2016 IL App (1st) 151101-U

FIFTH DIVISION
December 30, 2016

No. 1-15-1101

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT F. HARRIS, Cook County Public Guardian, Plenary Guardian of the Estate and Person of BETTY HUBKA, a disabled person,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	No. 12 P 2678
v.	)	
FIFTH THIRD BANK, N.A.,	)	Honorable Carolyn Quinn,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon concurred in the judgment.
Justice Lampkin concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Affirming the dismissal with prejudice of multiple claims asserted against a bank on behalf of a disabled individual.

¶ 2 Betty Hubka (Betty) executed a power of attorney for property appointing her twin sister, Shirley Jones (Shirley), as her attorney-in-fact. Without Betty's knowledge, Shirley used the power of attorney to open accounts at a branch of Fifth Third Bank, N.A. (Fifth Third) near Shirley's residence in Indiana. The accounts named Betty and Shirley as joint owners, in

violation of the Fifth Third's internal policies and procedures. Shirley funded the accounts with significant amounts generated from the sale of property owned by Betty. By the time Betty learned of the existence of the accounts, Shirley had withdrawn the funds. Based on these events, Robert Harris, the Cook County Public Guardian (Public Guardian) – as the plenary guardian of Betty's estate and the limited guardian of her person – pursued Fifth Third for the funds. For the reasons that follow, we affirm the judgment of the circuit court dismissing the Public Guardian's claims against Fifth Third.

¶ 3 BACKGROUND

¶ 4 Betty resided in Lyons, Illinois, at all relevant times, unless otherwise noted herein. Shirley and her husband Roy Jones (Roy) resided in Carbon, Indiana. On January 16, 2004, Betty executed an Illinois durable power of attorney (POA) appointing Shirley as her attorney-in-fact with respect to property matters; Roy was the successor agent. The termination date designated in the POA was Betty's death. The POA provided, among other things, that Shirley was authorized to act for Betty and in Betty's name with respect to "Financial Institution Transactions." The POA did not delineate any specific limitations on Shirley's powers.

¶ 5 On April 4, 2005, Shirley opened a checking and savings account at the Fifth Third branch located in Brazil, Indiana. Each was a joint account with rights of survivorship. On the signature cards for each account, Betty was designated as the primary owner, but the listed address and telephone number were for Shirley's residence in Carbon. Shirley signed Betty's name and also signed "Shirley M. Jones POA." A photocopy of Shirley's Indiana driver's license was included in Fifth Third's records.

¶ 6 The signature card for each account included the following language:

"TERMS AND CONDITIONS

1. The terms and conditions stated herein, together with resolutions or authorizations which accompany this signature card, if applicable, and the Rules, Regulations, Agreements, and Disclosures of Bank constitute the Deposit Agreement ['Agreement'] between the individual[s] or entity[ies] named hereon ['Depositor'] and the Bank.
2. This Agreement incorporates the Rules, Regulations, Agreements, and Disclosures established by Bank from time to time, clearing house rules and regulations, state and federal laws, recognized banking practices and customs, service charges as may be established from time to time ***.
3. All signers hereby agree that the above named bank is authorized to act as a depository under the terms and conditions of the Agreement.
4. Bank is authorized to recognize the signatures executed hereon in such numbers as indicated, for the withdrawal of funds or transactions of any other business regarding this account until written notice to the contrary is received by Bank.

* * *

7. All signers agree to the Terms and Conditions set forth herein and acknowledge receipt of a copy of the Rules and Regulations, Agreements, and Disclosures of Bank and agree to the terms set forth therein."

¶ 7 In May 2012, the Public Guardian filed a petition for the appointment of a guardian for Betty in the Probate Division of the Circuit Court of Cook County based on her alleged disability due to bipolar disorder. Betty was also diagnosed with concomitant dementia. The circuit court appointed a guardian *ad litem*, Enid Kempe (Kempe), who interviewed Betty. Kempe was

informed that Shirley and Roy had taken substantial amounts through misuse of the POA six years earlier. Kempe reported to the court that Betty indicated that "the financial exploitation began approximately 2006 after [Betty's] spouse passed away[1] when [Betty] was a patient" at a psychiatric hospital. After reviewing documents provided by Betty, Kempe opined that some of her claims "may have validity."

¶ 8 In July 2012, the Public Guardian was appointed as temporary guardian of Betty's estate. After a hearing, the court entered an agreed order in September 2012 appointing the Public Guardian as the limited guardian of Betty's person and the plenary guardian of her estate. Throughout the probate proceedings, the court authorized the Public Guardian to sell various assets and take other actions to address Betty's health, safety, and care.

¶ 9 In February 2013, the circuit court granted the Public Guardian's petition for the issuance of a citation to discover assets against Shirley, Roy, and Fifth Third.[2] The petition alleged, in part, that as of January 2006, the Fifth Third accounts held more than $369,000 that "belonged solely to Betty." The deposited funds included proceeds from the sale of property inherited by Betty after the deaths of her mother and husband. According to the petition, Shirley and Roy "began to drain" the accounts shortly after January 2006. Following a series of withdrawals, Shirley transferred the remaining balance of $218,557.86 from the savings account to Roy's personal bank account on September 1, 2006.

¶ 10 In August 2013, the Public Guardian filed a "Petition to Issue a Citation to Recover Assets" in Betty's probate case against Shirley, Roy, and Fifth Third, which the circuit court granted. The petition alleged, in part:

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[1] Betty's husband, Thomas Hubka, died in January 2003.

[2] After the bank failed to respond to the citation, the court entered a rule to show cause, which was subsequently withdrawn.

> "3. Despite the fact that [Betty] never appeared at the bank, [Shirley] was able to open two joint accounts with [Betty's] funds at Fifth Third Bank N.A. of Indiana. [Shirley] opened the two joint accounts using her own identification and using her own home address and phone number, but listed the address and phone number as [Betty's]."

The petition further alleged:

> "25. Fifth Third Bank allowed [Shirley] to open a joint checking account and a joint savings account, with [Betty] and [Shirley] as the joint owners of the accounts. [Shirley] signed her own name and she also signed [Betty's] name on the signature cards. The only identification presented to open the two joint bank accounts was [Shirley's] Indiana driver's license, which was copied by Fifth Third Bank. ***"

According to the petition, Betty did not realize that Shirley and Roy had depleted the accounts "until much later." Betty contacted Fifth Third twice in 2012 to request a fraud investigation, but the bank allegedly took no action.

¶ 11 Count I of the petition against Fifth Third alleged breach of the duty of ordinary care; seven other counts were directed at Shirley and/or Roy.[3] The Public Guardian asserted, in part, that the bank "knowingly violated their own policies when they permitted [Shirley] to open the joint accounts with the right of survivorship using only [Shirley's] picture identification, but obtained no identification for [Betty], the joint account holder." The attachments to the petition included a Fifth Third document that lists various types of personal account ownership, including "power of attorney." A document entitled "Customer Identification Program (CIP) – Quick

[3] As Fifth Third is the sole appellant herein, we do not address the disposition of the claims against Shirley and Roy, except as otherwise provided herein.

Guide" instructed Fifth Third employees to collect specific information in accordance with the Patriot Act[4] when opening accounts, including a valid type of identification, *e.g.,* a driver's license or a state identification card. Another document pertaining to Fifth Third's account opening procedures stated that the signature of the grantor on a power of attorney "should be compared with that of the signature card for the accounts."

¶ 12 Fifth Third filed a motion to dismiss Count I of the citation pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). The bank argued: (1) a citation to recover assets could not be used to pursue a negligence claim under section 16-1 of the Probate Act (755 ILCS 5/16-1 (West 2012)); (2) the negligence claim was barred by the economic loss doctrine and by the Fiduciary Obligations Act (760 ILCS 65/1, *et seq.* (West 2012)); (3) proximate cause was not alleged based on Shirley's alleged "intervening criminal act"; and (4) the claim was time-barred pursuant to the two-year statute of limitations for negligence claims (735 ILCS 5/13-202 (West 2012)). In its response to the bank's motion to dismiss, the Public Guardian argued, in part, that "no contract ever existed" between the bank and Betty and thus the economic loss doctrine did not apply. The Public Guardian also asserted that the bank provided Shirley with the "proverbial 'keys to the candy store' " by allowing the joint accounts to be opened solely by Shirley and that the limitations period was tolled due to Betty's disability.

¶ 13 Fifth Third's motion to dismiss was granted in part and denied in part, and the Public Guardian was granted leave to replead. During the hearing on the motion, the circuit court found that the economic loss doctrine barred the negligence claim. The court also cited cases for the

[4] The PATRIOT Act is the popular name of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. 107-56 (Oct. 26, 2001).

proposition that "the scope of a citation to recover is limited to questions of title or recovery of property unless a fiduciary relationship exists." Finding that "no fiduciary relationship is alleged to exist between [Betty] and the bank," the court agreed with the bank that a citation to recover assets could not be used to pursue the negligence claim. The court rejected the bank's arguments regarding the Fiduciary Obligations Act, proximate causation, and the statute of limitations.

¶ 14 In March 2014, the Public Guardian filed an "Amended Complaint" against Fifth Third in Betty's probate case. Count I alleged fraudulent misrepresentation, and Count II alleged negligent misrepresentation. Count III alleged breach of ordinary care pursuant to the Illinois Uniform Commercial Code. Count IV alleged breach of contract and Count V alleged "breach of contract by Fifth Third Bank, third-party beneficiary," *i.e.*, that Betty was a "direct and intended third-party beneficiary of the two joint accounts."

¶ 15 In response Fifth Third filed a section 2-619.1 motion to dismiss the amended complaint, raising five arguments. First, the bank sought dismissal of all of the counts "because citation proceedings under 755 ILCS 5/16 are limited to the conversion and recovery of estate property" and "cannot be used to make Fifth Third a debtor of [Betty's] estate or to recovery [*sic*] money damages against Fifth Third for allegedly aiding [Shirley's] conversion." Second, Fifth Third claimed that the Fiduciary Obligations Act provided a complete defense to all of the claims. Third, Fifth Third asserted that the fraudulent and negligent misrepresentation counts should be dismissed because the amended complaint did not allege that the bank made a false statement to Betty. Fourth, Fifth Third sought dismissal of the breach of ordinary care based on a number of grounds, including the grounds raised in its prior section 2-619.1 motion. Finally, Fifth Third argued that the two breach of contract counts should be dismissed because, among other things, there was no contract between Betty and the bank.

¶ 16 The circuit court *sua sponte* raised, and then ultimately rejected, the possibility of transferring the amended complaint to the Law Division. According to the Public Guardian, the circuit court subsequently "questioned whether the bank's actions could be a proximate cause of Betty's losses if [Shirley], as Betty's agent, had the legal authority to open a joint account in the first place." The Public Guardian argued, in part, that Shirley did *not* have such authority. "[E]ven if [Shirley] had authority to open a joint account with Betty, or any account at all," the Public Guardian contended, "the fact remains that the bank either intentionally or negligently deviated from its own anti-fraud procedures in the process of opening the accounts." Fifth Third responded, in part, that "the burden of employing honest fiduciaries is on the principal," *i.e.*, Betty, and that Fifth Third's internal policies and procedures do not create duties between itself and its customers or potential customers.

¶ 17 The circuit court ultimately granted in part and denied in part the section 2-619.1 motion. Counts I and II (fraudulent and negligent misrepresentation) were dismissed with prejudice. The order indicates "No objection by O.P.G." The order further provides that Count III (breach of ordinary care pursuant to the Illinois Uniform Commercial Code), "which was dismissed previously, is deemed dismissed with prejudice; (No objection by O.P.G.)." Counts IV and V (breach of contract and breach of contract - third party beneficiary) were not dismissed. The Public Guardian was granted leave to replead Counts IV and V.

¶ 18 The Public Guardian filed a second amended complaint against Fifth Third in December 2014. The second amended complaint alleged, in part:

> "19. Each joint account opened by [Shirley] was a contract binding [Shirley] and [Betty] with Fifth Third Bank.
>
> 20. Both joint account contracts include and incorporate Fifth Third Bank rules,

regulations, policies, procedures, memorandum, and signature cards[.]"

Count I alleged breach of contract and Count II alleged breach of contract – third-party beneficiary. Count II provides, in part, "In the alternative, [Betty] was a direct and intended third-party beneficiary of the two joint accounts."

¶ 19 Fifth Third moved to dismiss the second amended complaint pursuant to section 2-619.1 of the Code. The bank argued that "there is no valid and enforceable contract between Fifth Third and [Betty] as a matter of law. Nor can [Betty] be a third party beneficiary of any alleged contract executed by [Shirley] who the Guardian alleges opened the Accounts in furtherance of a conspiracy to steal [Betty's] money." Fifth Third further contended that the Public Guardian's claims fail even if there was an enforceable contract because, among other things, (a) the Illinois Joint Tenancy Act and the bank's deposit agreement absolve the bank from liability for allowing Shirley, a joint owner of the accounts, from withdrawing funds, and (b) the bank's internal policies and procedures were not part of its deposit agreement. Arguing that the Public Guardian "also bases its breach of contract claims on the allegation that Fifth Third violated the Patriot Act when it opened the accounts," the bank countered that the Patriot Act does not give rise to a private cause of action. The bank also asserted that it was shielded from liability by the Fiduciary Obligations Act.

¶ 20 The motion to dismiss included the affidavit of Cindy Ascher (Ascher), Retail Operations Manager at Fifth Third. Ascher averred that the internal bank policies and procedures that were appended to the second amended complaint "are not part of the 'Rules, Regulations, Agreements, and Disclosures of Bank' referenced in the signature cards attached as Exhibit D to the Second Amended Complaint or Fifth Third's Deposit Agreement."[5]

[5] A document entitled "Rules & Regulations Applicable to All Fifth Third Accounts and Cards,"

¶ 21 When issuing its ruling, the circuit court stated that "[s]igning the account agreements with the bank to open joint accounts with ownership thereby vesting in [Shirley] constituted an improper gift" under the Power of Attorney Act. Because "[t]he facts pleaded in the second amended complaint support the presumption of fraud when an agent engages in self-dealing," the court concluded that "the act of [Shirley] here in signing the joint bank account agreements exceeded her expressed and implied authority." The court also noted that "the Public Guardian appears to concede in its response brief that this is not a case of apparent agency." The court thus dismissed counts I and II of the second amended complaint.

¶ 22 As to the "third party beneficiary" claim, the court specifically noted, in part, that "while the plain terms of the agreements identify the ward as a direct and intended beneficiary, the circumstances surrounding their execution as alleged by the Public Guardian would indicate no benefit was intended to be conferred on [Betty] by the bank or [Shirley]." The court thus concluded that "[e]ven allowing for all of the reasonable inferences to be drawn in favor of [Betty] from the allegations of the pleading, the Office of the Public Guardian has failed to assert facts showing that both the terms of the contracts and the circumstances existing at the time of the execution indicate an intention by [Shirley] and the bank to directly benefit [Betty] by their acts."

¶ 23 In a written order, the circuit court dismissed both counts of the second amended complaint with prejudice pursuant to section 2-615 of the Code and "denied" the bank's section 2-619 arguments. After the court added Rule 304(a) language to the order (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)), the Public Guardian filed the instant appeal.

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dated February 2005, was appended to Ascher's affidavit in the appendix to the bank's appellate brief. This document was not included in the record on appeal and is thus not considered herein.

¶ 24 ANALYSIS

¶ 25 The Public Guardian argues on appeal that the circuit court erred in dismissing Counts I, II, and III of the amended complaint and in dismissing Counts I and II of the second amended complaint.

¶ 26 As an initial matter, we address an issue that was not raised by the parties but is critical to the disposition of this appeal. Count I (fraudulent misrepresentation), Count II (negligent misrepresentation), and Count III (breach of ordinary care pursuant to the Uniform Commercial Code) of the first amended complaint were dismissed with prejudice. Counsel for the Public Guardian expressly stated during the hearing on the motion to dismiss that there was "no objection" to dismissal of Counts I, II and III with prejudice. The Public Guardian repleaded Count IV (breach of contract) and Count V (breach of contract – third party beneficiary) of the first amended complaint as the two counts of its second amended complaint. The second amended complaint, however, did not reference or incorporate Counts I, II, or III of the amended complaint.

¶ 27 By electing to proceed on the breach of contract counts only, and to file a second amended complaint that "neither referenced nor incorporated any of the previously dismissed counts," the Public Guardian "effectively abandoned and withdrew those counts and in so doing waived any appellate review of their dismissal." *Bonhomme v. St. James*, 2012 IL 112393, ¶ 19. As the Illinois Supreme Court has stated, "unless the amended pleading somehow incorporates or references the pleadings in the former complaint, 'a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints.' " *Id.* ¶ 23, citing *Boatman's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 99 (1995). Based on the foregoing, we need not consider the Public Guardian's arguments with respect to the dismissal of

Counts I, II and III of the amended complaint. See *Bonhomme*, 2012 IL 112393, ¶ 31. We thus turn our attention to the dismissal of the breach of contract counts, *i.e.*, Counts I and II of the second amended complaint.

¶ 28 A motion to dismiss under section 2-615(a) of the Code (735 ILCS 5/2-615(a) (West 2012)) "tests the legal sufficiency of a plaintiff's claim." *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 578-79 (2006). "A cause of action should not be dismissed pursuant to a section 2-615 motion unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). "In ruling on such a motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *Id.* A motion to dismiss under section 2-619(a) (735 ILCS 5/2-619(a) (West 2012)) "asserts certain defects or defenses outside the pleading that defeat the claim." *Solaia Technology*, 221 Ill. 2d at 579. Our review is *de novo* under either section. *Id.*

¶ 29 The Public Guardian advances a number of contentions regarding Counts I and II of the second amended complaint. We need only consider certain of the parties' section 2-615 arguments to resolve the issues on appeal. See *AIDA v. Time Warner Entertainment Co.*, 332 Ill. App. 3d 154, 158 (2002) (noting that "this court may affirm a correct dismissal by the trial court for any reason appearing in the record").

¶ 30 Count I of the second amended complaint alleges breach of contract. The elements of a breach of contract claim include: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant damages or injury to the plaintiff. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 30. See also *Village of South Elgin v. Waste Management of Illinois, Inc.*, 348 Ill. App. 3d 929, 940

(2004) (stating that the elements of a breach of contract action are "(1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages").

¶ 31 The second amended complaint fails to adequately plead the existence of a valid and enforceable contract between Betty and Fifth Third – a necessary element of a breach of contract action. *Razor Capital*, 2012 IL App (2d) 110904, ¶ 30. The second amended complaint alleges, among other things, that Betty was not present when Shirley opened the accounts and that Shirley forged Betty's name on the signature cards. "It is elementary law that in order for a contract to come into being there must be mutual assent of all of the parties thereto." *Calo, Inc. v. AMF Pinspotters, Inc.*, 31 Ill. App. 2d 2, 8 (1961). Accord *Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 838 (2005). As Betty was not aware of the existence of the accounts until substantially after their creation – and her "assent" at the time of their creation was forged – no "mutual assent" was present and thus no contract was formed between the bank and Betty. See also *Sphere Drake Insurance Ltd. v. All American Insurance Co.*, 256 F.3d 587, 590-91 (7th Cir. 2001) (stating that a "person whose signature was forged has never agreed to anything").

¶ 32 We recognize that "[a] party to a contract need not personally participate in its formation where he is represented by an agent." *Bull v. Mitchell*, 114 Ill. App. 3d 177, 187 (1983). "An agent may bind his principal contractually upon proof of the agency relationship and proof that the agent had authority to bind his principal in contract." *Id.* "In order for the acts of an agent to bind his principal when entering into a contract with a third person, such acts must be within the express, implied or apparent authority conferred on him by the principal." *Barraia v. Donoghue*, 49 Ill. App. 3d 280, 283 (1977). The Public Guardian's verified pleadings and the inferences drawn therefrom, however, establish that Shirley acted outside of the scope of her agency in

opening the accounts. For example, the repeated allegation in the second amended complaint that Shirley "forged" Betty's name on the signature cards indicates Shirley's actions exceeded her authority.

¶ 33 We observe that "where an agent who is not so authorized enters into a contract on behalf of his principal, the principal may nonetheless be bound by ratifying the contract – accepting or retaining the benefits of it – upon proof that the principal electing to ratify had knowledge of all material facts surrounding the transaction." *Bull*, 114 Ill. App. 3d at 187. The allegations of the second amended complaint make clear that Betty did not ratify any alleged contract, *e.g.*, she made a theft complaint to the police and requested a fraud investigation by the bank upon her discovery of the accounts.

¶ 34 Count II asserts, in the alternative, that Betty was a "third-party beneficiary of the two joint accounts." Under Illinois law, an individual who is not a party to a contract may enforce the contract's rights when the original parties intentionally enter into the contract for the direct benefit of the individual. See *Swavely v. Freeway Ford Truck Sales, Inc.*, 298 Ill. App. 3d 969, 973 (1998). A third party acquires no rights under a contract entered into by others, however, "unless the provision at issue was intentionally included for the direct benefit of the third party." *Weil, Freiburg & Thomas, P.C. v. Sara Lee Corp.*, 218 Ill. App. 3d 383, 393 (1991).

¶ 35 "Whether a party is a third-party beneficiary depends on the intent of the contracting parties and is determined on a case-by-case basis." *Swavely*, 298 Ill. App. 3d at 973. The "critical inquiry centers on the intention of the parties, which is to be gleaned from the language of the contract and the circumstances surrounding the parties at the time of its execution." *Cahill v. Eastern Benefit Systems, Inc.*, 236 Ill. App. 3d 517, 520 (1992). "Illinois law holds a strong presumption against creating contractual rights in third parties, and this presumption can only be

overcome by a showing that the language and circumstances of the contract manifest an affirmative intent by the parties to benefit the third party." *Estate of Willis v. Kiferbaum Construction Corp*., 357 Ill. App. 3d 1002, 1007 (2005). "That the parties expect, know, or even intend that the contract benefit others is insufficient to overcome the presumption that the contract was intended only for the parties' *direct* benefit." (Emphasis in original.) *Bank of America National Assoc. v. Bassman FBT, L.L.C.*, 2012 IL App (2d) 110729, ¶ 27.

¶ 36 Although Betty was designated as the primary owner on the signature cards, the circumstances surrounding the creation of the accounts does not manifest any affirmative intent to directly benefit Betty or to benefit Betty at all. The allegations set forth in the second amended complaint include the fact that Shirley forged Betty's name on the signature cards, that she opened the accounts without Betty being present, and that she provided her Indiana address to the bank. A claim that the parties to any contract intended for Betty to be its direct beneficiary is clearly at odds with not only the allegations of the complaint, but also the extensive litigation by the Public Guardian directed against the allegedly improper activities of Shirley and Roy.

¶ 37 For the foregoing reasons, the dismissal of Count I (breach of contract) and Count II (breach of contract – third party beneficiary) were proper and are supported by the record. In light of our disposition herein, we need not consider the parties' remaining arguments, including Fifth Third's contention that the Public Guardian's claims are barred by the Fiduciary Obligations Act.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we affirm the judgment of the circuit court dismissing with prejudice the Public Guardian's claims against Fifth Third.

¶ 40 Affirmed.

¶ 41 JUSTICE LAMPKIN, concurring in part and dissenting in part.

¶ 42 I agree with the majority's decision that the Public Guardian's failure to reference or incorporate in the second amended complaint counts I, II, and III from the first amended complaint resulted in the abandonment and withdrawal of those claims and forfeiture of any appellate review of their dismissal. However, I disagree with the majority's decision to affirm the trial court's dismissal, based on inadequate pleading, of the claims of the breach of contract and breach of contract as to a third party beneficiary against the bank. For the reasons that follow, I would reverse the dismissal of the two contract claims and remand this matter with leave for the Public Guardian to amend those two claims.

¶ 43 A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Fitzgerald v. Chicago Title & Trust Co.*, 72 Ill. 2d 179, 187 (1978). Once the court identifies the well-pleaded facts which are to be considered, it must then draw all reasonable inferences therefrom favorable to the pleader. *Bishop v. Ellsworth*, 91 Ill. App. 2d 386, 391 (1968). No pleading is bad in substance which reasonably informs the opposite party of the nature of the claim which it is called upon to meet. *Browning v. Heritage Insurance Co.*, 33 Ill. App. 3d 943, 947 (1975).

¶ 44 Concerning the breach of contract claim, the majority finds the complaint failed to adequately plead the existence of a valid contract between Betty and the bank because all the parties did not assent to the creation of a contract where Shirley exceeded the scope of her agency by forging Betty's name on the signature cards, Betty did not know the accounts existed until long after Shirley had drained Betty's money from the accounts, and Betty never ratified any alleged contract. I disagree. The second amended complaint contained well-pleaded facts to indicate all the parties mutually assented to create a contract and Shirley neither exceeded the

scope of her agency nor forged Betty's name on the signature cards.

¶ 45 According to the alleged facts, Betty executed a broad power of attorney that authorized Shirley to act for Betty in any way Betty could act in person with respect to financial institution transactions. Consequently, Shirley was authorized to, *inter alia*, open bank accounts for Betty, deposit Betty's money into those accounts, and withdraw money from those accounts. When Shirley used the valid power of attorney to open accounts at the bank with Betty's money, Betty was bound to Shirley's action based on the either express or apparent authority Betty had conferred on Shirley. See *Wing v. Lederer*, 77 Ill. App. 2d 413, 417 (1966) (apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which the principal holds the agent out as possessing; it is the authority a reasonably prudent man, exercising diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess).

¶ 46 Furthermore, the bank's acceptance of Betty's deposited funds meant that title of the funds passed to the bank, which became a debtor to Betty to the extent of the funds on deposit. *Mid-City National Bank of Chicago v. Mar Building Corp.*, 33 Ill. App. 3d 1083, 1089 (1975); *Your Style Publications, Inc. v. Mid Town Bank and Trust Co. of Chicago*, 150 Ill. App. 3d 421, 426 (1986). "Out of the relation of debtor and creditor existing between banks and their depositors, the law *implies the contract* on the part of the bank to pay the depositor's checks, to the amount of his deposit, to the persons to whom he orders payment to be made." (Emphasis added.) *United States Cold Storage Co. v. Central Manufacturing District Bank*, 343 Ill. 503, 513 (1931); see also *National Bank of Monticello v. Quinn*, 126 Ill. 2d 129, 135 (1988) (implicit in such contracts is the common-law duty of the bank to use ordinary care in disbursing the depositor's funds); *Bull v. Mitchell*, 114 Ill. App. 3d 177, 186-87 (1983) (an express contract is

proved by an actual agreement or by the expressed words used by the parties; an implied contract is proved by circumstances showing that the parties intended to contract or by circumstances showing the general course of dealing between the parties).

¶ 47 Joint tenancies in personal property in Illinois are governed by section 2 of the Joint Tenancy Act, 765 ILCS 1005/2 (West 2014), which in relevant part provides that parties other than executors or trustees must create a joint tenancy in personal property with the right of survivorship by a written instrument expressing that intention, or else the owners of joint property will be deemed tenants in common. Illinois bank accounts created in the name of two persons, when the funds are payable to either party whether the others be living or not, shall be valid joint tenancies with right of survivorship *if* an agreement permitting such payment *is signed by the persons named on the account at the time the account is created or if such a document is signed by the persons named on the account thereafter to that affect*. See 765 ILCS 1005/2(a) (West 2014). Because the Joint Tenancy Act requires a written agreement between joint tenants to be signed and expressly state that the account is to be held in joint tenancy, the requirements of the statute are not satisfied if an account holder instructs a third party, like a bank employee, to merely list someone's name to the account as a joint account holder. *Doubler v. Doubler*, 412 Ill. 597, 601 (1952) (a joint account was not created when the husband instructed the bank assistant cashier to write the name of the wife immediately after the husband's name, and the husband also wrote above both names that the funds were payable to either of them or the survivor with full survivorship rights).

¶ 48 Recognized banking practices and customs, the Joint Tenancy Act, the bank's rules and agreements, and the terms and conditions listed on the bank's signature cards required the bank to obtain the signature specimen and verify the identity, address and phone number of every

account holder in order to set up a valid joint tenancy account. However, the bank here accepted Betty's funds and proceeded to title and service her accounts as joint accounts despite the lack of her actual signature, identification and contact information. Nevertheless, Shirley's authority to open bank accounts for Betty was not wiped out by the bank's alleged failure to follow its procedures and recognized banking practices or Shirley's alleged subsequent misappropriation of the account funds. Accordingly, I would conclude that the well-pled facts showed the parties' mutual assent to the creation of the contractual debtor/creditor relationship.

¶ 49 Contrary to the majority's conclusion, the alleged facts do not show that Shirley exceeded the scope of her agency by forging Betty's name to the account signature cards. Although the second amended complaint also characterized Shirley's actions in opening the accounts as forgery, the actual well-pled facts do not support the conclusory allegation of forgery.

¶ 50 An unauthorized signature means one made without actual, implied or apparent authority and includes a forgery. See 810 ILCS 5/1-201(b)(41) (West 2014). Furthermore, the essential elements of the offense of forgery are (1) a false writing or alteration of some instrument in writing; (2) the instrument as written must be apparently capable of defrauding; and (3) there must be an intent to defraud. *People v. Brown*, 397 Ill. 92, 97 (1947). The well-pled factual allegations do not support the conclusion that Shirley, who had broad authority to act for Betty in financial institution transactions, committed a forgery when she incorrectly wrote both their names on the bank's signature cards with the knowledge of the bank and the bank did not correct or clarify the discrepancy.

¶ 51 According to the pleadings, Betty was designated as the primary owner of the accounts, and, as discussed above, Shirley had actual or apparent authority to open bank accounts for her. Furthermore, the circumstances concerning the signing of the signature cards establish neither

the capability of the signature cards defrauding the bank nor Shirley's intent to defraud. When Shirley opened the accounts, she did not represent herself to the bank as Betty; rather, in the presence of a bank employee, Shirley wrote both Betty's name and her name on the signature cards and referenced her power of attorney. See *Kallison v. Harris Trust & Savings Bank,* 338 Ill. App. 33, 38 (1949) (a partner's alleged improper endorsement of checks payable to the partnership and deposit of those checks into his personal bank account did not constitute a forgery because he had authority to endorse the checks under the partnership agreement). Moreover, Shirley presented only her driver's license to the bank to establish her identity and Indiana address; there is no allegation that she presented some type of false identification to represent that Betty also resided at Shirley's Indiana address.

¶ 52 Because the well-pled facts do not support allegations that Shirley forged Betty's signature and exceeded the scope of her authority by opening bank accounts, the issue of ratification is inapplicable under the circumstances of this case.

¶ 53 Concerning the breach of contract as to a third party claim, the majority finds the complaint failed to adequately plead any intent to benefit Betty based on Shirley's improper activities of forging Betty's name on the signature cards, listing Shirley's address as Betty's address, and opening the accounts without Betty being present.

¶ 54 I disagree. As discussed above, the well-pled facts do not support an inference of forgery or that Shirley exceeded the scope of her authority to open bank accounts for Betty. Moreover, the alleged facts show that Betty was injured when the bank opened her accounts but breached the deposit agreement and failed to follow recognized banking practices and the Joint Tenancy Act by titling and servicing the accounts as joint accounts.

¶ 55 Based on the foregoing, the trial court should not have dismissed the contract and third party beneficiary causes of action on the pleadings because it is not clearly apparent that no set of facts could be proved which will entitle Betty to relief. See *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 488 (1994). Accordingly, I respectfully dissent from the majority's judgment affirming the trial court's dismissal of the two contract claims.