's accounts. Ms. Peterson avers that six months after decedent opened his accounts with Morgan Stanley, MSSB was created and took over responsibility as successor in interest for Morgan Stanley of decedent's accounts. She reviewed the complaint and avers that the "IRA agreement[s]" attached to the complaint are incomplete and are only one part of the agreement with decedent. She avers the IRA plan booklet constitutes the remainder of the IRA agreement with decedent. Further, the Inherited IRA adoption agreements and Inherited IRA booklet were not attached to the complaint and together comprise the agreements with the plaintiffs, executed after their father's death. The IRA plan booklets issued by Morgan Stanley and MSSB in addition to the Inherited IRA adoption agreements were attached to her affidavit. Ms. Peterson avers that the plan booklets and Inherited IRA agreements attached are true and correct copies.

¶ 9 Plaintiffs filed a response to the motion to dismiss containing a motion to strike Ms. Peterson's affidavit. Plaintiffs argued the Peterson affidavit did not comply with Supreme Court Rule 191 because: (1) Ms. Peterson did not establish sufficient facts to show personal knowledge of the allegations in her affidavit; (2) the documents attached to the affidavit were not self-authenticating and did not have the requisite evidentiary foundation as business records; and (3) the affidavit did not have sufficient documentation to support the allegation that defendant had standing to enforce the agreements against plaintiffs. Plaintiffs did not file a counter affidavit.

¶ 10 The IRA adoption agreements attached to the complaint provide that "[b]y signing this

Adoption Agreement, you [decedent and plaintiffs] *** acknowledge receipt of all applicable agreements related to this account contained in this booklet and agree to the terms of such documents." In the next paragraph, the adoption agreements specifically reference the IRA plan booklets. The IRA and Inherited IRA booklets found in the record contain identical provisions in Article VII entitled "Duties of the Participant or Beneficiary." Section 7.3 "Indemnification of Custodian" provides

> "[t]he Participant shall indemnify and hold the Custodian harmless from any liability that may arise hereunder except liability arising from the gross negligence or willful misconduct of the Custodian."

¶ 11 On May 9, 2012 the circuit court granted defendant's section 2-619(a)(9) motion to dismiss with prejudice. The court also denied plaintiffs' motion to strike the Peterson affidavit finding it complied with Rule 191. The court found the agreements entered into with Morgan Stanley and MSSB both expressly incorporated the indemnification provision found in the IRA plan booklets and therefore, plaintiffs agreed to indemnify defendant from any liability arising under the agreements, including the requested distribution, absent defendant's gross negligence or wilful misconduct. The circuit court concluded that the indemnification provisions in the IRA agreements barred plaintiffs' claims in their entirety as plaintiffs had failed to allege defendant had acted with gross negligence or willful misconduct. Plaintiffs timely filed this appeal on June 7, 2012.

¶ 12 ANALYSIS

¶ 13 Plaintiffs' four count second amended complaint alleged defendant's liability for

conversion, breach of contract, specific performance and breach of fiduciary duty. Count I for conversion was previously dismissed and was repled for purposes of appeal only. Its prior dismissal was not raised in plaintiff's notice of appeal nor argued in its appeal brief. Therefore, any issue regarding the dismissal of the conversion claim is not part of this appeal. Ill. S. Ct. R. 341 (h)(7) (eff. July 1, 2008).

¶ 14 As a preliminary matter, the IRA plan booklets contain a choice of law provision designating that the laws of the State of New York govern the plans and accounts at issue. We apply the law of Illinois with regard to matters of pleading and procedure and will apply New York law to the substantive legal issues raised in this appeal. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 565 (2000). Plaintiffs contend the trial court erred in denying its motion to strike the Peterson affidavit and in granting the section 2-619(a)(9) motion to dismiss. We will address each issue in turn.

¶ 15 We review an order denying a motion to strike an affidavit submitted in conjunction with a section 2-619 motion to dismiss *de novo*. *Evergreen Oak Elec. Supply and Sales Co., Inc. v. First Chicago Bank of Ravenswood*, 276 Ill. App. 3d 317, 318-20 (1995); see also *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 377 (2003) (stating that, "because a dismissal under section 2-619(a)(9) resembles the grant of a motion for summary judgment, an appeal from a section 2-619(a)(9) dismissal is the same in nature as an appeal following a grant of summary judgment, and is likewise afforded *de novo* review.")

¶ 16 The purpose of a section 2-619 motion is to dispose of issues of law and issues of fact that can be easily proved early in the litigation. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). A

section 2-619 motion for involuntary dismissal admits the sufficiency of a plaintiff's claim, but asserts some affirmative matter outside of the pleading that defeats the claim. *Id*. An "[a]ffirmative matter is something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact contained in, or inferred from the complaint." (Internal quotation marks omitted.) *Golden v. Mullen*, 295 Ill. App. 3d 865, 869 (1997). If the affirmative matter asserted in the section 2-619 motion is not apparent on the face of the complaint, the movant must support its motion with an affidavit. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill.2d 112, 116 (1993). When the movant satisfies its initial burden of proof by providing an affidavit supporting the basis of the motion, the burden then shifts to the plaintiff. *Id*. A section 2-619(a)(9) motion to dismiss is granted where the movant meets its initial burden of proof and the party contesting the motion fails to submit admissible evidence to refute that evidence. *Hollingshead v. A.G. Edwards & Sons, Inc*., 396 Ill. App. 3d 1095, 1101-02 (2009).

¶ 17 I. Motion to Strike the Peterson Affidavit

¶ 18 Plaintiffs argue the Peterson affidavit did not satisfy the requirements of Rule 191 and the circuit court erred in failing to strike the affidavit. Specifically, plaintiffs argue: (1) Peterson did not allege sufficient facts evidencing personal knowledge of the facts contained in the affidavit; (2) the documents attached were not self-authenticating and lacked adequate foundation as business records to shift defendant's evidentiary burden; and (3) Peterson did not include sufficient documentary evidence to support its position that Morgan Stanley had standing to enforce the IRA agreements and that they were legally enforceable contracts. We disagree.

¶ 19 Affidavits in support of a motion for involuntary dismissal brought under section 2-619 are governed by Supreme Court Rule 191(a). Ill. S. Ct. R. 191 (eff. July 1, 2002). In relevant part, Rule 191(a) provides:

> "[A]ffidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

If after review of an affidavit as a whole, "it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied." (Internal quotation marks omitted.) *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 349 (2010).

¶ 20 First, the Peterson affidavit complies with the personal knowledge requirement in Rule 191(a). In the affidavit, Ms. Peterson avers that (1) she has been employed by defendant since it was created in June 2009, and that she previously worked for Morgan Stanley from 1998 until 2009; (2) she is responsible for assisting with the opening, processing and operational aspects of individual IRA accounts, including the IRA accounts established with Morgan Stanley by the decedent and the Inherited IRA accounts established with MSSB by the plaintiffs; and (3) in the execution of her responsibilities she utilizes and refers to the IRA plan booklet and is familiar

with the provisions therein. By being responsible for opening, processing and operating the individual IRA accounts at issue, and by utilizing and referring to the IRA Plan Booklet, Ms. Peterson has the personal knowledge and familiarity with the plan booklets required to satisfy Rule 191(a). We find the affidavit as a whole sufficiently establishes that it was based upon Peterson's personal knowledge and there is a reasonable inference that Peterson is competent to testify to the facts averred to and the documents attached to her affidavit.

¶ 21 Second, plaintiff contends the documents attached to the affidavit are not self-authenticating and lack proper evidentiary foundation as business records. Attached to the motion to dismiss and the Peterson affidavit were two IRA booklets and the Inherited IRA adoption agreements executed by plaintiffs. Plaintiffs argue these four documents were not certified, lack a proper foundation as business records and improperly include a plan booklet issued by a separate and distinct entity, Morgan Stanley & Co., not the defendant which cannot be enforced by defendant. We disagree.

¶ 22 The record shows defendant attached the plan booklets and Inherited adoption agreements to its motion to inform the court that plaintiffs had failed to provide the court with the entirety of the agreements between the decedent, plaintiffs and defendant. Defendant provided the court with the complete agreements. The court was satisfied of Ms. Peterson's competence to aver that the IRA adoption agreements, IRA plan booklets and Inherited IRA adoption agreements constituted the agreements as a whole between decedent and defendant as well as plaintiffs and defendant, respectively.

¶ 23 In the affidavit, Ms. Peterson states that the IRA plan booklets attached are complete,

true, and correct copies of the contracts entered into by the decedent with Morgan Stanley and the plaintiffs with MSSB. Ms. Peterson avers that she worked for each of these companies successively beginning in 1998 through the date of her affidavit. She avers that she has personal knowledge of the contents of the IRA plan booklets acquired through her responsibilities in assisting in the opening, processing and implementing operational aspects of individual IRA accounts. This knowledge includes the IRA accounts established with Morgan Stanley by the decedent, the Inherited IRA accounts established with MSSB by the plaintiffs and the IRA account agreements between the parties. Furthermore, Ms. Peterson's affidavit is certified in compliance with Rule 191. See Ill. S. Ct. R. 191(a) (eff. July 1, 2002); See 735 ILCS 5/1-109 (West 2010).

¶ 24 Therefore, we find no merit in plaintiffs' argument that the affidavit should have been stricken because the booklets lacked proper foundation as business records. The documents were not submitted as business records from which certain averments or conclusions were drawn. Rather, the booklets were attached to Ms. Peterson's uncontroverted affidavit to provide the court with the entirety of the IRA agreements between the parties. Ms. Peterson satisfied the requirements of Rule 191(a) in showing that she has sufficient personal knowledge to testify that the booklets constitute a part of the IRA agreement and the Inherited IRA agreements between plaintiffs and defendant that govern their relationship.

¶ 25 Third, plaintiffs argue defendant was required to provide documentation showing MSSB is entitled to enforce the indemnification provisions found in the Morgan Stanley IRA plan booklet. Peterson sufficiently avers personal knowledge of the formation of MSSB and the

transfer of the accounts. Peterson avers that after the decedent opened his two accounts in 2008, MSSB was created as a new venture on June 1, 2009. She avers MSSB became the successor in interest to Morgan Stanley and took over the responsibilities of holding and servicing the decedent's IRA accounts.

¶ 26 Courts must accept an affidavit as true if it is uncontradicted by a counter affidavit or other evidentiary materials. *Lindahl v. The City of Des Plaines*, 210 Ill. App. 3d 281, 299 (1991). When facts within an affidavit are not contradicted by counter affidavit, they must be taken as true notwithstanding the existence of contrary unsupported allegations in the adverse party's pleadings. *Ligenza v. Village of Round Lake Beach*, 133 Ill. App. 3d 286, 293 (1985). This court must accept all well-pleaded facts as true, and make all reasonable inferences therefrom. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 658 (2006).

¶ 27 Plaintiffs did not file a counter affidavit to controvert the Peterson Affidavit, nor is there any indication that plaintiffs sought discovery through oral or written interrogatories to challenge Peterson's averments concerning the corporate merger of Morgan Stanley with MSSB. Therefore, we must accept as true her averments that the decedent's accounts were transferred from Morgan Stanley to MSSB. The uncontroverted affidavit taken as a whole, when considering her averments of personal knowledge of the transfer of the accounts based on her duties and responsibilities for Morgan Stanley and MSSB, is sufficient to show MSSB is entitled to enforce its agreements with decedent.

¶ 28 Plaintiffs rely on *Hayes v. M & T Mortgage Corp.*, 389 Ill. App. 3d 388 (2009), for the proposition that the supporting affidavit must allege sufficient facts and provide all relevant

documents necessary to establish MSSB is entitled to enforce the Morgan Stanley agreement. We find plaintiffs' reliance on *Hayes* is misplaced. In *Hayes*, this court found that because no affidavit was attached to a motion to dismiss, there was no foundation laid to support the attached documents. Here, in contrast, the uncontroverted Peterson affidavit was filed in support of defendant's motion.

¶ 29 Furthermore, plaintiffs' argument cannot be reconciled with their complaint. Plaintiffs name MSSB as the only defendant in this action and allege that plaintiffs are entitled to the distributions under a *valid* and *enforceable* contract with MSSB. Plaintiffs' allegations in the second amended complaint support Peterson's averment that MSSB is entitled to enforce the IRA agreements. Plaintiff raised for the first time their argument that MSSB did not have standing to enforce the certain Morgan Stanley agreements executed by the decedent in their response to the motion to dismiss. There is no reference in the complaint as to any issue regarding the transfer of accounts from Morgan Stanley to MSSB during the decedent's lifetime or after his death. The record establishes that plaintiffs executed Inherited IRA agreements with MSSB for the purpose of effectuating distributions from the decedent's accounts opened with Morgan Stanley and later taken over by MSSB.

¶ 30 Fourth, plaintiffs argue Ms. Peterson was required to name in the affidavit the individual who sold the IRA plans to the decedent and state that person's qualifications and registration status in order to enforce the indemnification clause. Plaintiffs cite *Aste v. Metropolitan Life Insurance Co.*, 312 Ill. App. 3d 972, 981 (2000), in support of this argument. In *Aste*, plaintiff sued an insurance company, securities brokerage firm and the account representative for acts

arising from the solicitation of an agreement for the sale of securities in conjunction with estate planning services. *Id*. at 973. The *Aste* court held that the agreement was void because the account representative was not licensed to solicit the sale of securities to plaintiff, and remanded the case to the trial court. *Id*. at 982-84. Here, in contrast to *Aste*, plaintiffs did not allege that the salesperson who sold the IRA plans to the decedent lacked proper registration. In fact, as stated above, plaintiffs alleged that the IRA contract's were valid and enforceable agreements with defendant. Therefore, contrary to plaintiffs' contention, we find no basis, under the facts of this case, to require the defendant to establish the name, qualifications, or registration status of the securities salesperson who sold the IRA plans in this case necessary to support its motion to dismiss.

¶ 31 II. Motion to Dismiss the Second Amended Complaint

¶ 32 Plaintiffs also argue the circuit court erred in granting the section 2-619(a)(9) motion to dismiss finding that the defendant's conduct did not rise to the level of gross negligence or willful misconduct. We find plaintiffs' argument is waived pursuant to Illinois Supreme Court Rule 341(h)(7). Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 33 Illinois Supreme Court Rule 341 requires that "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on" be included in the argument section of the appellant's brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). The failure to provide us with legal authorities or reasoned argument results in an argument's waiver. *Water Tower Nursing & Home Care, Inc. v. Estate of Weil*, 2013 IL App (1st) 122681, ¶ 16. An issue is forfeited if it is not "clearly defined and sufficiently presented to satisfy the requirements

of Rule 341 (h)(7)." *Del Real v. Northeast Illinois Regional Commuter R.R. Corp.*, 404 Ill. App. 3d 65, 73 (2010). Plaintiffs cite no authority to support their contention and argue in the most general sense that the trial court erred in dismissing the complaint. Plaintiffs' argument consists of two paragraphs and was presented in a cursory manner. We cannot say that plaintiffs presented a sufficiently formed argument. Accordingly, this issue is forfeited for the failure to present an adequate argument on the merits and for the failure to cite to any relevant legal authority pertaining to this argument in the appellants' brief.

¶ 34 However, even on the merits, we are not persuaded by plaintiffs' contention. We find the indemnification provisions in plaintiffs' and decedent's IRA agreements bar the claims asserted in the second amended complaint because plaintiffs failed, as agreed, to furnish defendant with reasonable documents when they requested the distribution and defendant's refusal did not rise to the level of gross negligence or willful misconduct.

¶ 35 The record establishes that plaintiffs' and decedent's IRA accounts were both subject to IRA plan booklets. The Morgan Stanley booklet was expressly incorporated into the IRA agreement executed by decedent. Similarly, the MSSB booklet was expressly incorporated into the Inherited IRA account agreement. The executed IRA agreements attached to the second amended complaint show decedent in establishing the IRA accounts "made a part of the adoption Agreement, acknowledge[d] receipt of all applicable agreements related to this account contained in this booklet and agree to the terms of such documents." Likewise, the Inherited IRA agreements attached to the motion to dismiss executed by plaintiffs provide that "[b]y signing this Adoption Agreement, [plaintiffs] establish the IRA which is made a part of the Adoption

Agreement, acknowledge receipt of all applicable agreements related to this account contained in this booklet and agree to the terms of such documents."

¶ 36 The applicable terms from the Morgan Stanley and MSSB booklets in this case relate to the indemnification provisions found in the booklets. The Inherited IRA booklet contains provisions identical to those found in the IRA plan booklet governing the decedent's account with Morgan Stanley. The indemnification provisions state that Morgan Stanley and MSSB, respectively, would be held "harmless from any liability that may arise hereunder except liability arising from the gross negligence or willful misconduct of the Custodian [Morgan Stanley or MSSB]."

¶ 37 In addition, both plan booklets contain a provision stating,

> "[a]ll directions to the Custodian for the distribution of property held in an Account must be in writing on a form acceptable to the Custodian or in such other medium as shall be acceptable to the Custodian. Such directions shall include but not be limited to an identification of the Account, the amount of cash or specific securities or other property to be distributed, the order in which securities or other property held in the Account shall be liquidated, if necessary, the nature or purpose of the distribution, whether income taxes are to be withheld and such other representations as the Custodian may reasonably require."

In section 7.2 the booklets provide that "the Participant shall furnish the Custodian with such information and documents as the Custodian may reasonably require" for it to perform its obligations at the request of the participant or beneficiary.

¶ 38 Plaintiffs requested a required minimum distribution from one of the decedent's accounts with MSSB. The required minimum distribution rules are set forth in the IRA plan booklets. In Article IV, entitled "Distributions", section 4.3(b) "Required Minimum Distributions" explains there are required minimum distributions which must be distributed each year in accordance with section 408(a)(6) of the Internal Revenue Code (26 U.S.C. § 408(a)(6)(2008)) and Q&A-2 Section1.401(a)(9)-9 and Q&A-3 Section 1.401(a)(9)-9 of the Code of Federal Regulations (26 C.F.R. § 1.401(a)(9)-9 (2002)). In section 4.6 "Effect of Distribution" the booklets provide that "[t]he Custodian shall not be liable for distributed Account assets removed from the Account at the direction of the Participant, Beneficiary, the duly authorized representative of either, or a court or government agency of competent jurisdiction." Specifically included in the IRA and Inherited IRA agreements, executed by the decedent and plaintiffs' respectively, is the acknowledgment that "I [the participant] understand that adoption of the Plan has significant Federal and State tax consequences and I have been advised *** to consult my attorney, account or other tax advisor."

¶ 39 The entirety of the IRA plan agreement consisting of the adoption agreements and plan booklets provide that a distribution can be made at the request of the participant provided it is made in writing in a form acceptable in defendant and provided defendant will not be held liable for a distribution made by request of the participant. Basically, the plaintiffs established an IRA account with defendant that was governed by IRS regulations. Defendant understandably does not want any IRS liability for a distribution requested by and made to plaintiffs. Plaintiffs agreed to this arrangement and defendant's insistence on indemnification before distribution was

consistent with the agreement.

¶ 40 Although decedent and plaintiffs agreed to execute forms acceptable to defendant when requesting a distribution and to indemnify defendant for any tax liability defendant may incur in making the required minimum tax distribution plaintiffs requested, plaintiffs refused to execute the pre-printed IRA distribution form prepared and required by defendant. The form requested information about the account, the distribution, method of withdrawal and pertinent tax elections. The signature page of the form contained an indemnification provision which stated "I hereby indemnify and hold harmless Morgan Stanley Smith Barney LLC and its affiliates for any tax consequences of this distribution request and the elections made above."

¶ 41 Through the decedent's and plaintiffs' acceptance of the plan booklets, they agreed to provide defendant with any documents and information reasonably required when requesting a required minimum distribution. The Appellate Division of the Supreme Court of New York has upheld similar, if not identical indemnification provisions, in similar situations and found claims for breach of contract, specific performance and breach of fiduciary duty were barred by the indemnification provisions. *Retty Financing, Inc. v. Morgan Stanley Dean Witter & Co.*, 293 A.D.2d 341 (N.Y. App. Div. 2002); *L.K. Station Group, LLC v. Quantek Media, LLC*, 62 A.D. 3d 487 (N.Y. App. Div. 2009); *Baquerizo v. Monasterio*, 90 A.D.3d 587 (N. Y. App. Div. 2011); As such, plaintiffs allegation that defendant improperly withheld the requested distribution until the form was completed in full, including the indemnity provision, cannot be supported by the facts and is negated by affirmative matter submitted by defendant. Accordingly, despite plaintiffs' failure to comply with Rule 341(h)(7), we find the circuit court properly dismissed the second

amended complaint pursuant to section 2-619(a)(9) with prejudice.

¶ 42 CONCLUSION

¶ 43 Based on the foregoing, we affirm the order denying plaintiffs' motion to strike the Peterson affidavit and dismissing plaintiffs' complaint with prejudice.

¶ 44 Affirmed.