

No. 1-12-2537

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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HELEN BANOS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellant,	)	of Cook County.
	)	
v.	)	
	)	No. 10 CH 16652
GEORGIA XAMPLAS; KATHY APOSTAL,	)	
STC CAPITAL BANK; ELISHA M. PRERO; and	)	
BMPC REAL ESTATE HOLDINGS, LLC,	)	Honorable
	)	Mary L. Mikva,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Harris and Justice Quinn concur in the judgment.

**ORDER**

- ¶ 1 *Held:* Where two defendants constituted a majority of the co-trustees of a trust, they had the authority to sell real estate that was the corpus of the trust without the consent of a third co-trustee. Plaintiff failed to state a claim for breach of fiduciary duty against the co-trustee defendants.
- ¶ 2 Plaintiff appeals from the dismissal of her complaint in which she challenged the validity of the sale of property held in her mother’s trust and the actions of her co-trustees. On appeal,

she argues that the sale was void because: (1) the co-trustees lacked the authority to convey the property; (2) the co-trustees violated their duty of loyalty because they benefitted personally by receiving the proceeds of the sale; (3) the co-trustees engaged in self-dealing; and (4) the co-trustees failed to give her proper notice of the sale in violation of the Trusts and Trustees Act (Act) (760 ILCS 5/10 (West 2008)). For the following reasons, we affirm.

¶ 3

### BACKGROUND

¶ 4 Plaintiff Helen Banos and defendants Georgia Xamplas and Kathy Apostal are sisters. Their parents, Christopher and Ann Banos, both now deceased, each created identical trusts to govern the distribution of certain real estate upon their deaths. Based on the record, there is some question as to whether the parents' trusts, and their one-half undivided interests in the real estate, were consolidated after their deaths. For simplicity, we will discuss the real estate at issue as being part of Ann's trust.

¶ 5 Ann executed a self-declared trust in 1993, naming herself as the trustee. Ann directed that upon her death, Banos, Xamplas, and Apostal would serve as successor co-trustees of the trust. It specifically stated that, "In the event of any disagreements[,] the decision of the majority of the co-trustees shall govern."

¶ 6 The corpus of Ann's trust consisted of three pieces of property: the family home and two contiguous parcels of real estate located on Grand Avenue in Chicago (the Property). Ann's trust directed that upon her death, the trust would be divided

"into separate trusts, equal in value, one for each then[-]living child of mine and one for the then[-]living descendants, collectively, of each deceased child of mine.

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The trustee shall distribute each trust set aside for the descendants for [sic] a deceased child of mine to such descendants, per stirpes.”

Ann’s trust made no mention of the distribution of the trusts for the living children. Nor did it provide any details about the creation or operation of the living children’s trusts.

¶ 7 After Ann’s death, Banos and her sisters sold the family home and shared the proceeds of the sale equally among themselves. The three sisters continued to operate the Property jointly for some time after Ann’s death under the name of the “Banos Partnership,” which had its own bank account and filed tax returns.

¶ 8 In 2004, Xamplas and Apostal offered to buy Banos’s interest in the Property. Banos believed that the sisters’ offers were too low and refused to sell. Xamplas and Apostal then asserted that “the [Property] continued to be held in [Ann’s trust] and that because [they] represented two of the three supposed successor trustees, they could do with the [P]roperty as they wished without regard to the interests of [Banos].”

¶ 9 In 2006, Banos filed a lawsuit seeking distribution of the trust corpus according to the terms of Ann’s trust (the 2006 lawsuit). She also sought an order compelling Xamplas and Apostal to repay the Banos Partnership for attorney fees they paid with Partnership funds. Banos also sought to have her sisters removed as trustees and, alternatively, to enjoin them from further using Partnership funds for purposes unrelated to the trust.

¶ 10 After a trial on the claims, the circuit court determined that although the intent of Ann’s trust was to avoid estate taxes and divide the trust corpus equally among her three daughters, the provision that ostensibly created the successive trusts for the living children failed because it did

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not contain all of the elements required to create the express trusts. Accordingly, the court granted Banos's request that "the corpus of the trust be distributed in equal shares to [her] and [Xamplas and Apostal]." The court further ordered that Xamplas and Apostal be enjoined from using Partnership funds for personal use and that upon distribution of the trust corpus, Banos receive a credit for her attorney fees. The court declined to remove Xamplas and Apostal as trustees. In conclusion, the court stated, "This basically ends the case, doesn't it?" with which Banos's counsel agreed.

¶ 11 Banos's attorney then said that he would prepare the order (the 2008 Order) and "talk to counsel about implementing other details, and I am hopeful that from here we can work things out. Now that your Honor's done the difficult part, we can work out the easy parts." The court then told the parties to return in about five weeks for a status hearing.

¶ 12 Banos alleged that after the trial, Xamplas and Apostal "ignored several requests to sign deeds conveying the property to [her] and themselves as tenants in common to reflect in the land records the result of the [2008 Order] \*\*\*." In the meantime, the three sisters agreed to hire an attorney to negotiate the sale of the Property to defendant BMPC Real Estate Holdings, a company formed by tenants who were then operating a restaurant on the Property. Banos alleged that during the negotiations with BMPC, she "did not insist upon immediately re-titling the property because [Xamplas and Apostal] agreed to do so as part of the sale and the jointly-hired counsel approved this procedure."

¶ 13 The parties eventually agreed on the terms of the sale of the Property; however, the sale was not completed because BMPC did not obtain its anticipated financing. BMPC then

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attempted to renegotiate the sale, proposing to buy the Property at a lower price and on a different schedule. Banos told Xamplas and Apostal that she did not agree to the sale under the new proposed terms because she thought the price was too low.

¶ 14 According to Banos, Xamplas and Apostal “had previously appeared to be reluctant to sell, [but] became insistent upon selling to [BMPC]. On information and belief, [they] will derive some personal benefit (not shared by [Banos]) from an immediate sale at the reduced price.” After Banos refused to sell at the lower price, Xamplas and Apostal “announced that they would cause the sale to be done through the supposed trusts and therefore sell the [P]roperty (including [Banos’s] undivided interest) without [Banos’s] consent.” Banos further alleged that Xamplas and Apostal “knew that the court had previously ruled [in the 2008 Order] that \*\*\* the [P]roperty was to be deeded of record to its actual owners: [Xamplas and Apostal] and [Banos] as tenants in common.”

¶ 15 Banos also stated in her complaint that Xamplas and Apostal “knew, because it was pleaded in the second amended complaint [in the previously-filed lawsuit], that [s]ection 10 of the [Act (760 ILCS 5/10 (West 2008))] requires prior written notice to a third trustee before the other two trustees (of a three trustee trust) may act. No such notice was given of any meeting to consider selling the [Property].” Banos alleged that Xamplas and Apostal, along with their attorney, defendant Elisha Prero, “purported to convey the [Property] to [BMPC] through purported trustees deeds, knowing at all times that such action was illegal and in contravention of [the 2008 Order].”

¶ 16 In count 1 of her amended complaint, Banos sought to quiet title in her one-third

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undivided interest in the Property. In count 2, she sought a declaration that the conveyance of the Property is void because there is an “active dispute \*\*\* as to the effectiveness of the purported conveyance.” In count 3, she asserted a claim for tortious interference, alleging that defendants have damaged the value of Banos’s interest in the Property by representing in public filings that the Property is only worth \$4 million instead of \$6 million, as she believes. Count 4 alleged that Xamplas and Apostal breached their fiduciary duties when they used Banos Partnership funds to pay their attorney for completing the sale of the Property to BMPC. In count 5, Banos alleged that Prero aided and abetted the breach of fiduciary duty by receiving the funds and preparing the documentation purporting to sell the Property knowing that it violated the circuit court’s order. Finally, in count 6, Banos alleged a violation of the Consumer Fraud Act (815 ILCS 505/1 *et seq.* (West 2010)) because “defendants’ conduct was both unfair and deceptive \*\*\* because it constituted acts which are immoral, unethical, oppressive, and unscrupulous” and because their actions “involved trade or commerce.”

¶ 17 Defendants filed a motion to dismiss the complaint under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)), arguing that it failed to state a valid cause of action.<sup>1</sup> In a written order, the circuit court rejected “the premise of [Banos’s] [c]omplaint that the sale should be considered void because [she] had a one-third interest and her consent was needed for a valid sale.” It noted that in the previous case, Banos’s prayer for relief specifically requested “an order \*\*\* enforcing the terms of the trusts and requiring the corpus of

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<sup>1</sup> Defendants also sought dismissal under section 2-619, arguing that a release executed by Banos negated the entire cause of action. The court denied the motion on that basis and that portion of the order is not before us on appeal.

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the each trust to be immediately distributed.” It further noted that the 2008 Order directed that the corpus of the trust be distributed in equal shares to Banos, Xamplas, and Apostal, although “it never occurred.” However, the court rejected Banos’s argument that by operation of the 2008 Order, she held title to one-third of the Property as a tenant in common because “equity views as done that which ought to be done” and that, consequently, the sale of the Property without her permission was void. Rather, the court noted, because this case was already pending at the time the Property was sold, equity required that Banos should have sought to stop the sale from occurring rather than trying to undo it after the fact.

¶ 18 The court specifically ruled that counts 1 and 2 failed to state a claim because they were premised on the argument that the sale was invalid, which the court previously rejected. The court ruled that count 3 failed to allege a tortious interference claim because there was no allegation that the challenged transaction involved interference with a business transaction. Count 6 under the Consumer Fraud Act also failed because there was no specific allegations that a fraudulent transaction occurred. The court found that Banos adequately alleged claims for breach of fiduciary duty and aiding and abetting that breach in counts 4 and 5, respectively. However, on a motion to reconsider by Xamplas and Apostal, the court dismissed counts 4 and 5 with leave to replead.

¶ 19 Banos then filed a second amended complaint in which she added two counts but did not replead counts 4 and 5. The new count 7 alleged another claim for breach of fiduciary duty. She alleged that before agreeing to sell the Property to BMPC, she was approached by one of its principals who offered her a “substantial sum of money to be paid to her secretly and directly” if

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she could “bring about the sale” of the Property. She alleged that after BMPC lost its financing, Xamplas and Apostal initially were opposed to selling the Property to BMPC at the reduced price in BMPC’s subsequent offer. However, “later, and with no other apparent change of circumstance, [Xamplas and Apostal] changed their position and favored sale at the reduced price.” Therefore, Banos alleged, “one or more of the principals of BMPC offered consideration to [Xamplas or Apostal, or both] and that this bribe was responsible for [Xamplas and Apostal] changing position.”

¶ 20 Banos alleged that Xamplas and Apostal then tried to convince her to agree to the sale and cooperate with their plan to obtain favorable tax treatment of the proceeds. She alleged that during the original sale negotiations with BMPC, all three sisters discussed conveying the Property to themselves as tenants in common and then exchanging their interests for like kind property to receive favorable tax treatment under section 1031 of the Internal Revenue Code (26 U.S.C. §1031 (2008)). However, in the subsequent sale to BMPC, Xamplas and Apostal could not take advantage of this tax deferral unless Banos agreed to it. She alleged that in light of her refusal to cooperate, Xamplas and Apostal subdivided Ann’s trust into six “sub-trusts,” two of which were for the sole benefit of Banos and of which Xamplas, Apostal, and Banos remained co-trustees. She alleged that Xamplas and Apostal then “caused these sub-trusts to purport to sell their undivided one-third interest in the [Property] to BMPC, notwithstanding that the sole beneficiary of the sub-trusts was opposed to the sale.” Banos alleged that this arrangement allowed Xamplas and Apostal to take advantage of the tax deferral, while allowing Banos to take her distribution in cash.

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¶ 21 Banos then alleged that Xamplas and Apostal breached their fiduciary duties because they benefitted personally from this arrangement, either because they received a bribe from BMPC principals to complete the sale or because they received favorable tax treatment for the sale proceeds. She asserted that “any action whereby a trustee personally benefits from the trustee’s exercise of trust powers on behalf of a beneficiary[ ] is voidable by the beneficiary” and she “elected to void the purported sale to BMPC of the undivided one-third interest of the [Property] held by the sub-trusts of which she was the sole beneficiary.”

¶ 22 In count 8, Banos alleged a second count of aiding and abetting the breach of fiduciary duty against Prero for drafting the documents creating the sub-trusts and conveying the Property to BMPC. Banos attached to her complaint a letter from Prero to her attorney. In it, Prero described the operation of the proposed severance of Ann’s trust under section 4.25 of the Act (760 ILCS 5/4.25 (West 2008)) and included a copy of the Declaration of Severance of Trust Estate. Prero also sought counsel’s direction as to whether Banos wanted to participate in the tax deferral arrangement or receive her distribution in cash. Prero also advised that because Banos called BMPC’s lender before the original closing was to occur “and threatened a lawsuit for some unspecified cause of action if the [l]ender were to lend for this purchase and sale,” thereby causing the cancellation of the scheduled closing, the lender demanded that an escrow account be created for the purpose of funding the defense of any lawsuit brought against it by Banos and that Xamplas and Apostal “will hold [Banos] personally liable for the escrowed amount.” The letter indicated that the closing was rescheduled to occur the next day.

¶ 23 Xamplas and Apostal filed a motion to dismiss the second amended complaint. After

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hearing argument on the motion, the court granted their motion and dismissed the complaint with prejudice. The court concluded that the allegations of breach of fiduciary duty based on bribery were baseless and failed to state a claim for relief.

¶ 24 The court also ruled that the issue in this case is Banos's challenge to Xamplas and Apostal's authority to sell the property. At the time they decided to sell, the Property was owned by Ann's trust and Xamplas and Apostal had the authority to convey the property to BMPC. The decision to divide the trust into sub-trusts happened after they decided to sell in order to abate the tax consequences. However, the court ruled, subdividing the trust did not change the fact that they had the authority to sell the Property.

¶ 25 The court also addressed an argument Banos's attorney made during the hearing in which he claimed that Xamplas and Apostal breached their fiduciary duties by failing to provide her with proper notice of a meeting of the trustees before acting, as required by section 10 of the Act (760 ILCS 5/10 (West 2008)). The court found that the Act does not require that there be a meeting or a vote before a majority of trustees may act. It also found that Banos does not dispute that she had notice that the sale would occur.

¶ 26 ANALYSIS

¶ 27 Banos now appeals the dismissal of her complaint pursuant to section 2-615 of the Code for failure to state a claim upon which relief may be granted. 735 ILCS 5/2-615 (West 2010). A motion to dismiss under section 2-615 tests the legal sufficiency of the complaint and is reviewed *de novo*. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. When ruling on a section 2-615 motion to dismiss, a court accepts as true all well-pleaded facts in the complaint, as well as any reasonable

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inferences that arise therefrom. *DeHart*, 2013 IL 114137, ¶ 18. Nevertheless, Illinois is a fact-pleading jurisdiction and we disregard mere conclusions of fact or law that are unsupported by specific factual allegations. *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408, ¶ 20; *Coghlan v. Black*, 2013 IL App (1st) 120891, ¶ 22. Conclusions of fact or law are insufficient to state a cause of action regardless of whether they generally inform the defendant of the nature of the claim against him. *Coghlan*, 2013 IL App (1st) 120891, ¶ 22. Additionally, any exhibits attached to a complaint become part of that complaint and if there is any conflict between the factual matters in the exhibits and those alleged in the complaint, the factual matters in the exhibit control. See *Coghlan*, 2013 IL App (1st) 120891, ¶ 24.

¶ 28 Dismissal of a cause of action under section 2-615 is warranted when it is clearly apparent from the face of the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. *DeHart*, 2013 IL 114137, ¶ 18. Thus, the critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *DeHart*, 2013 IL 114137, ¶ 18.

¶ 29 Banos asserts four arguments on appeal, none of which are specifically tied to the counts that have been dismissed. However, based upon our review of the operative complaint and the arguments asserted, we surmise that Banos appeals from the dismissal of counts 1, 2, and 7.

¶ 30 Count 1 was a claim to quiet title. To obtain such relief, a plaintiff must actually have title to the disputed property. *Hoch v. Boehme*, 2013 IL App (2d) 120664, ¶ 41. Furthermore, the plaintiff's ability to prevail on such a claim is based on the strength of her own title rather

than claimed defects in the defendant's title. *Hoch*, 2013 IL App (2d) 120664, ¶ 41.

¶ 31 Banos argues that the sale of the Property was “not authorized” and advances several theories in support of this claim. Principally, she contends, as she did in the court below, that the 2008 Order required that the Property be distributed to each of the sisters as tenants in common and Xamplas and Apostal's purported sale of the Property without her consent invalidates the sale altogether. We disagree.

¶ 32 In the 2008 Order, pursuant to Banos's lawsuit seeking to terminate the trust, the court granted the precise relief requested by Banos and ordered that “the corpus of the trust be distributed in equal shares to [Banos] and [Xamplas and Apostal].” There was no indication by the court that the Property must be distributed in kind and no indication that this was the type of relief Banos sought in that lawsuit. On the contrary, the court noted that “there's nothing [in Ann's trust] to indicate that the [Property] was to remain in joint ownership to be governed by the majority of the [*sic*] rule of the co-trustee[s].”

¶ 33 Quite frankly, we find Banos's contention here disingenuous in light of the allegations she made in her complaint in that earlier lawsuit. In seeking to terminate the trust, Banos alleged the following.

“10. [Ann's trust] previously contained home occupied by Christopher and Ann Banos. After the death of Ann Banos, the home was sold and the proceeds distributed to the parties hereto, actions which are consistent with the trust terminating upon the second to die of Christopher and Ann Banos, and which are inconsistent with the trust continuing.

11. [Banos], both as one of the trustees and as one of the beneficiaries, has demanded that [Xamplas and Apostal], as trustees, terminate the trusts and distribute the trust property to the parties hereto.”

She then asserted that she was “entitled to an order of this Court that the corpus of [Ann’s trust] be distributed in equal shares” and that is precisely what the court ordered.

¶ 34 In this case, Banos also made no demand that the Property be distributed in kind and there was no discussion of that remedy at the hearing. Rather, she sought to have the Property treated the same way as the family home: by selling it and dividing the proceeds equally.

¶ 35 Although Banos alleged in her complaint in this case that she sought to have the sisters deed the Property to the three of them as tenants in common and that they refused, she never returned to the circuit court seeking to enforce the order that she now claims required the in-kind distribution of the Property. Rather, she agreed with her sisters to sell the Property and distribute the proceeds. Thus, we reject the contention that Banos owned an undivided one-third interest in the Property by operation of the 2008 Order and her quiet title claim necessarily fails. See *Hoch*, 2013 IL App (2d) 120664, ¶ 41.

¶ 36 Count 2 sought “a declaratory judgment that the purported conveyance [of the Property] is void.” The essential elements of a declaratory judgment action are: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an actual controversy between the parties concerning such interests. *Beahringer v. Page*, 204 Ill. 2d 363, 372 (2003). The declaratory judgment process allows a court to address controversies after a dispute arises but before steps are taken that give rise to claims for damages or other relief. *Beahringer*, 204

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Ill. 2d at 372-73. The procedure “was designed to settle and fix rights before there has been an irrevocable change in the position of the parties that will jeopardize their respective claims of right.” (Internal quotation omitted.) *Beahringer*, 204 Ill. 2d at 373. As we have recently reiterated, “although a declaratory judgment action is proper to determine the parties’ existing rights, a court may dismiss such an action if ‘a party seeks to enforce his rights after the fact.’ ” *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 10 (quoting *Senese v. Climatemp, Inc.*, 222 Ill. App. 3d 302, 314 (1991)).

¶ 37 Other than a general statement that all preceding paragraphs of the complaint are incorporated by reference, count 2 states only that “[t]here is presently an active dispute by and between [Banos], on the one hand, and [Xamplas and Apostal], STC Capital Bank and [BMPC], on the other hand, as to the effectiveness of the purported conveyance.” That claim, such as it is, is merely an attempt by Banos to “enforce her rights after the fact” to challenge a purportedly invalid conveyance. However, she cannot undo the sale of the Property to BMPC by way of a declaratory judgment action brought after the Property has been sold. See *Beahringer*, 204 Ill. 2d at 373.

¶ 38 We recently addressed this very issue in *Karimi*. In that case, the plaintiff failed to obtain financing to buy certain real estate under the terms of a purchase contract. *Karimi*, 2011 IL App (1st) 102670, ¶ 6. The defendant then terminated the contract and sold the property to a third party and retained the plaintiff’s earnest money as liquidated damages. *Karimi*, 2011 IL App (1st) 102670, ¶ 6. The plaintiff then sought a declaration that the purchase contract was still enforceable and sought return of the earnest money. *Karimi*, 2011 IL App (1st) 102670, ¶ 7. We

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held that the claim was essentially one for breach of contract and was inappropriate for consideration as a declaratory judgment claim. *Karimi*, 2011 IL App (1st) 102670, ¶ 10.

Similarly, in this case, as the circuit court correctly noted, Banos should and did seek to recover damages from her sisters for injuries that may have occurred by virtue of their alleged failure to abide by the terms of the 2008 Order or their alleged breach of fiduciary duty in selling the Property. However, under these circumstances, declaratory judgment is not appropriate and dismissal was proper. *Karimi*, 2011 IL App (1st) 102670, ¶ 10.

¶ 39 Banos advanced several other arguments on appeal under the rubric of “The Sale [of the Property] Was Not Authorized.” The arguments are not specifically tied to any of the causes of action contained in the complaint, but all conclude that the sale of the Property to BMPC was invalid. For example, she contends that after Ann’s trust failed to create the living children’s trusts, a resulting trust was created and the trustees of a resulting trust have no authority to sell trust corpus. She also argues that pursuant to the Statute of Uses, she held title to a one-third undivided interest in the Property and the sale was invalid absent her conveyance. She also claims that the terms of Ann’s trust prevented the sale of the Property. To the extent that these are arguments in support of the claim for “a declaratory judgment that the purported conveyance [of the Property] is void,” as we have just determined, that claim was properly dismissed because it is an improper legal device to retroactively challenge the sale of the Property.

¶ 40 Additionally, as defendants note, Banos never presented these theories for consideration in the court below and, thus, they are forfeited. She responds that where a complaint states a claim under any theory, regardless of whether it was argued in the court below, then dismissal is

inappropriate and must be reversed, citing *Krautstrunk v. Chicago Housing Authority*, 95 Ill. App. 3d 529, 534-35 (1981). The rule set forth in *Krautstrunk* is based on the principle that “no complaint is insufficient if it reasonably informs the defendant of the nature of the claim he is called on to answer.” *Krautstrunk v. Chicago Housing Authority*, 95 Ill. App. 3d 529, 534-35 (1981). While those propositions of law may be true, in this case, Banos did not plead facts sufficient to inform defendants that they were being called up on to answer claims based upon resulting trusts or the Statute of Uses. Therefore, they are forfeited.

¶ 41 Despite all of the procedural deficiencies in Banos’s complaint, we are compelled to note that on the merits, Banos’s claim that the sale was void is without merit. To be clear, after the 2008 Order directed that Ann’s trust be terminated and the trust corpus be distributed, the Property remained an asset of Ann’s trust until its sale and the terms of Ann’s trust governed its disposition. Ann’s trust specifically provided that the co-trustees had the authority to “sell any trust property” and that “[i]n the event of any disagreements [among the co-trustees,] the decision of the majority of the co-trustees shall govern.” Xamplas and Banos were authorized under the express terms of Ann’s trust to distribute the trust corpus by selling the Property and distributing the proceeds to each of the sisters, which is also in accordance with the 2008 Order.

¶ 42 In count 7, Banos asserted a claim for breach of fiduciary duty against Xamplas and Apostal. To state a claim for breach of fiduciary duty, it must be alleged and ultimately proved that: (1) a fiduciary duty exists; (2) the fiduciary duty was breached; and (3) such a breach proximately caused the injury of which the party complains. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 69. In particular, a trustee owes trust beneficiaries a duty of loyalty

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and is obligated to carry out the trust according to its terms and to act with the highest degree of fidelity and utmost good faith. *Faville v. Burns*, 2011 IL App (1st) 110335, ¶ 41. The trustee is prohibited from dealing with the trust's benefit for his own individual benefit. *Faville*, 2011 IL App (1st) 110335, ¶ 41. Moreover, the trustee may not engage in any form of self-dealing with the trust or place himself in a position where his interests conflict with those of the trust beneficiaries. *Faville*, 2011 IL App (1st) 110335, ¶ 42.

¶ 43 Banos alleged that her sisters personally benefitted from the sale of the Property to BMPC and violated their duty of loyalty in two ways: (1) her sisters were bribed by BMPC or its principals to complete the sale, and (2) her sisters created the sub-trusts and caused them to sell the Property to BMPC, against her wishes, which allowed them to obtain favorable tax treatment for their portion of the sale proceeds.

¶ 44 As to the first assertion, Banos's allegation of bribery is wholly conclusory and insufficient to state a breach of fiduciary duty claim. See *Coghlan*, 2013 IL App (1st) 120891, ¶ 22. Banos alleged that before the initial agreed sale of the Property to BMPC, one of the principals of BMPC approached her and offered to pay her a bribe to ensure that the sale went through. After the agreed sale to BMPC fell through, her sisters were initially opposed to selling the Property to BMPC at a reduced price. However, "with no other apparent change of circumstance," they later agreed to sell at the lower price. Therefore, Banos alleged, the sisters must have been bribed by one or more of the principals of BMPC which caused them to sell the Property at the lower price.

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¶ 45 Banos supplies no information as to who offered or accepted the bribe. Nor does she supply any information about when the alleged bribery occurred, or even whether it actually occurred. Rather, her claims rely on the unreasonable inferences that (1) because an unnamed principal of BMPC attempted to bribe Banos, her sisters must have been bribed, and (2) these bribes alone were the basis for their decision to sell the Property. We are not obligated to accept her allegations as true where they are wholly conclusory and devoid of any factual basis in support. *Kilburg*, 2013 IL App (1st) 113408, ¶ 20. Thus, they are not well-pled allegations that can support a breach of fiduciary duty claim. See *Coghlan*, 2013 IL App (1st) 120891, ¶ 22.

¶ 46 Banos also alleged that the sisters breached their duties of loyalty when they severed Ann's trust into sub-trusts and caused the sub-trusts to sell the Property to BMPC for the purpose of obtaining favorable tax treatment for their proceeds. However, her claims do not contain any allegations of self-dealing with Ann's trust or actions adverse to her interests that would constitute a breach of loyalty. Banos attached to and referenced in her complaint a letter written by Prero to her attorney explaining the proposed severance of Ann's trust and the operation of the sub-trusts. The information contained in that letter is fatal to Banos's claim of disloyalty. See *Coghlan*, 2013 IL App (1st) 120891, ¶ 24.

¶ 47 Prero first explained that Ann's trust, not the sub-trusts, sold the Property to BMPC. In fact, in support of their motion to dismiss, Xamplas and Apostal included the closing documents verifying that the sale occurred between Ann's trust and BMPC. As we have discussed at length, Xamplas and Apostal were empowered under the express terms of Ann's trust and the 2008 Order to sell the Property and distribute the proceeds equally. Although they later created the

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sub-trusts pursuant to section 4.25 of the Act (760 ILCS 5/4.25 (West 2008)) to defer their capital gains taxes, we fail to see how the tax treatment of their portions of the sale proceeds conflicted with or had any effect whatsoever on what Banos did with her portion of the proceeds. In fact, Prero explained that Banos was given the option to participate in the tax deferral arrangement under the sub-trusts also or to receive her sale proceeds directly.

¶ 48 There is no allegation that either of them benefitted from the sale *at the expense of* Banos or Ann's trust, as is required to sustain a breach of fiduciary duty claim. They, like Banos, received one-third of the sale proceeds. Banos did not allege that she received less than her fair share of the proceeds, that her sisters sold the Property for less than market value, or that the sisters were involved in purchasing the Property from Ann's trust, directly or through a straw purchaser. In short, she has not made any allegations that constitute the type of self-dealing with Ann's trust that conflicts with their responsibilities to her or to the trust. See generally Restatement (Second) of Trusts §170. The cases cited by Banos in her brief involve trustees who "purchase[d] from [themselves]," which is markedly different from the actions of Xamplas and Apostal, who sold the Property in an arms-length transaction pursuant to a court order to distribute the proceeds of a terminated trust. We decline to recognize their receipt of an equal share of the sale proceeds as a "self-interested" act, and Banos has provided us with no authority requiring us to hold otherwise. Accordingly, we conclude that Banos has failed to state a claim for breach of fiduciary duty.

¶ 49 Finally, Banos argues on appeal that the sale of the Property is void because Xamplas and Apostal violated section 10 of the Act (760 ILCS 5/10 (West 2008)) by failing to give her notice

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of or hold a meeting to discuss the sale of the Property to BMPC. After thorough review of Banos's complaint, we find that it contains no claim for relief based on a purported violation of section 10 and that her argument on appeal borders on the frivolous. In her brief, she contends that "[t]he Amended Complaint pleads \*\*\* that there was no notice 'of any meeting to consider selling the [Property].'" However, the full text of that passage, which is contained in the general allegations of the complaint, states:

“[Xamplas and Apostal] knew, because it was pleaded in the second amended complaint [in the 2006 lawsuit] that [s]ection 10 of the \*\*\* Act [760 ILCS 5/10 (West 2008)] requires prior written notice to a third trustee before the other two trustees (of a three trustee trust) may act. No such notice was given of any meeting to consider selling the [Property].” (Emphasis supplied.)

That is insufficient to establish a cause of action upon which relief may be granted based on a purported lack of notice under the Act. Whatever allegations Banos may have made in a prior lawsuit have no effect on the requirement that she properly plead a cause of action in this lawsuit, which she has not done. Moreover, that the issue of notice under the Act “was pleaded” in a prior lawsuit suggests that it was either disposed of by the court or abandoned by Banos. In either case, we would likely be precluded from revisiting that matter here under either the doctrine of *res judicata* or the doctrine of collateral estoppel. *BankFinancial, FSB v. Tandon*, 2013 IL App (1st) 113152, ¶¶ 17, 18 (*res judicata* bars litigation of issues that were actually decided in the first action as well as matters that could have been decided); *State Farm Fire and Casualty Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 558 (2007) (under

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collateral estoppel, the adjudication of a fact or issue in one cause bars relitigation of the same fact or issue in a subsequent suit).

¶ 50

#### CONCLUSION

¶ 51 For the foregoing reasons, we affirm the dismissal of Banos's complaint.

¶ 52 Affirmed.