

material fact existed as to whether Dolores improperly converted funds from a family trust for her own use, and whether Dolores breached her fiduciary duty as trustee of the family trust. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

¶ 4 Alexander Radziewicz (Alexander) and Helen Roskie (Helen) are the parents of Ronald Radziewicz (Ronald) and Dolores. On January 23, 1976, Alexander and Helen created a trust for Ronald's benefit (the Ronald Trust).¹ In 1983, Ronald died and his sister, Dolores, became trustee of the Ronald Trust. At the time of Ronald's death, the only assets held in the Ronald Trust were its beneficial interest in four parcels of land located in Elk Grove Village and Park Ridge, Illinois. Ronald's adult children, Kimberly Parrish (Kimberly), Barbara DiMatteo (Barbara), and Michael Roskie (Michael), were beneficiaries of the Ronald Trust. Kristen and Salvatore are the adult children of Kimberly. According to the plaintiffs, Kristen and Salvatore, at the time of Ronald's death, the Ronald Trust lacked sufficient assets to pay for certain funeral and other expenses. As a result, Helen agreed to loan money to the Ronald Trust to cover those financial obligations. In January 1984, in exchange for Helen's loan, Dolores, as trustee, executed a promissory note on behalf of the Ronald Trust, which made payable to Helen, on demand, the sum of \$169,814.63 (the 1984 Note). On December 12, 1986, Helen agreed to forgive \$30,000 of the balance due on the 1984 Note, thereby reducing the principal amount to \$139,814.63. On that same day, Dolores, as trustee of the Ronald Trust, executed a second promissory note to reflect those changes—making payable to Helen, on demand, the sum of

¹ A separate trust was also created for the benefit of Dolores (the Dolores Trust), which is not the subject of this appeal.

\$139,814.63 "with interest at the applicable federal short term rate from time to time in effect" (the 1986 Note).

¶ 5 From 1988 until her death in 2005, Helen was a client of a licensed certified public accountant (CPA), Sam Remer (Remer). According to Remer's discovery deposition, services he performed for Helen included tax return preparation and estate planning advice. At some point, Remer "had calculated [Helen's] estate as being somewhere around [\$3 million]," which carried with it a substantial potential estate tax liability under the applicable estate tax laws at that time. As a result, Remer and Helen engaged in discussion about reducing her estate in order to minimize her potential estate tax liabilities upon her death. Remer recommended that Helen gift portions of the 1986 Note to her family members up to the annual gift exclusion of \$10,000 per individual. Subsequently, Helen took Remer's advice and made gifts to Kristen, Salvatore, and other family members with portions of the 1986 Note between 1995 and 1997. According to Remer, the 1986 Note was a "receivable" that would have been included in Helen's estate. However, by gifting out portions of the 1986 Note to Helen's family members, it reduced the balance due on the note and thus, reduced "an asset in her estate." This gifting program "was a way to reduce Helen's estate for estate tax purposes without any money actually going out of her pocket." Helen never made a demand for repayment on the 1986 Note prior to her death in 2005.

¶ 6 In 2006, Kimberly and Barbara, as Ronald's adult children and beneficiaries of the Ronald Trust, filed an action against Dolores in the circuit court of Cook County (case No. 06 CH 022765) (the Kowalski lawsuit). The Kowalski lawsuit alleged that Dolores had breached her fiduciary duties to them and their brother, Michael, as beneficiaries of the Ronald Trust by, *inter alia*, failing to collect appropriate rent from the tenant of one of the four parcels of land in

which the Ronald Trust held a beneficial interest.² On February 12, 2008, the Kowalski lawsuit proceeded to mediation, and the parties in the Kowalski lawsuit memorialized their agreement in a handwritten document entitled "Term Sheet." They agreed that the four parcels of land in which the Ronald Trust held a beneficial interest should be sold, with the net proceeds from the sale to be divided among the Ronald Trust and other family trusts. The parties in the Kowalski lawsuit also agreed that Kimberly, Barbara, and Michael would each receive \$125,000 from the proceeds of the sale of the first property to be sold. Further, they agreed that the entire principal amount on the 1986 Note, plus accrued interest, shall be cancelled. According to Kimberly and Barbara's deposition testimony, cancellation of the 1986 Note was a term included in the agreement for the benefit of Kimberly, Barbara, and Michael as beneficiaries of the Ronald Trust, because the note was an obligation of the Ronald Trust that they would have had to fulfill in the event that Helen's estate sought repayment of it upon the sale of the properties. On April 13, 2010, following the sale of one of the four properties and the payment of \$125,000 each to Kimberly, Barbara, and Michael, the parties in the Kowalski lawsuit held a second mediation, at which they agreed to settle issues involving the remaining three properties. Dolores agreed to purchase all of the Ronald Trust's beneficial interest in the three remaining properties for a total purchase price of \$2.3 million, which was to be divided equally among Kimberly, Barbara, and Michael as beneficiaries of the Ronald Trust. The parties in the Kowalski lawsuit further agreed that, within five days of the closing on the properties, Dolores would resign as trustee of the Ronald Trust while Kimberly, Barbara, and Michael would become its successor co-trustees. On November 29, 2010, the parties in the Kowalski lawsuit executed a settlement agreement and

² The complaint in the Kowalski lawsuit is not part of the record before us on appeal. However, the basis for and procedural background of the Kowalski lawsuit are referenced in the fact section of Dolores' brief on appeal, which Kristen and Salvatore do not challenge.

mutual release, which incorporated by reference the February 12, 2008 Term Sheet. On December 7, 2010, Dolores resigned as trustee of the Ronald Trust, and Kimberly, Barbara, and Michael became its successor co-trustees. Thereafter, the Ronald Trust was eventually dissolved.

¶ 7 On April 28, 2011, Kristen and Salvatore, who are the adult children of Kimberly and the grandchildren of Ronald, filed the instant lawsuit against Dolores for improper conversion of funds from the Ronald Trust. The complaint was amended several times and, on April 27, 2012, Kristen and Salvatore filed a third amended complaint³ against Dolores, individually and as trustee of the Ronald Trust, seeking to recover money allegedly owed to them by virtue of the interest that accrued on the principal of the 1986 Note. The third amended complaint alleged claims of conversion (count I), breach of contract (count II), unjust enrichment (count III), constructive trust (count IV), "money had and received" (count V), and breach of fiduciary duty (count VI).⁴ The third amended complaint alleged that Kristen and Salvatore are "residual beneficiaries" of the Ronald Trust; that Dolores owed fiduciary duties to them as residual beneficiaries of the Ronald Trust; that Helen had assigned to Kristen, Salvatore and other family members Helen's right to payment of all interest accrued on the principal of the 1986 Note; that Helen had directed Dolores, who agreed, to annually pay such interest to Kristen and Salvatore; that accounting documents for the Ronald Trust showed the receipt of money from Helen that were set aside and held for the benefit of Kristen, Salvatore, and other family members; and that Dolores failed and refused to pay Kristen and Salvatore any interest that accrued on the principal of the 1986 Note, but instead wrongfully retained the payments for her own use.

³ The third amended complaint was the final complaint filed by Kristen and Salvatore.

⁴ Only count VI of the third amended complaint was alleged against Dolores in her capacity as trustee of the Ronald Trust.

¶ 8 On June 29, 2012, the circuit court entered an order dismissing counts II, III and V of the third amended complaint; thus, counts I, IV and VI remained.

¶ 9 On October 16, 2013, Dolores filed a motion for summary judgment, arguing that Kristen and Salvatore failed to show any evidence that Dolores converted property belonging to them for her own benefit; that Dolores neither owed nor violated any fiduciary duty to Kristen and Salvatore; and that imposition of a constructive trust was improper.

¶ 10 On October 18, 2013, Kristen and Salvatore filed a cross-motion for summary judgment, arguing that they were entitled to judgment because Dolores had judicially admitted the existence of the gifts of interests which Dolores had failed to pay them; that Dolores wrongfully converted such payments of interest for her own use; that Dolores and her sons operated a trucking business on one of the four properties in which the Ronald Trust had a beneficial interest; that Dolores and her sons paid very little rent for the use of the property which, in effect, deprived the Ronald Trust of sufficient liquidity to pay the interest owed to Kristen and Salvatore; that a constructive trust should be imposed over the funds Dolores improperly converted; and that Dolores, as trustee, breached her fiduciary duty by failing to make the required distribution of gifts to Kristen and Salvatore.

¶ 11 On December 2, 2013, the circuit court granted Dolores' motion for summary judgment and denied Kristen and Salvatore's cross-motion for summary judgment.

¶ 12 On January 17, 2014, this court granted Kristen and Salvatore leave to file a late notice of appeal, which was filed on January 21, 2014. Accordingly, we have jurisdiction to resolve this appeal.

¶ 13

ANALYSIS

¶ 14 The sole inquiry before us is whether the circuit court erred in granting Dolores' motion for summary judgment, which we review *de novo*. See *Collins v. St. Paul Mercury Insurance Co.*, 381 Ill. App. 3d 41, 45 (2008).

¶ 15 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). In considering a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party. *Pielet v. Pielet*, 2012 IL 112064, ¶ 29. "The purpose of summary judgment is not to try a question of fact, but to determine whether one exists" that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421 (2002). "Thus, although the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment." *Id.* at 432. When parties file cross-motions for summary judgment, as was the case here, they agree that only a question of law is involved and invite the court to decide the issues based on the record. See *Pielet*, 2012 IL 112064, ¶ 28. "However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment." *Id.* A reviewing court may affirm a circuit court's grant of summary judgment on any basis apparent in the record, regardless of whether the circuit court relied on that basis or whether the court's reasoning was correct. *Harlin v. Sears Roebuck & Co.*, 369 Ill. App. 3d 27, 31-32 (2006).

¶ 16 Kristen and Salvatore make several arguments that the circuit court erred in granting summary judgment in favor of Dolores. They first argue that Dolores was not entitled to summary judgment on their conversion claim (count I), where genuine issues of material fact existed as to whether Dolores had wrongfully converted property belonging to them for her own use. Kristen and Salvatore point to Dolores' responses to interrogatories in the Kowalski lawsuit, in arguing that Dolores had already "judicially admitted" to the existence of gifts of interest to them. Kristen and Salvatore also point to certain portions of Remer's deposition testimony in the case at bar to argue that those gifts belonged to them at all times. They argue that genuine issues of material fact existed as to whether Dolores wrongfully converted for her own use the payments of interest that accrued on the principal of the 1986 Note.

¶ 17 Dolores responds that she was entitled to summary judgment on the conversion claim (count I), where Kristen and Salvatore failed to identify any genuine issues of material fact that, if decided in their favor, would entitle them to relief. She argues that Helen did not intend to gift Kristen and Salvatore with the interest that accrued on the 1986 Note. Rather, Dolores argues, the uncontroverted facts show that Helen gifted Kristen and Salvatore with portions of the 1986 Note itself; thus, she argues, they held portions of a note reflecting a debt owed by the Ronald Trust to Helen—a debt that Helen never demanded repayment of and that was extinguished by the cancellation of the 1986 Note in the Kowalski lawsuit. Dolores contends that the record contains no evidence that she converted for her own use any of Kristen and Salvatore's property. At most, she claims, Kristen and Salvatore were creditors of the Ronald Trust by virtue of Helen's gifting of a portion of the 1986 Note to them, and that any claim for repayment on the note by Kristen and Salvatore should have been brought against the Ronald Trust itself.

¶ 18 To prove conversion, a plaintiff must establish that: "(1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property." *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114 (1998). "Money may be the subject of conversion, but only if it is shown that the money 'at all times belonged to the plaintiff and that the defendant converted it to his own use.' " *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 15 (quoting *In re Thebus*, 108 Ill. 2d 255, 261 (1985)). The general rule, however, is that an action for conversion may not be maintained for money representing a general debt or obligation. *Thebus*, 108 Ill. 2d at 261.

¶ 19 Count I of the third amended complaint sets forth a conversion claim against Dolores as an individual. It alleges that Helen had "assigned her right to receive payments of interest under the [1984 and 1986 Notes] and instructed Dolores, as agent for [Kristen and Salvatore], to make those payments to [them]"; that Dolores agreed to do so; that Dolores "failed and refused to make payments of the interest that were the property of [Kristen and Salvatore]"; that Dolores "kept the payments of interest for herself"; and that Dolores did not have a legal right to convert the payments of interest to herself and, thus, wrongfully deprived Kristen and Salvatore of approximately \$70,000 "plus interest and earnings."

¶ 20 Based on our review of the record, we find that the circuit court properly granted summary judgment in favor of Dolores on the conversion claim (count I). Initially, we note that Kristen and Salvatore point to Dolores' answers to interrogatories in the Kolwalski lawsuit, as well as portions of Remer's deposition testimony in the instant lawsuit, as evidence of the existence of "gifts" to them. However, this argument is inapposite as Dolores does not dispute

the existence of gifts given to Kristen and Salvatore, but only disputes that Helen gifted them with payments of interest that accrued on the 1986 Note. Rather, Dolores maintains that the gifts were of portions of the 1986 Note itself which at most made Kristen and Salvatore creditors of the Ronald Trust. Thus, Kristen and Salvatore's reliance on these parts of the record do not help advance their arguments.

¶ 21 Count I centers upon Kristen and Salvatore's assertions that Helen had gifted them with payments of interest accrued on the 1986 Note; that Helen directed Dolores to make those payments to them; but that Dolores failed to do so and instead kept the interest payments for herself. We find that Kristen and Salvatore have failed to provide sufficient facts to show that they had a right to any payments of accrued interest, or that they had an absolute and unconditional right to the immediate possession of those payments of interest—the first two elements of a conversion claim. Nothing in the record suggests that Helen gifted Kristen and Salvatore with payments of *interest* on the 1986 Note. Rather, the record shows that Helen gifted them, along with other family members, with portions of the 1986 Note itself as a way of reducing Helen's estate in order to minimize potential tax liabilities. Kristen and Salvatore further direct our attention to Remer's deposition testimony, in arguing that they had a right to immediate possession of the payments of interest because Helen had directed Dolores to make those payments to them. However, nothing in our examination of Remer's testimony reveals that Helen gave such directives to Dolores. In fact, Remer testified that Helen, by gifting out portions of the 1986 Note, reduced an asset in her estate "without any money actually going out of her pocket" and without any intention that "there would be a check written to do that." Dolores also testified in her deposition that Helen never directed her to pay to anyone any of the interest that accumulated on either the 1984 or 1986 Note. Thus, we find that no genuine issue

of material fact was presented as to whether Kristen and Salvatore had a right to any payments of accrued interest on the 1986 Note, or whether they had an absolute and unconditional right to the immediate possession of those payments of interest.

¶ 22 Nor did Kristen and Salvatore present any factual basis to raise a genuine issue of material fact as to the fourth element of their conversion claim—that is, whether Dolores wrongfully kept the accrued interest payments, or any property belonging to Kristen and Salvatore, for her own use. According to Salvatore's own deposition testimony, he testified that he did not know whether Dolores ever took any money from the Ronald Trust, or whether she ever received any money from the Ronald Trust. Likewise, Kristen testified that she did not know if any money from the Ronald Trust was ever paid to anyone. During their deposition testimony, when questioned about the existence of any evidence showing that Dolores took for herself money belonging to them, Kristen and Salvatore both pointed to Exhibit D of the third amended complaint as the *only* purported evidence. Exhibit D, however, is a set of accounting spreadsheets prepared by Remer, reflecting the amounts due Helen under the 1986 Note and the gifting of portions of that note to various family members. Nothing on the face of that document gives rise to an inference that Dolores wrongfully kept for her own use any money due Kristen and Salvatore. The record contains no bank statements, cancelled checks, ledgers, or other documents to support Kristen and Salvatore's argument that Dolores retained any purported interest payments or assets belonging to them. Rather, the uncontroverted evidence shows that, for estate planning purposes, Helen gifted family members portions of a debt owed to her by the Ronald Trust, and that the debt was ultimately extinguished pursuant to a mediated agreement in the Kowalski lawsuit. Kristen and Salvatore further makes various arguments that Dolores deprived the Ronald Trust of substantial funds by operating a trucking business on one of the

four parcels of land while paying little rent to the Ronald Trust. In support of these arguments, they point to an affidavit of Kimberly which is included in the appendix of their opening brief but not included in the record. Kristen and Salvatore have not sought to supplement the record on appeal with Kimberly's affidavit. Thus, we decline to consider Kimberly's affidavit as evidence where it is not properly a part of this record. See *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 679 (2000) (attachments to briefs that are not included in the record are not properly before this court and cannot be used to supplement the record). Regardless of Kimberly's affidavit, Kristen and Salvatore's argument regarding loss of rent cannot be a basis for relief, where this theory was not one upon which recovery was sought in the third amended complaint. See *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911 (1994) ("[a] plaintiff fixes the issues in controversy and the theories upon which recovery is sought by the allegations in his complaint. *** In ruling on a motion for summary judgment, the court looks to the pleadings to determine the issues in controversy"); *Gold Realty Group Corp. v. Kismet Café, Inc.*, 358 Ill. App. 3d 675, 679-80 (2005). Thus, we find that no genuine issues of material fact were raised as to whether Kristen and Salvatore had a right to any payments of accrued interest, whether they had an absolute and unconditional right to the immediate possession of those payments of interest, and whether Dolores wrongfully kept for her own use any accrued interest payments or property belonging to Kristen and Salvatore. Therefore, we find that no reasonable trier of fact could conclude that all of the elements of the conversion claim could be satisfied. Accordingly, we hold that the circuit court properly granted summary judgment in favor of Dolores on count I.

¶ 23 Kristen and Salvatore next argue that Dolores was not entitled to summary judgment on their breach of fiduciary duty claim (count VI). They contend that they are "residual

beneficiaries" of the Ronald Trust; that Dolores was directed by Helen to make payments of interest to them; and that Dolores breached her fiduciary duty by failing to distribute those gifts to them.

¶ 24 Dolores counters that the circuit court properly granted summary judgment in her favor on the breach of fiduciary duty claim (count VI), where she owed no duty to Kristen and Salvatore and nothing she did constituted a breach of an obligation to them. Dolores further argues that Kristen and Salvatore's assertion that they are "residual beneficiaries" must fail, where they did not bring this lawsuit as residual beneficiaries of the Ronald Trust, but only as creditors of the Ronald Trust. Dolores asserts that, even if they were residual beneficiaries of the Ronald Trust, their claim must fail where the Ronald Trust has been dissolved and there is nothing more for them to claim.

¶ 25 Count VI of the third amended complaint alleges a breach of fiduciary claim against Dolores in her capacity as trustee of the Ronald Trust. It alleges that Dolores, as trustee, owed a fiduciary duty to Kristen and Salvatore as "residual beneficiaries" of the Ronald Trust; that Dolores was required to pay them annual payments of interest that accrued under the 1984 and 1986 Notes; that Dolores breached her fiduciary duty to them by failing to do so; and that, as a result, the Ronald Trust received approximately \$70,000 "plus interest and earnings" that belonged to Kristen and Salvatore.

¶ 26 To prove a claim for breach of fiduciary duty, a plaintiff must prove: (1) a fiduciary duty on the part of the defendant; (2) a breach of that duty; (3) damages; and (4) a proximate cause between the breach and the damages. *Carter v. Carter*, 2012 IL App (1st) 110855, ¶ 25. "A fiduciary relationship giving rise to a duty of loyalty owed to the person for whom the fiduciary is acting exists when one person places trust and confidence in another who, as a result, gains

influence and superiority over the other." *Citicorp Savings of Illinois v. Rucker*, 295 Ill. App. 3d 801, 809 (1998). "The relationship may arise as a matter of law, such as between agent and principal, or it may be moral, social, domestic, or personal based upon the particular facts." *Id.* The burden of proving the existence of a fiduciary relationship lies with the party seeking to establish it. *Id.*

¶ 27 We find this argument to be forfeited, where Kristen and Salvatore, in violation of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008), cite no legal authority to support their position. See *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶¶ 80-82 (failure to cite legal authority in violation of Rule 341(h)(7) results in forfeiture of the issue). Nevertheless, even if not forfeited, Kristen and Salvatore have not presented any facts to raise a genuine issue of material fact as to whether Dolores owed them a fiduciary duty and whether Dolores breached her fiduciary duty, if any existed, to them. Viewing the record in favor of Kristen and Salvatore, we find no evidence to suggest that Kristen and Salvatore placed their trust and confidence in Dolores. As a matter of law, Kristen and Salvatore cannot establish that Dolores owed them a fiduciary duty, where they were not beneficiaries of the Ronald Trust for which Dolores was a trustee. Dolores, as trustee to the Ronald Trust, only owed a fiduciary duty to its beneficiaries—Kimberly, Barbara, and Michael. Even if we were to accept Kristen and Salvatore's characterization of themselves as "residual beneficiaries," and even if Dolores owed them a fiduciary duty, we find that they have failed to raise a genuine issue of material fact showing that Dolores breached her fiduciary duty to them. As discussed, there was nothing in the record to show that Helen ever directed Dolores to make payments of interest that accrued on either the 1984 or 1986 Note. Rather, the record shows that Helen availed herself of methods to minimize her potential estate tax burdens by gifting Kristen and Salvatore, along with other

family members, with portions of a debt owed by the Ronald Trust to Helen—the 1986 Note itself—so as to reduce the total amount of assets in her estate. Thus, we find that no reasonable trier of fact could conclude that Dolores breached any sort of duty by not distributing any alleged payments of interest to Kristen and Salvatore. Accordingly, because Kristen and Salvatore failed to present any facts to create a genuine issue of material fact on every element of their breach of fiduciary claim, we hold that the circuit court properly granted summary judgment in favor of Dolores on count VI.

¶ 28 Finally, Kristen and Salvatore argue, again without citing to legal authority, that the circuit court erred in granting summary judgment in favor of Dolores on the constructive trust claim (count IV). They contend in a single conclusory paragraph that because Dolores converted funds owed to them and abused her role as trustee in doing so, the imposition of a constructive trust was appropriate.

¶ 29 Dolores counters that a constructive trust is a remedy, not a separate cause of action. She argues that, even if it were considered a separate cause of action, there was no basis for imposing a constructive trust, where there was no evidence that she took anything from the Ronald Trust or anything belonging to Kristen and Salvatore.

¶ 30 A constructive trust is an equitable remedy imposed to rectify unjust enrichment. *Kurtz v. Solomon*, 275 Ill. App. 3d 643, 651 (1995). "Generally, there are two situations which give rise to a constructive trust: where there was actual fraud or a fiduciary relationship which was abused." *Id.* "Where a defendant has obtained money to which he is not entitled, under such circumstances that in equity and good conscience he ought not to retain it, the rightful owners of the money can claim it through a constructive trust to avoid unjust enrichment." (Internal quotation marks omitted.) *Norton v. City of Chicago*, 293 Ill. App. 3d 620, 628-29 (1997).

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¶ 31 In light of our holding that Kristen and Salvatore failed to raise genuine issues of material fact to preclude summary judgment on their conversion claim (count I) and breach of fiduciary duty claim (count VI), we find that they cannot establish a need for the imposition of a constructive trust. Accordingly, we hold that the circuit court properly granted summary judgment in favor of Dolores on count IV.

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.