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¶ 1 One grandson filed this will contest concerning his grandfather's probated will, alleging that the other grandson had destroyed a subsequent will which revoked the probated will. On appeal, he challenges the judgment of the circuit court of Cook County dismissing his complaint for failure to state a cause of action.

¶ 2 BACKGROUND

¶ 3 Plaintiff Michael Cangelosi and defendant Peter Cangelosi III are brothers. On June 14, 2007, Harold G. Epifanio (decedent), the grandfather of plaintiff and defendant, died. On June 9, 2011, the probate division of the circuit court admitted to probate the last will and testament of Harold G. Epifanio dated May 6, 1993, and his codicil dated October 21, 1998, and issued letters of office as independent executor to defendant. This will left the entire estate to defendant. The court also entered an order of heirship and found that the sole heirs of decedent were plaintiff and defendant.

¶ 4 On October 23, 2012, plaintiff filed a second amended complaint which frames the instant appeal. That complaint consisted of count I, a will contest, and count II, alleging intentional interference with an inheritance. Count I contests the validity of the decedent's will dated May 6, 1993, and the codicil dated October 21, 1998. In support of that count, plaintiff alleged that:

"7. On or about April 25, 2005, Harold G. Epifanio verbally stated to Peter Cangelosi II [*sic*], Michael Cangelosi, and Tanya Metoff his intention to revoke his last will and testament dated May 6, 1993 and Codicil dated October 21, 1998, and execute either a new last will and testament or amend his Declaration of Trust dated May 6, 1993

to equally distribute his estate between Michael Cangelosi and Peter Cangelosi III.

8. On or about February 5, 2007, Harold G. Epifanio again verbally stated to Michael Cangelosi his intention to revoke both his last will and testament dated May 6, 1993 and Codicil dated October 21, 1998, and execute either a new last will and testament or amend his Declaration of Trust dated May 6, 1993 to equally distribute his estate between Michael Cangelosi and Peter Cangelosi III.

9. Upon information and belief, at some point between February 5, 2007 and June 14, 2007, Harold G. Epifanio, fully intending to revoke or modify the last will and testament dated May 6, 1993 and codicil dated October 21, 1998 created a new last will and testament, which was:

(a) signed by Harold G. Epifanio;

(b) two witnesses were present and saw Mr. Epifanio or some person in his presence and by his direction sign the will: and

(c) those two witnesses believed Harold G. Epifanio to be of sound mind and memory at the time of signing or acknowledging the will.

10. Upon information and believe[sic], and pleading in the alternative to Paragraph 9, at some point between February 5, 2007 and June 14 2007, Harold G. Epifanio amended the Declaration of Trust dated May 6, 1993 and the Revoked October 21, 1998 Amendment, to equally distribute his estate between Michael Cangelosi and Peter Cangelosi III, and leaving an amount equal to \$25,000 to Nick Anastas, a long-time friend of his.

11. Hours after the death of Mr. Epifanio, Peter III went to Mr. Epifanio's home with the intention of finding and destroying Mr. Epifanio's newest and final will or trust documents.

12. Peter III wanted to destroy these documents because they essentially divided Mr. Epifanio's assets equally between him and Michael.

13. Peter III replaced these newest estate documents with older, revoked estate documents he had found in his mother's safe.

14. Accompanied by Anthony Bruscatto, Peter III found, removed, and ultimately destroyed the newest estate documents of Mr. Epifanio.

15. On March 31, 2011, almost four years after Mr. Epifanio's death, Peter III fraudulently submitted the following revoked estate documents to this Court:

Last Will and Testament of Harold G. Epifanio, signed May 6, 1993, filed March 31, 2011.

First Codicil to Last Will and Testament of Harold G. Epifanio, signed October 21, 1998.

16. On May 19, 2011, Peter III committed perjury when he filed the 'Petition for Probate of Will and for Letters Testamentary.'

17. In that document, under penalties of perjury, Peter III stated that Mr. Epifanio left a will dated May 6, 1993 and codicil dated October 21, 1998.

18. In so doing, Peter III committed fraud."

¶ 5 In count II, for intentional interference with an inheritance, plaintiff realleges and

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incorporates the above allegations. He additionally alleges that:

20. An expectancy existed when Mr. Epifanio drafted the final will and trust documents.

21. The existence of Michael's expectancy was confirmed shortly after Mr. Epifanio's death when Peter III found the final will and trust documents. These documents divided Mr. Epifanio's assets equally between Peter III and Michael.

22. Peter III intentionally interfered with Michael's expectancy when Peter III found, removed, and destroyed the final will and trust documents at Mr. Epifanio's home hours after Mr. Epifanio's death."

¶ 6 Plaintiff further alleges that defendant interfered with his expectancy under the 2007 will by taking various actions that decreased the value to the decedent's estate. Specifically he alleges that defendant closed the heat in Mr. Epifanio's house so that the pipes would freeze, rupture and flood the house so that defendant could file a fraudulent insurance claim for the damage. He further alleged that defendant chose not to rent decedent's house, rendering four years of rental income wasted. Finally, plaintiff alleged that defendant disposed of decedent's personal property without offering plaintiff an opportunity to examine it and that defendant commingled estate assets with his personal assets.

¶ 7 On December 19, 2012, defendant filed a motion to dismiss plaintiff's second amended complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)), contending that plaintiff failed to sufficiently establish the existence of the alleged 2007 will, particularly since there were no copies of the purported destroyed documents. On February

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4, 2012, the trial court dismissed counts I and II for failure to state a cause of action. In ruling on the motion, the trial court stated that "plaintiff's entire complaint was based upon a legal fiction." On March 1, 2012, plaintiff filed this appeal.

¶ 8 ANALYSIS

¶ 9 On appeal, plaintiff contends that the trial court erred in finding that he had not pled a valid will contest or a cause of action for intentional interference with an expected inheritance because he made sufficient factual allegations in support of both counts. Defendant responds that plaintiff's second amended complaint failed to state sufficient factual allegations in counts I and II, and dismissal under section 2-615 was therefore appropriate. 735 ILCS 5/2-615 (West 2010).

¶ 10 A motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)) challenges the legal sufficiency of the complaint. *Karimi v. 401 North Wabash Venture, LLC.*, 2011 IL App (1st) 102670, ¶ 9 (citing *Dloogatch v. Brinccat*, 396 Ill. App. 3d 842, 846 (2009)). In ruling on the motion, the court accepts as true all well-pleaded facts in the complaint as well as all reasonable inferences drawn therefrom. *Karimi*, 2011 IL App (1st) 102670, ¶ 9 (citing *Vitro v. Mihelic*, 209 Ill. 2d 76, 81 (2004)). Dismissal under section 2-615 is proper if the pleadings and attachments, when construed in the light most favorable to the plaintiff, clearly show that plaintiff cannot prove any set of facts that would entitle him to relief. *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group Inc.*, 186 Ill. 2d 419, 424 (1999). Review of the trial court's dismissal of plaintiff's complaint pursuant to section 2-615 is *de novo*. *Doe v. McKay*, 183 Ill. 2d 272, 274 (1998). "However, the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action." *Tedrick v. Community*

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Resource Center, Inc., 235 Ill.2d at 161; see also *Thurman v. Champaign Park Dist.*, 2011 IL App (4th) 101024, ¶ 8. Thus, the only consideration is whether the allegations of the verified second amended complaint state legally sufficient causes of action.

¶ 11 Plaintiff's first contention is that the trial court erred in dismissing count I of his second amended complaint, in which he contested the validity of the will of decedent dated May 6, 1993 and the codicil dated October 21, 1998. Plaintiff maintains that he made sufficient factual allegations to support his contention that a subsequent will prepared by decedent revoked the probated will and codicil.

¶ 12 In his complaint, plaintiff alleged that, prior to his death, the decedent told him verbally that he was going to change his will to equally distribute his estate between the plaintiff and the defendant. This conversation was allegedly heard by two witnesses. Plaintiff further alleged that the decedent did, in fact, create a new will at some point between February 5, 2007 and June 14, 2007. Moreover, he alleged that the 2007 will was signed by the decedent and witnessed by two persons who believed decedent to be of sound mind and memory at the time of signing. Finally, he alleged that defendant destroyed the 2007 will documents. Relying on *Anderson v. Irwin*, 101 Ill. 411, 416 (1882) (slight evidence of a destroyed will is sufficient), plaintiff contends that where defendant has destroyed a written instrument, strict proof of the contents is not needed.

¶ 13 In response, defendant argues that plaintiff has not alleged sufficient facts to show that the purported 2007 will was validly executed or that the 1993 will and 1998 codicil were ever revoked. Defendant also argues that, even if the alleged 2007 will had been validly executed, it would still not be legally effective in this action because it has not yet been admitted to probate.

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We agree with this second contention.

¶ 14 In Illinois, a will is not effective for any purpose until it is admitted to probate. *Crooker v. McArdle*, 332 Ill. 27, 29 (1928). No will can be shown to revoke a previous will until the subsequent will has been admitted to probate. *Id.* Therefore, a contest of decedent's 1993 will because of its revocation by the alleged 2007 will cannot be successfully maintained, because the 2007 will cannot be admitted into evidence until it has been probated. *Id.* It is for this reason that the court in *Mather v. Minard*, 260 Ill. 175, 178 (1913), stated, "The Supreme Court will not allow the question of revocation of the probated will by a later will to be raised in the will contest." The basis for this determination was that the newly discovered will, which had allegedly revoked the probated will, would first be required to be probated. *Id.* Thus, we find that the trial court did not err in dismissing count I of plaintiff's complaint.

¶ 15 Plaintiff next challenges the trial court's finding that count II of his complaint failed to state a cause of action for intentional interference with an expectancy under a will. To plead a cause of action for the tort of interference with an expectancy of receiving property pursuant to a will, plaintiffs must allege: (1) the existence of an expectancy; (2) defendant's intentional interference with that expectancy; (3) interference that involves tortious conduct such as fraud, duress, or undue influence; (4) a reasonable certainty that the expected property would have been received but for defendant's interference; and (5) damages. *Simon v. Wilson*, 291 Ill. App. 3d 495, 507 (1997) (citing *Prosen v. Chowaniec*, 271 Ill. App. 3d 65, 67 (1995)). "The remedy for an intentional interference with a testamentary expectancy is not the setting aside of the will, but a judgment against the individual defendant. Further, where the defendant has received the benefit

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of the bequest or legacy, the plaintiff's remedies include a simple money judgment to the extent of the benefit tortiously acquired." *Bjork v. O'Meara*, 2013 IL 114044, ¶ 24.

¶ 16 The relevant inquiry is whether the allegations in the complaint, if true, lead to the conclusion that there is a reasonable certainty that plaintiff would have received that which he expected under the will, but for defendant's actions. *Simon v. Wilson*, 291 Ill. App. 3d 495, 507 (1997). This reasonable certainty has been described as follows:

" 'A bare possibility may not be [protectible]. But where an intending donor, or testator * * * has actually taken steps toward perfecting the * * * devise, * * * so that if let alone the right of the * * * devisee * * * will cease to be inchoate and become perfect, we are of the opinion that there is such a status that an action will lie, if it is maliciously and fraudulently destroyed, and the benefit diverted to the person so acting, thus occasioning loss to the person who would have received it.' " *Id.* at 507 (quoting *Nemeth v. Banhalmi*, 99 Ill. App. 3d 493, 498 (1981)).

¶ 17 In this case, plaintiff alleges that the decedent did take steps toward perfecting the devise, insofar as he purportedly executed the 2007 will. The validity of a will is determined under section 6-4 of the Probate Act, which sets forth the requirements for a will to be admitted to probate. The statute states in pertinent part:

"6-4. Admission of will to probate-testimony or affidavit of witnesses.

(a) When each of 2 attesting witnesses to a will states that (1) he was present and saw the testator or some person in his presence and by his discretion sign the will in the

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presence of the witnesses or the testator acknowledged it to the witness as his act, (2) the will was attested by the witness in the presence of the testator and (3) he believed the testator to be of sound mind and memory at the time of signing or acknowledging the will, the execution of the will is sufficiently proved to admit it to probate, unless there is proof of fraud, forgery, compulsion or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will." 755 ILCS 5/6-4 (West 2010).

¶ 18 Plaintiff has sufficiently alleged facts that, if true, would establish the validity of the 2007 will. He alleged that two witnesses were present at the signing of the will, and those two witnesses believed the decedent to be of sound mind and memory at the time of signing. Plaintiff further alleged that he had an expectancy under the 2007 will, since it allegedly "divided Mr. Epifanio's assets equally between Peter III and Michael." Furthermore, plaintiff alleged that defendant intentionally and tortiously interfered with his expectancy by finding, removing, and destroying the estate documents in the presence of a named witness, Bruscato. Plaintiff also alleges that defendant committed various other acts of interference, such as commingling estate assets with his personal funds, failing to rent the decedent's house, and causing the pipes in decedent's house to freeze so that defendant could file a fraudulent insurance claim.

¶ 19 Plaintiff's allegation that Bruscato witnessed the destruction of testamentary documents, taken together with all the other allegations noted above and taken as true at this stage of the proceedings, was sufficient to withstand a motion to dismiss. When ruling on a section 2-615 motion, courts must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from those facts. *Nelson v. Quarles and Brady, LLP*, 2013 IL App (1st) 123122 ¶

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27. Additionally, as the supreme court has repeatedly reminded us, pleadings are to be liberally construed. *Brucker v. Mercola*, 227 Ill. 2d 502, 531 (2007); *Norman A. Koglin Associates v. Valenz Oro, Inc.*, 176 Ill. 2d 385, 395 (1997); see 735 ILCS 5/2-603(c) (West 2012). Thus, we find that based on these allegations plaintiff has sufficiently alleged an expectancy.

¶ 20 Notwithstanding the foregoing, defendant argues that plaintiff has not sufficiently established the validity of the 2007 will. Specifically, defendant maintains that plaintiff does not have the actual date of execution of the alleged revised testamentary documents and that plaintiff has not named the witnesses. Defendant further argues that plaintiff does not have a reproduction of the will and he has not alleged the content and terms of the will. However, in order to withstand a 2-615 motion for dismissal, plaintiff does not yet have to establish or prove anything. 735 ILCS 5/2-615 (West 2010). He simply needs to allege facts that sufficiently fall within the elements of the cause of action. *Nelson*, 2013 IL App (1st) 123122, ¶ 27. Plaintiff in this case has done that. Defendant has no authority that says a plaintiff must plead the names of the witnesses to a purported will. Also, it is possible that discovery may reveal the facts that defendant says are now missing. Plaintiff is entitled to discovery and the chance to prove his allegations.

¶ 21 Turning to defendant's argument that plaintiff did not comply with supreme court rule 103(b) (Ill. S. Ct. R. 103(b) (eff. July 1, 2007)) by failing to exercise reasonable diligence to obtain service on a defendant, plaintiff maintains that the trial court made it clear in its ruling it did not reach this argument. To preserve an issue for review, a litigant must first obtain either a ruling on the issue or a refusal to rule on it from the trial court. *Raintree Homes, Inc. v. Village of*

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Kildeer, 302 Ill. App. 3d 304, 306 (1999). Courts of review are intended to review matters upon which rulings have already been made. *Somerset House, Inc. v. Board of Appeals of City of Chicago*, 131 Ill. App. 2d 569, 572 (1970). Thus, we need not address this argument.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons we affirm the decision of the trial court dismissing count I but reverse as to count II and remand for further proceedings.

¶ 24 Affirmed in part, reversed in part and remanded.