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SIXTH DIVISION
May 1, 2015

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALLAN MIGDAL,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 10 P 003200
)	
RAYNA MIGDAL JOSEPH, Individually and as)	
Executrix and Trustee of the Estate of Earl Migdal, and)	
MITCHELL JOSEPH,)	
)	
Defendants-Appellees,)	
)	
(Ronald Migdal,)	The Honorable
)	Mary Ellen Coghlan,
Defendant).)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶1 *HELD:* The second amended petition to contest the will and to set aside or contest the validity of revocable trusts of the decedent was properly dismissed where plaintiff failed to sufficiently allege facts upon which to state a claim for undue influence.

¶2 Plaintiff, Allan Migdal, appeals the circuit court's order dismissing his second amended petition to contest the will of his father, Earl Migdal, and to set aside or contest the validity of revocable trusts of Earl Migdal based on the undue influence of defendants, Rayna Migdal Joseph, individually and as executrix and trustee of the Estate of Earl Migdal, and Mitchell Joseph. Plaintiff contends the circuit court erred in dismissing his second amended petition where he sufficiently stated a cause of action for setting aside the will and revocable trusts due to undue influence. In the alternative, plaintiff contends the circuit court erred in denying his request for leave to file his proposed third amended petition. Based on the following, we affirm.

¶3 FACTS

¶4 On April 30, 2010, Earl died leaving plaintiff, Rayna, and Ronald as his only heirs at law and next of kin. On December 3, 2010, plaintiff filed a petition to contest Earl's will and to set aside or contest the validity of Earl's revocable trusts, along with a complaint for breach of contract, for the establishment of a constructive trust, and for interference with his inheritance expectancy.¹ On May 16, 2011, plaintiff's petition was dismissed pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)) for failure to sufficiently state a cause of action upon which relief may be granted. Plaintiff, however, was granted leave to file an amended petition. Thereafter, plaintiff filed a first amended petition, which was also dismissed pursuant to section 2-615 of the Code.

¶5 The petition before this court, namely, plaintiff's second amended petition, was filed on August 9, 2013. In the second amended petition, plaintiff alleged Earl's purported will and trusts were not his but, rather, were the result of undue influence and reflected the intentions of Rayna and Mitchell, Rayna's husband. In particular, the petition referenced Earl's last will and

¹ Plaintiff does not contest the dismissal of his complaint for breach of contract, for the establishment of a constructive trust, and for interference with his inheritance expectancy.

testament, which was executed on January 29, 2009, and was proved and admitted to the record and probate on June 8, 2010, as well as two trusts, namely, the Earl Migdal Revocable Trust agreement, dated December 18, 2003, restated on December 27, 2005, and amended on June 11, 2008, and the Earl Migdal Revocable Living Trust agreement, dated October 28, 1998, restated on April 15, 2004, and amended on April 27, 2010. Plaintiff had been disinherited from the challenged instruments.

¶6 More specifically, in his will, Earl exercised his power of appointment over the Sylvia Migdal Trust Agreement dated December 18, 2003, and restated December 27, 2005, to distribute the balance of the family trust to Rayna (67%) and Ronald (33%). Earl's will stated that his personal effects, household goods, automobiles, and all other goods were to be divided between Rayna and Ronald. In addition, Earl's will nominated Rayna as the executor and provided the residue of his estate to the trustee of the Earl Migdal Revocable Trust dated December 18, 2003, restated on December 27, 2005, and amended on June 11, 2008. As restated on December 27, 2005, the Earl Migdal Revocable Trust agreement, dated December 18, 2003, provided the balance of the trust to Sylvia Migdal, Earl's wife, and, in the event she predeceased Earl, the balance was to be divided *per stirpes* to Rayna and Ronald. The June 11, 2008, amendment to the trust added a piece of property to be transferred upon Earl's death to Rayna and Mitchell. The Earl Migdal Revocable Living Trust agreement, dated October 28, 1998, restated on April 15, 2004, and amended on April 27, 2010, provided the balance of the trust to Rayna (75%) and to Rayna, as trustee of the Ronal Migdal Trust (25%).

¶7 Because the focus of this case is the sufficiency of plaintiff's second amended petition, we quote from the pleading at length. The second amended petition provided:

"8. At the time of the alleged making of the instrument Earl was of unsound mind and memory. He was under the undue influence, domination and control of Rayna and Mitchell. Rayna and Mitchell deprived him of his free will, and by their undue influence the trust instruments were procured and made. By the undue and wrongful influence and constraint of Rayna and Mitchell, Earl's volition was overpowered and circumvented and he was induced to make the purported amendments to the Revocable Trust and Revocable Living Trust contrary to his deliberate judgment and reason, and Rayna and Mitchell's desires were substituted for Earl's judgment.

9. During the last year of Earl's life Rayna succeeded in forcing her will for the will of the decedent by abusing her fiduciary relationship with Earl and causing him to surrender to her will by engaging in a pattern of abuse, including, but not limited to:

- A. Controlling testator's medication;
- B. Controlling with whom testator was allowed to communicate with;
- C. Directing testator how to spend his money; and
- D. Directing testator how to run his business.

10. Earl had two prior wills from November [] 1998 *** and December 18, 2003 *** which both named Petitioner as successor executor in the event that Sylvia Migdal (Earl's wife) predeceased him.

11. Prior to his death Earl owned Tower Financial, LLC, which was in the business of making loans and investing in real estate. As a result, during his

lifetime, Earl amassed a considerable amount of wealth through his considerable amount of business acumen.

12. While Earl was still relatively healthy and not dependant on Rayna, his intent was to have his estate divided between his children and his wife, who has since predeceased him.

13. During the last years of his life, Earl was suffering from congestive heart failure and needed to go to doctor's appointments constantly, needed his medication administered, and needed assistance cleaning, dressing, and feeding himself.

14. As his health declined, Earl placed his trust and confidence in Rayna and Mitchell because they provided him with his basic daily necessities. Specifically, since Earl was frequently ill and no longer capable of taking care of himself, he relied on Rayna to transport him to doctor appointments and any other location he needed to go to.

15. Prior to his death Earl's health had deteriorated to the point that he was no longer able to drive, prepare his own meals, or administer daily medical procedures including taking medications that were necessary for his health and well being. If Rayna was not willing to drive Earl, then he could not run errands or manage his affairs. If Rayna was not willing to prepare a meal for Earl, then he would not eat. If Rayna was not willing to administer Earl's daily medical procedures or provide him with his medications, then Earl would not receive such procedures or medications that were necessary to maintain his health and well-being.

16. For the last few years of his life and by reason of his physical condition, Earl was completely dependent on Rayna and easily influenced by her. During the last year of his life and sometime earlier, by reason of his age and physical condition, his mental faculties had become so impaired that he was easily influenced by those in whom he had confidence. During this time, Rayna and Mitchell took advantage of and abused the trust and confidence Earl placed [in] them by using their influence over him to coerce him into giving them total control of his finances and estate planning which includes the drafting of the Will and Trust in question here.

17. During this time Rayna and Mitchell engaged in a pattern of conduct which was designed to make Earl more dependent and more susceptible to their directions and alienate Earl from Petitioner. This conduct was calculated to persuade Earl to remove Petitioner as executor and trusted advisor and allow Rayna to serve as the sole executor of Earl's will and trustee of Earl's trusts. Further, this conduct was calculated to remove Petitioner as beneficiary of his father's estate and to convert Petitioner's portion of the estate to Rayna and Mitchell by:

- A. Falsely telling Earl that Petitioner had caused the IRS to audit him;
- B. Falsely telling Earl that Petitioner had stole[n] money from him;
- C. Requesting that Petitioner file suit against Earl in 2005 in order that they might place their mother, Sylvia Migdal, on a respirator to

prolong her life while concurrently telling Earl that it was Petitioner's idea alone;

D. Falsely telling Earl that Petitioner was having an affair with one of Sylvia's caretakers knowing that this would enrage Earl;

E. Falsely telling Earl that Petitioner was securing improper medical care for Sylvia and causing her to suffer;

F. Falsely telling Earl that Petitioner did not want to speak with him or mend their relationship;

G. Falsely telling Earl that Petitioner broke into his home while Earl was in Florida; and

H. Falsely telling Earl that Petitioner wanted to harm him and no longer wanted to see him.

18. The continuing pattern of abusive conduct weakened Earl's resolve making him incapable of exerting his own will and created a dependent relationship between Rayna and Mitchell and Earl.

19. Given the dependent nature of their relationship, Earl was induced to place confidence and trust in Rayna and Mitchell to such an extent that a fiduciary relationship existed between them. As a result of the trust and confidence Earl placed in Rayna and Mitchell they were able to control and influence his mind and actions to such an extent that he, during this period, did whatever they suggested or instructed him to do.

20. By the time Rayna and Mitchell instructed Earl to amend his Will and Trusts he was no longer capable of resisting their instructions. As a result of

Earl's diminished physical and mental capacity, Rayna and Mitchell were able to wear down and dominate Earl's will to the point where he could not resist their instructions. This resulted in several acts of conversion, including:

A. Misappropriating, altering, and depositing in Rayna's account two checks in the amount of \$22,000 each *** which were intended for Petitioner and Ronal Migdal ***;

B. Seizing control of one of Earl's businesses 1925 West Potomac, LLC *** for the purpose of converting the assets of this corporation and causing Petitioner to be removed as Potomac's agent;

C. While in control of Potomac Mitchell signed a covenant with the City of Chicago purporting to be the "owner" of Potomac ***;

D. While in control of Potomac Mitchell forged Earl's name on several deeds and other documents related to real estate transactions and said forgeries were notarized by Michael Fiandaca who knew or should have known that the signature was a forgery ***; and

E. Misappropriating an estimated \$450,000 in cash and an unknown amount in other valuables from Earl's safety deposit boxes.

21. Rayna and Mitchell used their influence over Earl to induce him to visit an attorney of their choosing for the purpose of drafting a new will and making significant changes to his trusts. The documents purporting to be the last will and testament of decedent and his trusts were prepared by this attorney at Rayna and Mitchell's suggestion. Rayna and Mitchell, by supplanting their will for that of the decedent and by abusing the trust and confidence reposed in them

by the decedent succeeded in having the decedent devise and bequeath to them by the documents purporting to be the last will and testament and trusts two thirds of Earl's estate. This estate plan contrasts with Earl's stated intent to see his estate distributed amongst his children in equal shares.

22. At the time of the alleged making of the instruments Earl was under the undue influence, domination, and control of his daughter, Rayna[,] and his son-in-law, Mitchell. Rayna and Mitchell deprived him of his free will, and by their undue influence the instruments were procured and made. By the undue and wrongful influence and constraint of Rayna and Mitchell, Earl's volition was overpowered and circumvented and he was induced to make the purported will and trusts contrary to his deliberate judgment and reason, and Rayna and Mitchell's desires were substituted for his judgment.

23. At the time of the execution of the documents purporting to be his last will and testament and trusts, the decedent was not following the dictates of his own free will which would naturally have led him to have devised and bequeathed his estate to his children in equal shares, but he was acting wholly under the influence of Rayna and Mitchell who suggested and dictated *** to him the terms of the will and trusts. The purported will and the purported trusts were not the free and voluntary act of the decedent, but they were made by the undue influence of Rayna and Mitchell."

¶18 On August 16, 2013, defendants filed a section 2-615 motion to dismiss the second amended petition.

¶9 On October 23, 2013, in a written order, the circuit court dismissed plaintiff's second amended petition in its entirety with prejudice, adding it would be an abuse of discretion to provide plaintiff "a fourth opportunity to attempt to state a factually sufficient cause of action" where defendants had "a right to have the validity of decedent's will determined without further unnecessary delay or expense to the estate." The circuit court ultimately concluded that, since the time of his original petition in December 2010, plaintiff had been unable to plead anything other than "merely conclusional" allegations in support of his claim that Earl's will should be invalidated as the product of undue influence.

¶10 On November 22, 2013, plaintiff filed a combined motion to reconsider and for leave to file a proposed third amended petition. Plaintiff additionally filed his proposed third amended petition. On March 19, 2014, the circuit court entertained arguments on the motion to reconsider, stating that it was the only motion properly before the court. Plaintiff's counsel argued that the circuit court erred in failing to draw reasonable inferences from the facts pled in favor of plaintiff in the second amended petition, that there was new information regarding the legal sufficiency of Earl's will, and that, as demonstrated in his proposed third amended petition, there were sufficient facts upon which to state a claim for undue influence. The circuit court responded:

"Just so it's clear, it is the responsibility and obligation of the pleader to state facts essential to his cause of action. Well pled facts is a term that stands in contrast to conclusions. To the extent that the complaint offers conclusion unsupported by allegations of fact, the Court does not accept those conclusions as true.

A pleading which merely paraphrases the law without stating the facts is insufficient. The Court should not grant the motion unless it is clear from the

factual allegations and the reasonably permissible inferences therefrom that no set of facts could be proved that would entitle the Plaintiff to recovery under the law.

Over the tortured history of this litigation and I think now we are now up to the fourth complaint that's been filed, I don't think that the pleader has met that burden, there has not been any well pled facts in any of these complaints.

Having said that, the issue before the Court today is whether there is a legal basis upon which the Court should grant a motion to reconsider. Given that the petitioner has not established that the Court has –that the movant has not pled new facts, new law or [a] misapplication of existing law, the motion is most respectfully denied."

In a written order, also dated March 19, 2014, the circuit court denied plaintiff's motion to reconsider the second amended petition without addressing plaintiff's request for leave to file a third amended petition. This appeal followed.

¶11 ANALYSIS

¶12 I. Sufficiency of Petition

¶13 Plaintiff first contends the circuit court erred in dismissing his second amended petition where he alleged sufficient facts to state a cause of action for setting aside Earl's will and trusts because of undue influence.

¶14 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint as having failed to state a cause of action upon which relief may be granted. 735 ILCS 5/2-615 (West 2010). A motion to dismiss pursuant to section 2-615 should only be granted if it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recovery. *In re Estate of DiMatteo*, 2013 IL App (1st) 122948, ¶ 56. When

considering a section 2-615 motion to dismiss, a court must construe the allegations of the complaint in a light most favorable to the plaintiff as well as accept as true all well-pleaded facts in the complaint and any reasonable inferences that may arise therefrom. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. A plaintiff need not set forth evidence in his or her complaint; however, because Illinois is a fact-pleading jurisdiction, a plaintiff must set forth sufficient facts to bring his or her claim within a legally recognized cause of action. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006); *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 11.

"After stripping the pleading of unsupported conclusions and inferences, sufficient facts must remain to state a cause of action." *Baumgarten*, 2012 IL App (1st) 112115, ¶ 11. We review the dismissal of a complaint based on section 2-615 of the Code *de novo*. *Id.*

¶15 This court has defined "undue influence" as influence that is excessive, improper, or illegal. *Id.* at ¶ 13. "Undue influence necessary to invalidate a will is that influence which prevents the testator from exercising his own free will in the disposition of his estate."

DiMatteo, 2013 IL App (1st) 122948, ¶ 62. "Undue influence" will be found where the influence is directly connected to the execution of the instrument, is operating at the time the instrument was made, and is directed toward procuring the will in favor of a particular party or parties. *Id.* In addition, the influence "must be of such a nature to destroy the testator's freedom concerning the disposition of his estate and render his will that of another." *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993).

¶16 In order to state a *prima facie* claim for undue influence, a plaintiff must sufficiently allege: (1) a fiduciary relationship between the testator and the person who is the recipient of a substantial benefit of the will; (2) a testator who was in a dependant situation and a beneficiary who was in a dominant role; (3) a testator who placed her trust and confidence in the beneficiary;

and (4) a will that was prepared or executed under circumstances in which the beneficiary participated or was instrumental. *Baumgarten*, 2012 IL App (1st) 112155, ¶ 14. "Proof of undue influence may be wholly inferential and circumstantial." *Hoover*, 155 Ill. 2d at 411-12.

¶17 After reviewing the second amended petition, which we considered in a light most favorable to plaintiff taking as true all well-pleaded facts and reasonable inferences to be drawn therefrom, we conclude the pleading failed to sufficiently state a cause of action for setting aside Earl's will and trusts as a result of undue influence. More specifically, plaintiff's second amended petition failed to allege sufficient facts to support his assertion that a fiduciary relationship existed between Earl and Rayna and Mitchell, that Earl was in a dependent situation wherein Rayna and Mitchell were in dominant roles, or that Rayna and Mitchell participated or were instrumental in the preparation or execution of Earl's will and trusts.

¶18 Turning to the first element of a *prima facie* case of undue influence, plaintiff failed to present sufficient facts alleging the existence of a fiduciary relationship. A fiduciary relationship is defined as "[a] relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship." Black's Law Dictionary 1402 (9th ed. 2009). A person is considered to act in a fiduciary capacity when he or she " 'handles money or property which is not his or her own, or for his or her own benefit, but for the benefit of the other person.' " *Baumgarten*, 2012 IL App (1st) 112155, ¶ 17 (quoting *In re Estate of Glogovsek*, 248 Ill. App. 3d 784, 792 (1993)).

¶19 In the case before us, the second amended pleading consistently alleged that Rayna provided Earl's health care and assistance with his self care and household matters, such as providing medication, driving Earl to doctor appointments, and assisting with meal preparation. The petition did not allege facts showing Rayna or Mitchell handled Earl's money or property.

The pleading merely stated "during the last year of Earl's life Rayna succeeded in forcing her will for the will of the decedent by abusing her fiduciary relationship with Earl and causing him to surrender to her will by engaging in a pattern of abuse, including, but not limited to *** [d]irecting testator how to spend his money; and *** [d]irecting testator how to run his business." These statements are not only conclusory, but also fail to allege that Rayna or Mitchell handled Earl's money or property. See *Baumgarten*, 2012 IL App (1st) 112155, ¶ 18-20. "Because a fiduciary relationship is not presumed, facts that constitute a fiduciary relationship must be clearly and explicitly alleged." *Id.* ¶ 20. Plaintiff's second amended petition merely demonstrated that a father was dependent on his daughter as his physical health deteriorated in his final years. We recognize that a fiduciary relationship may arise "from a relationship which is moral, social, domestic or personal in its origin." *Estate of Maher*, 237 Ill. App. 3d 1013, 1017 (1992). However, this court has found allegations that simply establish the reliance of one family member on another while suffering poor health do not rise to the level of supporting a fiduciary relationship. *Baumgarten*, 2012 IL App (1st) 112155, ¶ 19-20.

¶20 To the extent, plaintiff alleged Rayna and Mitchell engaged in "several acts of conversion" after having worn down and dominated "Earl's will to the point where he could not resist their instructions," such as "[m]isappropriating, altering, and deposing in Rayna's account two checks of \$22,000 each *** which were intended for Petitioner," "[s]eizing, control of one of Earl's business[es] *** for the purpose of converting the assets," and "[m]isappropriating an estimated \$450,000 in cash and unknown amount in other valuables from Earl's safety deposit boxes," we find plaintiff's allegations still fail to sufficiently demonstrate an established fiduciary relationship where there were no facts showing the acts of conversion resulted from Rayna and Mitchell's handling of Earl's property in a fiduciary capacity.

¶21 Turning to the second element of a *prima facie* case of undue influence, plaintiff failed to present sufficient facts alleging Earl was in a dependent situation and Rayna and Mitchell were in a dominant role. To present a sufficient claim, the pleading "must specifically allege the manner in which the free will of the testator was impaired at the time the challenged instrument was executed. [Citation.] The mere conclusion that the persuasive or dominant nature of the beneficiary influenced the testator is not sufficient." *Id.* ¶ 22 (citing *In re Estate of Sutera*, 199 Ill. App. 3d 531, 536 (1990)). Plaintiff's second amended petition was replete with conclusory statements regarding the dominance Rayna and Mitchell had over Earl's free will. For example, "[a]t the time of the alleged making of the instrument[s] Earl was of unsound mind and memory. He was under the undue influence, domination and control of Rayna and Mitchell. Rayna and Mitchell deprived him of his free will and by their undue influence the trust instruments were procured and made" and "[d]uring the last year of his life and sometime earlier, by reason of his age and physical condition, his mental faculties had become so impaired that he was easily influenced by those in whom he had confidence." These statements contained a number of "buzz" words, but failed to specifically allege the manner in which Earl's free will was impaired *at the time* the challenged instruments were executed. In fact, plaintiff provided no time frame at all for when Earl allegedly became of "unsound mind and memory" and how that timing coincided with the execution of the challenged instruments.

¶22 Moreover, in his second amended complaint, plaintiff alleged that Rayna and Mitchell engaged in a "pattern of conduct" that was "calculated to persuade Earl *** to remove Petitioner as beneficiary." Plaintiff then provided a list of alleged misrepresentations made by Rayna and Mitchell to Earl. However, unlike in *DiMatteo*, there was no evidence that Earl internalized the misrepresentations concerning plaintiff's character. *DiMatteo*, 2013 IL App (1st) 122948, ¶ 71

(after hearing the misrepresentations regarding the plaintiff, the testator became "visibly very angry at [the plaintiff]" and said that he would "write-out [the plaintiff]", thereby demonstrating the testator was prompted to act in accord with the beneficiary's intent rather than his own).

Further, there was no identifying information regarding the alleged misrepresentations, *i.e.*, when they were made, by whom, to whom, or who was present when they were made.

¶23 Finally, even assuming, *arguendo*, plaintiff's second amended petition sufficiently alleged Earl placed his trust and confidence in Rayna and Mitchell in terms of the third element of a *prima facie* case of undue influence, plaintiff's second amended petition failed to sufficiently allege the fourth element of a *prima facie* case where there were no facts demonstrating Rayna and Mitchell directly participated in the procurement or execution of Earl's will and trusts. Plaintiff merely alleged that "Rayna and Mitchell used their influence over Earl to induce him to visit an attorney of their choosing for the purpose of drafting a new will and making significant changes to his trusts. The documents purporting to be the last will and testament of decedent and his trusts were prepared by his attorney at Rayna and Mitchell's suggestion." Plaintiff's allegation utterly fails to establish Rayna and Mitchell actually participated in the procurement or execution of Earl's will and trusts. Even taking as true, as we must, that Rayna and Mitchell suggested a new attorney and Earl used that attorney, there are no allegations to establish, or from which we reasonably can infer, the circumstances surrounding the changes made to the will and trusts, Earl's capacity or intent when he made the changes, or how Rayna and Mitchell were involved.

¶24 In sum, plaintiff's second amended petition failed to sufficiently allege a set of facts upon which to state a claim for invalidating Earl's will and trusts on the basis of undue influence.

¶25 Contrary to plaintiff's argument, we find *Hoover* and *In re Estate of Roeseler*, 287 Ill. App. 3d 1003 (1997), to be distinguishable from the case before us. In *Hoover*, the relevant question before the supreme court was whether the circuit court erred in granting summary judgment for the defendant beneficiary under the contested will. The plaintiff had alleged that the testator's will had been overborne by a series of misrepresentations made by the defendants regarding the plaintiff's character. *Hoover*, 155 Ill. 2d at 413. Described as a "'secret influences' case," the supreme court found the circumstantial evidence, which included letters and diary excerpts, demonstrated that the defendants' influence "was connected with and operative at the time of execution of the will and that the influence was directed towards procuring the will in favor of the beneficiary." *Id.* at 414. The evidence from which undue influence could be inferred revealed that the plaintiff, the son of the testator, had once had a close relationship with his father and his disinheritance coincided with the defendant's misrepresentations regarding the plaintiff's character and actions. *Id.* Ultimately, the supreme court found triable issues of fact existed and, therefore, reversed summary judgment. *Id.* at 415.

¶26 In contrast, here, plaintiff's second amended petition did not allege facts to demonstrate the allegations regarding plaintiff's character made by Rayna and Mitchell coincided with his disinheritance. Plaintiff simply provided examples of a "pattern of conduct" without establishing any connection between the allegations and Earl's decision to modify his will and trusts. Contrary to plaintiff's argument, the second amended petition does not allege sufficient facts from which to infer undue influence. *Cf. DeHart*, 2013 IL 114137, ¶ 28 (finding the plaintiff alleged sufficient facts to plead a cause of action for undue influence where the complaint alleged a "series of misrepresentations concerning [the] plaintiff's character that occurred shortly

before the execution of the will, which include[d] lies about telephone calls that were made and the interceptions and destruction of cards and letters").

¶27 In *Roeseler*, the question again was whether summary judgment was properly granted in favor of the defendants under the challenged will. This court ultimately concluded there were genuine issues of material fact preventing the entry of summary judgment regarding whether the defendants unduly influenced the execution of the testator's will. *Roeseler*, 287 Ill. App. 3d at 1019. Of particular importance was the fact that the testator was mentally enfeebled at the time the will was changed to disinherit his step-daughter, who was his only family member, in favor of his attorney's mother and two neighbors. *Id.* at 1011. In addition, the *Roeseler* court found the record supported the establishment of a *prima facie* case where, *inter alia*, the record reflected that one of the defendants had a power of attorney over the decedent's legal and financial affairs and that, due to his declining physical and mental health, the decedent relied on the same defendant for his basic needs, such as grocery shopping, banking, and picking up medical prescriptions. *Id.* at 1019. The *Roeseler* decedent was almost blind, suffered from other physical ailments, had difficulty writing checks and signing his name, could not adequately care for himself, and could not make rational decisions. *Id.* at 1011.

¶28 We cannot agree with plaintiff's contention that the instant case is "almost identical" to the facts in *Roeseler*. Here, plaintiff's second amended petition merely established that Earl suffered from congestive heart failure and was advancing in age. Unlike the decedent in *Roeseler*, there were no facts alleged to demonstrate Earl was incompetent. Moreover, in contrast to the facts of our case, the defendant who provided the decedent's day to day assistance in *Roeseler* also served as the decedent's fiduciary having held a financial and legal power of attorney.

¶29 We note plaintiff repeatedly argues in his appellate brief that his petition should not have been dismissed because he was not required to present factual allegations with a level of specificity that amounts to pleading evidence and because the circuit court failed to draw reasonable inferences in his favor. We agree that plaintiff was not required to set forth evidence in his petition in order to avoid dismissal; however, he was required to set forth allegations with specificity and not merely provide the conclusory allegations that composed plaintiff's second amended petition. With regard to plaintiff's complaint that the circuit court did not draw reasonable inferences in his favor, we have done so in reviewing his appeal and continue to find that he did not sufficiently allege a claim for undue influence.

¶30 II. Leave to Amend Petition

¶31 Plaintiff next contends the circuit court erred in refusing to grant him leave to file his proposed third amended petition where the affidavits attached to the pleading demonstrated that he could state a cause of action for undue influence.

¶32 Although plaintiff's proposed third amended petition appears in the record on appeal, we do not have jurisdiction to review his contention related thereto. Our review of the record reveals the circuit court essentially discarded that portion of plaintiff's "combined" motion to reconsider the dismissal of his second amended petition and for leave to file a third amended petition upon which plaintiff bases his argument on appeal. The transcript from the hearing on March 19, 2014, makes clear that plaintiff's proposed third amended petition, which plaintiff filed without first obtaining leave, was not properly before the court.

¶33 In relevant part, the circuit court stated, "[s]o far, I haven't heard any basis upon which the Court should legally reconsider the written order entered previously in this cause. So that's what we're here for today, for you to argue your motion to reconsider." Plaintiff's counsel

replied, "[a]nd just respectfully, your Honor, it is a combined motion." The circuit court responded, "[w]ell, you know what, you have filed a pleading that is not authorized by the rules of the court. I am considering this to be a motion to reconsider and I'm going to certainly allow your pleading to stand for whatever value a reviewing court might consider that it has, but this Court is considering today a motion to reconsider, that is what is properly before the Court." Plaintiff's counsel then inquired, "[s]o just to make the record clear, you are not considering the proposed third amended petition?" In what appears to be a misstatement, the circuit court replied, "[s]o the record is clear, I'm considering your motion to reconsider and I'm giving you leave to file your third amended petition which I do not believe states a cause of action either, so the record is clear, but you may proceed." The circuit court continued, "[y]ou've already filed [the proposed third amended petition], so it's of record, you filed it. You did not have leave to file it, no, but you have filed it, so for whatever value it has to the reviewing court, you filed it ***." The court further restated, "this is up today for the Court to consider your motion to reconsider and for leave to file proposed third amended petition which you glommed together in one motion. In fairness to you, I'm going to rule on your motion to reconsider and I have not given you leave to file a proposed third amended petition *** because the Court has already dismissed with prejudice the prior pleading."

¶34 Later, the circuit court addressed plaintiff's counsel, clarifying the court's position further, in stating "you're trying to turn this into a discussion of a pleading that you haven't even been granted leave to file. Again, it's of record, if this Court is incorrect and it's believed that this is just as defective as every other pleading you've filed, so be it. But for purposes of today, in order that I can enter a ruling on your motion to reconsider, is there anything further that you would like to argue with respect to that pleading, not the new complaint, the motion to reconsider."

Moreover, the circuit court's written order solely addressed plaintiff's motion to reconsider. In fact, the order, drafted by plaintiff, states "this matter coming before the Court for hearing on Petitioner's Combined Motion to Reconsider and Motion for Leave to File Proposed Third Amended Petition *** it is ordered: (1) the Petitioner's Motion to Reconsider is denied for the reasons stated in the record."

¶35 On appeal, plaintiff does not challenge the propriety of the circuit court's order denying his motion to reconsider. Rather, plaintiff contends the circuit court abused its discretion in denying petitioner leave to file his proposed third amended petition. The record, however, does not contain a ruling on plaintiff's request for leave to file a third amended petition. We, therefore, lack jurisdiction to consider plaintiff's challenge to a ruling that does not appear in the record.

¶36

CONCLUSION

¶37 We affirm the dismissal of plaintiff's second amended petition.

¶38 Affirmed.