2016 IL App (2d) 140242-U
Nos. 2-14-0242, 2-14-1063, 2-14-1213 cons.
Order filed January 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF DONALD E. SUSMAN,	)	Appeal from the Circuit Court
	)	of Lake County.
	)	
	)	Nos. 08-P-725
	)	09-CH-3765
	)	10-CH-1579
	)	
(Estate of Donald E. Susman, Petitioner-Appellee, v. Robert Susman, Respondent-Appellant).	)	Honorable
	)	Nancy S. Waites,
	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: In appeal No. 2-14-1063, the trial court did not err in dismissing a declaratory judgment complaint seeking to void a settlement agreement for failure to include a necessary party, where the party could not allege any claim to the trust *res*, thus, foreclosing her assertion of necessary-party status. In appeal No. 2-14-0242, the trial court did not abuse its discretion in awarding attorney fees based on its finding of a breach of a settlement agreement. In appeal No. 2-14-1213, the trial court did not err in denying the parties' section 2-1401 petition seeking to set aside a settlement agreement for failure to include an alleged necessary party, where necessary-party status could not be sufficiently pleaded. Affirmed.

¶ 2 Following Donald E. Susman's death, lengthy disputes, including an earlier appeal, arose concerning the disposition of his ownership interest in the family business and the real property

(held in a land trust) upon which the business is located. The present proceedings involve three consolidated appeals. For the following reasons, we affirm in each of the appeals, namely, appeal Nos. 2-14-0242 (concerning the dismissal of a declaratory judgment complaint seeking to void a settlement agreement for the alleged failure to include a necessary party), 2-14-1063 (concerning an attorney fees award), and 2-14-1213 (concerning the denial of a section 2-1401 petition seeking to set aside a settlement agreement for failure to include an alleged necessary party).

¶ 3 I. BACKGROUND

¶ 4 A. Land Trust

¶ 5 In 1961, Matt and Angeline Susman established a land trust (No. 1570), under which North Star is the successor trustee, to hold the real property on which the family business, Susman Linoleum and Rug Company, Inc. (at 3500 Grand Avenue in Gurnee) is now located. Under the trust, Matt and Angeline were the initial beneficiaries and each possessed a power of direction. The trust provided that, in the event of Matt and Angeline's deaths, their interests in the trust would pass to only two of their children: Donald and Robert Susman. If Donald or Robert died, his right and interest in the trust would pass to his executor or administrator and not to his heirs-at-law. The document further states that the death of any beneficiary would *not* terminate the trust or affect the powers of the trustee. The trust provided that it could be amended "by the joint consent of the Trustee and all of the beneficiaries for the time being." Apparently, there were no amendments to the trust. Finally, and as most relevant here, the trust stated:

> "If the trust property or any part thereof remains in the trust until twenty (20) years from this date, the Trustee shall either sell the same at public sale on reasonable

notice, and divide the proceeds of the sale among those who are entitled thereto under this agreement or convey the same to the beneficiaries in accordance with their respective interests."

¶ 6 The trust continued to hold the real estate after the 20-year period expired (*i.e.*, 1981). After 1981, Matt and Angeline, along with Robert and Donald thereafter, continued to pay the fees to maintain the trust. Matt passed away in 1996, Angeline passed away in 2001, and Donald died in 2008.

¶ 7 B. Matt and Angeline's Estate Plans

¶ 8 Matt and Angeline's estate plans funneled the residue of their probate estates to testamentary trusts for the benefit of family members, including not only Donald and Robert, *but also their daughter, Margaret Faber*. Specifically, Matt's will provided that the residue of his probate estate was to pass to First Midwest Bank, as trustee for certain testamentary trusts. The trusts were for Angeline's primary benefit during her lifetime, with the remaining balance after her death to pass *per stirpes* to Matt's surviving descendants. Angeline's will similarly provided that the residue of her estate would pass to First Midwest Trust Company, as trustee of certain trusts for the benefit of Angeline's then-living descendants.

¶ 9 C. Initial Litigation Leading to First Appeal

¶ 10 Donald died on July 18, 2008, and is survived by his wife, Diane, and their children. At the time of his death, Donald and Robert owned equal shares in Susman Linoleum. Robert refused to acknowledge Donald's ownership interest in Susman Linoleum, as well as his interest in the real property where the business is located.

¶ 11 After Donald's death, Kathy A. Drennan, the executor of Donald's estate (the Executor), requested that North Star distribute one-half of the land trust property. North Star issued a

trustee's deed that conveyed an undivided one-half interest in the trust property to the Executor. The transfer gave rise to two proceedings against the Susman defendants (*i.e.*, Robert and Susman Linoleum) and North Star (but not Faber) that resulted in an earlier appeal. *In re Estate of Susman*, 2012 IL App (2d) 110121-U (addressing three consolidated appeals; first, affirming trial court's denial of request to stay proceedings and its denial of the defendants' motion to vacate the settlement agreement (therein *Susman III*); and second, dismissing as moot the remaining two appeals (*Susman I*, concerning the land trust, and *Susman II*, concerning a contempt order)). In one of the proceedings, the Executor, in 2009, sued for breach of a shareholder agreement that provided that, upon the death of either Robert or Donald, the surviving party would purchase the stock from the decedent's estate. She also sought dissolution of the land trust and a judicial sale. On June 18, 2009, Diane was granted leave to participate in the proceedings as an interested person. 755 ILCS 5/1-2.11 (West 2010).

¶ 12 On January 6, 2011, the trial court granted the Executor summary judgment on her count seeking dissolution of the land trust and a judicial sale. The court found that the land trust was created on May 20, 1961, specified a fixed duration of 20 years, and did not state that a purpose or objective was to maintain property for a particular use or business. The court further found that there were no amendments to the land trust agreement, that *the trust expired*, and that no purpose was identified within the trust that remained unfulfilled. The trial court *ordered termination of the trust* and a judicial sale, but it reserved a date for the judicial sale pending trial on the remaining causes of action. (This order was the subject of one of the original appeals, *Susman I*, which this court dismissed as moot.)

¶ 13 On April 12, 2011, the Executor entered into a settlement agreement with the Susman defendants. The agreement provided that: the Susman defendants would dismiss all appeals

without cost to any party; Robert would purchase the Estate's stock in Susman Linoleum for $650,000; no party would file any attorney fee petitions against the Susman defendants; and that, if any party breached the order and litigation ensued, the litigation costs, including reasonable attorney fees of the non-breaching parties, would be assessed against and paid by the breaching party. However, on May 11, 2011, the Susman defendants moved to vacate the settlement agreement order. The trial court denied their motion on September 9, 2011.

¶ 14 Litigation ensued between the parties over Robert's refusal to tender the cash payment. The probate court proceedings included hearings on a preliminary injunction, actions to freeze certain accounts, proceedings concerning a rule to show cause and contempt proceedings against Robert, and a hearing on the motion to vacate the settlement agreement order. During this litigation, Diane (as an interested party for the benefit of Donald's estate) and the Executor incurred additional post-settlement attorney fees.

¶ 15 On November 8, 2012, this court affirmed the trial court's denial of the motion to vacate the settlement agreement and dismissed as moot the other two appeals, which involved orders concerning a contempt order against Robert (*Susman II*) and an order terminating the land trust and ordering a judicial sale (*Susman I*). *In re Estate of Susman*, 2012 IL App (2d) 110121-U.

¶ 16 D. Proceedings on Remand

¶ 17 On January 27, 2014, in an agreed order, Robert agreed to purchase the Estate's interest in the real estate for $288,750. The Estate received payment and, at Robert's direction, the Executor executed a deed on or about May 5, 2014, that conveyed the Estate's interest in the real estate back to the land trust (for Robert's benefit).

¶ 18 (1) Faber's Complaint - Appeal No. 2-14-1063

¶ 19 On July 12, 2013, Margaret Faber filed a declaratory judgment action, arguing that the trial court's January 6, 2011, order terminating the land trust and the ensuing settlement agreement were void because she was never included in the original cases as a necessary party. In her amended complaint, Faber asserted that she was a necessary party to the probate court proceedings, arguing that the land trust terminated after 20 years (in 1981) and that ownership of the real estate reverted to Matt and Angeline, to be distributed upon their deaths to testamentary trusts to be divided in equal shares for each of her three children: Faber, Robert, and Donald. Faber reasoned that, based upon her 1/3 share of the real estate, her interests were materially affected by the relief the Executor sought in her complaint (*i.e.*, dissolution of the land trust and a judicial sale of the real estate) and for which the Executor was granted summary judgment on January 6, 2011. Faber sought a declaration that she was a necessary party to the Executor's complaint and that the court's January 6, 2011, order (and any subsequent orders) was null and void for failure to include her as a necessary party. Alternatively, she sought a declaration that she was a necessary party and that the court declare that the land trust expired after 20 years (on May 19, 1981).

¶ 20 The Executor and North Star moved to dismiss Faber's complaint, arguing that: (1) Faber failed to sufficiently allege a legal interest in the trust or real estate so as to state a cause of action for declaratory judgment; (2) she lacked standing; (3) Faber released any claim against the real estate by executing releases in the administration of her parents' estates; and (4) her claim was barred by the statute of limitations.

¶ 21 On September 24, 2014, the probate court dismissed Faber's amended complaint with prejudice. The court noted that it relied on two cases, *Breen v. Breen*, 411 Ill. 206, 211 (1952), and *Heritage County Bank & Trust v. State Bank of Hammond*, 198 Ill. App. 3d 1092, 1097

(1980), which considered trusts that contained language "fairly identical" to that in the Susmans' land trust and the fact that there had been no attempts to terminate the land trust. It also noted that the trust fees kept being paid after the 20-year period expired. The court found that the expiration of that period did not cause the trust to be terminated; rather, the trust language was merely directory, as the case law instructed. The court also found that Faber did not have any interest in the land in the trust. (The court stated that the Susman defendants' section 2-1401 petition was, thereby, moot.) The court also noted that it found, but to a lesser extent, that Faber lacked standing and that she had signed a release of claims after Angeline died. Faber appeals (appeal No. 2-14-1063).

¶ 22 (2) Susman Defendants' Section 2-1401 Petition – Appeal No. 2-14-1213

¶ 23 On November 20, 2013, the Susman defendants filed a section 2-1401 petition, seeking to vacate the probate court's April 12, 2011, order incorporating the settlement agreement based upon Faber's absence as a necessary party. They argued that the January 6, 2011, summary judgment order made Faber a necessary party to the litigation and rendered void the subsequent settlement agreement.

¶ 24 On November 3, 2014, the probate court denied the section 2-1401 petition "as stated in the Report of Proceedings." (No such report was filed. In the same order, the court denied as untimely (Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2015)) the Susman defendants' motion for a bystander's report.) The Susman defendants appeal (appeal No. 2-14-1213).

¶ 25 (3) Attorney Fees – Appeal No. 2-14-0242

¶ 26 On June 26, 2013, the Executor and Diane, Donald's widow, each petitioned for attorney fees, claiming breach of the settlement agreement. The motions were continued until the initial appeals were resolved. In her petition, Diane had sought fees arising from the post-settlement

probate court litigation, not for any appellate litigation. She sought reimbursement from decedent's Estate on the basis that such fees were incurred for the benefit of the Estate and, thus, properly payable from it. Specifically, she sought $22,498.50 in fees to the Lesser, Lutrey, McGlynn & Howe, LLP firm and $49,454.34 to the Pasquesi Associates firm. The Executor sought $73,239.41 to the Lesser firm. In total, the Executor and Diane sought $145,192.25 in attorney fees.

¶ 27 On September 26, 2013, the court granted Diane's petition for attorney fees from the Estate (thereby converting them into additional fees of the Estate for which the Executor sought recovery from the Susman defendants). The court also ruled at this hearing that the Estate was entitled to attorney fees pursuant to the settlement agreement, but set another hearing date to determine the amount of the fees to be awarded. Nevertheless, it also stated during the hearing that, although Robert had the right to appeal parts of the case, certain portions could have been combined but were not (*i.e.*, Robert urged that the three initial appeals be separately briefed), thereby, resulting in additional attorney fees for the parties.

¶ 28 On November 20, 2013, the court held an evidentiary hearing on the fee petitions (of which there is no transcript or bystander's report in the record on appeal, but of which there is an exhibit list included, specifying the aforementioned fees).

¶ 29 On January 2, and February 11, 2014, the trial court granted the fee petitions, awarding fees in the Estate's and Diane's favors and against Robert. On January 2, 2014, the court granted the fee petitions in full in the Estate's favor and against Robert, including fees reimbursed by the Estate to Diane. It found that Robert breached the settlement agreement by not dismissing two pending appeals and not purchasing the Susman Linoleum stock within the 30 days specified in the agreement. The court further found that the fees were reasonable and necessary. It entered

judgment against Robert in the amount of $145,192.25. On February 11, 2014, the trial court entered an order clarifying that the fee award in its January 2, 2014, order had not been vacated by a separate order and vacated only a portion addressing the sale of the real estate. Robert appeals from the January 2, and February 11, 2014, orders (appeal No. 2-14-0242).

¶ 30 II. ANALYSIS

¶ 31 A. Appeal No. 2-14-1063 – Necessary Party

¶ 32 In appeal No. 2-14-1063, Faber challenges the trial court's September 24, 2014, order, dismissing with prejudice her amended complaint. Faber sought a declaration voiding the settlement agreement and other orders, asserting that she was an excluded necessary party to the probate court proceedings. She believed that she was a necessary party because the land trust necessarily terminated, in her view, after 20 years, whereupon the trust *res* reverted to her parents' and, after they passed, their estates; as a 1/3 beneficiary under the estates, Faber had an interest in the trust *res*. For the following reasons, we reject Faber's argument.

¶ 33 North Star's motion to dismiss was brought pursuant to section 2-619 of the Code, and the Executor's motion was brought pursuant to sections 2-615 and 2-619 of the Code. The trial court's ruling did not specify whether dismissal was granted under section 2-619 alone or also under section 2-615. A motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)) tests the legal sufficiency of the complaint, whereas a motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)) admits the legal sufficiency of the complaint but asserts an affirmative defense that defeats the claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 578-79 (2006). In considering a motion to dismiss pursuant to either section 2-615 or 2-619, we accept all well-pleaded facts in the complaint as true, drawing all reasonable inferences from those facts in favor

of the nonmoving party. *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009). When reviewing a decision to grant a motion pursuant to section 2-615, our inquiry is whether the allegations of the complaint, construed in the light most favorable to the nonmoving party, are sufficient to establish a cause of action upon which relief may be granted. *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1086 (2010). Under section 2-619(a)(9), our inquiry is whether affirmative matter, *i.e.*, "some kind of defense 'other than a negation of the essential allegations of the plaintiff's cause of action,' " defeats the claim. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120-21 (2008) (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993)). Our review under either section 2-615 or 2-619(a)(9) is *de novo*. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 12 (2005); see also *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 274 (2004) (dismissal of declaratory judgment complaint is subject to *de novo* review).

¶ 34 A declaratory judgment action requires: (1) a plaintiff with a tangible legal interest; (2) a defendant with an adverse interest; and (3) an actual controversy regarding that interest. 735 ILCS 5/2-701 (West 2014); *Local 1894, American Federation of State, County & Municipal Employees, AFL-CIO v. Holsapple*, 201 Ill. App. 3d 1040, 1050 (1990). For an actual controversy to exist, the case must present a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof. *Howlett v. Scott*, 69 Ill. 2d 135, 141-42 (1977).

¶ 35 Turning to the necessary-party concept, the failure to join a necessary party may be raised at any time, either by the parties or *sua sponte* by the trial or appellate court. *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill. App. 3d 792, 811 (1985). The Code provides only some

guidance as to what constitutes a necessary party. Section 2-406(a) (bringing in new parties—third-party proceedings) states:

"If a complete determination of a controversy cannot be had without the presence of other parties, the court may direct them to be brought in. If a person, not a party, has an interest or title which the judgment may affect, the court, on application, shall direct such person to be made a party." 735 ILCS 5/2-406(a) (West 2014).[1]

[1] Section 2-404 (joinder of plaintiffs) provides, in relevant part:

"All persons may join in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, whenever if those persons had brought separate actions any common question of law or fact would arise. If upon the application of any party it shall appear that joinder may embarrass or delay the trial of the action, the court may order separate trials or enter any other order that may be expedient. Judgment may be entered for any one or more of the plaintiffs who may be found to be entitled to relief, for the relief to which he or she or they may be entitled." 735 ILCS 5/2-404 (West 2014).

Also, Section 2-405(a) (joinder of defendants) states that:

"Any person may be made a defendant who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, or in the transaction or series of transactions out of which the controversy arose, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein, or against whom a liability is asserted either jointly,

¶ 36 Case law provides more guidance, defining a necessary party as one whose presence in a suit is required for any of three reasons: (1) to protect an interest that the absentee has in the subject matter of the controversy that would be materially affected by a judgment rendered in his or her absence (see also *Zurich Insurance Co. v. Raymark Industries, Inc.*, 144 Ill. App. 3d 943, 946 (1986) (defined as "one who has a legal or beneficial interest in the subject matter of the litigation and will be affected by the action of the court"); *Lakeview Trust*, 134 Ill. App. 3d at 811 (defined as a person who "has an interest in the subject matter of the suit which may be materially affected by a judgment entered in his [or her] absence"); *Jones v. Bryant*, 204 Ill. App. 609, 617 (1917) (defined as "persons whose interests will necessarily be affected by any decree that may be rendered")); (2) to reach a decision that will protect the interests of those who are before the court; or (3) to enable the court to make a complete determination of the controversy. *Lain v. John Hancock Mutual Life Insurance Co.*, 79 Ill. App. 3d 264, 268-69 (1979). See, *e.g.*, *Lah v. Chicago Title Land Trust Co.*, 379 Ill. App. 3d 933, 940 (2008) (finding that company was a necessary party, where it might have been prevented from taking title to property by fraud; this was sufficient to show an interest in title proceedings sufficient to require the company's inclusion; complete determination of controversy would have included the company's opportunity to assert its claim to the title). It has also been stated that two factors must be satisfied. *American Home Assurance Company v. Northwest Industries, Inc.*, 50 Ill. App. 3d 807, 812 (1977). First, the party must have a legal or equitable interest in the subject matter of the suit. *Id.* Second, that interest must be " 'a present substantial interest as distinguished from a mere expectancy or future contingent interest.' " *Id.* (quoting *Oglesby v. Springfield Marine*

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severally or in the alternative arising out of the same transaction or series of transactions, regardless of the number of causes of action joined." 735 ILCS 5/2-405(a) (West 2014).

Bank, 385 Ill. 414, 422 (1944)). One court has further noted that the "relevant inquiry is not whether the court's judgment has in fact materially affected the absent individual's interests in the subject matter in controversy; instead, it is whether the absent person 'might claim a substantial and present interest' [citation] which determines that he [or she] is a necessary and indispensable party." *Lakeview Trust*, 134 Ill. App. 3d at 811 (quoting *Lain*, 79 Ill. App. 3d at 269) (framing the issue before it as whether a corporate beneficiary of a trust had a present interest in the subject premises that might have been materially affected by the court's judgment upon the trustee's petition to quiet title).

¶ 37 In their joint briefs, Faber, joined by the Susman defendants, argues that the trial court erred in dismissing her declaratory judgment complaint because she was a necessary party to the Executor's action concerning the land trust. She contends that, "if" any portion of the property in the land trust went to Matt or Angeline, Faber would be a 1/3 beneficiary of that property upon her parents' passing by virtue of the testamentary trust established in Angeline's will. She further complains that she was deprived of the ability to conduct discovery as to the issues that the Executor and North Star raised in their motions to dismiss. According to Faber, she was entitled to the same information as her siblings concerning her parents' "true intentions" as to the disposition of the real estate in the land trust.

¶ 38 In response, the Executor and North Star, in separate briefs, assert that Faber failed to sufficiently plead a declaratory judgment action, namely, an interest in the real estate. Thus, she failed to allege facts empowering her to seek a declaratory judgment that she was a necessary party to the probate proceedings. The Executor and North Star maintain that Faber was not a necessary party to the litigation involving the land trust because she lacked a present substantial interest in the property, as opposed to a mere expectancy or future contingent interest. They note

that Faber was never a trust beneficiary and, at most, had a mere expectancy based on her theory that the land trust terminated on its own in 1981 and reverted back to her parents. They primarily rely on the two cases cited by the trial court, *Breen* and *Heritage County Bank*, and which we find dispositive.

¶ 39 In *Breen*, three of four real estate trust beneficiaries sued the fourth beneficiary, seeking partition of the premises. The premises were owned by the parents, who had conveyed the property into a trust. The trust agreement stated: " 'If any property remains in this trust twenty years from this date it shall be sold at public sale by the trustee on reasonable notice, and the proceeds of the sale shall be divided among those who are entitled thereto under this trust agreement.' " *Id.* at 208. About 10 months after the 20 years had passed, the plaintiffs filed their suit. The trial court dismissed the complaint. On appeal, the plaintiffs argued that the trust's term had expired, the trustee's powers had ceased, and that the beneficiaries were entitled to partition.

¶ 40 The supreme court affirmed the dismissal. *Id.* at 212. It noted that the primary question in the case involved construction of the trust agreement, specifically, the question of its duration. *Id.* at 210. Relying on various treatises, the court adopted a rule that, even where a trust provides that it is to terminate on upon the expiration of a certain period, it will not terminate on the expiration of that period if the trust's purposes have not been accomplished and if the settler manifested an intent that the trust should continue until they are accomplished. *Id.* "In such a case, the provision that the trust is to terminate on the expiration of the period is construed as being merely directory." *Id.*

¶ 41 In *Heritage County Bank & Trust Co. v. State Bank of Hammond*, 198 Ill. App. 3d 1092 (1990), the First District applied the principles stated in *Breen* to another case strikingly similar

to the case before us. In *Heritage County Bank*, the decedent father established a trust in 1954 that held a parcel of real estate. The father was the sole beneficiary until his death, at which point his *brother* became beneficiary. The trust also provided that: " 'If any property remains in this trust twenty years from this date it shall be sold at public sale by the trustee on reasonable notice and the proceeds of the sale shall be divided among those who are entitled thereto under this trust agreement.' " After expiration of the 20-year period, neither the father nor the trustee attempted to sell the land and the father continued to pay the trust fees until 1978. He died in 1984 and left his *estate* to his *children*. In 1988, at the brother's request, the trustee conveyed title to the property to him. Later that year, the trustee filed suit to quiet title. The trial court granted the brother summary judgment, finding that the father had manifested an intent to have the trust continue.

¶ 42 The First District upheld summary judgment for the brother. *Id.* at 1094. The court stated several general rules, including that, if the trust specifies that it terminates and the proceeds be distributed by a certain date or after a certain amount of time, then the beneficiaries are entitled to the trust *res* at that time. *Id.* at 1095. Also, the court noted that, if a trust does not specify a termination point and instead directs that the trust *res* be sold and the proceeds distributed after a certain time, but this distribution does not occur, then the beneficiaries may petition the court for distribution. *Id.* However, following *Breen*, the *Heritage County Bank* court held that the father's trust did not terminate; rather, by its terms, after 20 years, the trustee was empowered to sell the property and distributed the proceeds. *Id.* at 1096. It also rejected granting equitable relief because the father continued to pay trust fees after the expiration of the 20-year period. *Id.* at 1096-97. The court concluded that this reflected an intent that the trust continue until his death, at which point the brother would take. *Id.* at 1097. Thus, the court held

that the trust continued until 1988, when the brother requested the trustee to convey title to the trust *res*. *Id.* at 1097.

¶ 43 The *Heritage County Bank* court also rejected the trustee's argument that the father acquired a right to the premises when the trustee failed to sell the property within a reasonable time. *Id.* The court noted that the trustee's failure to act in a reasonable time gave the beneficiaries the right to petition the court for action or a new trustee, but it did not terminate the trust. *Id.* The time when interests vest, it further stated, was not dependent on when the trustee performed its duties, but on the trust's terms. *Id.* It emphasized that, under *Breen*, land trust beneficiaries have no legal or equitable right to the real estate. *Id.* at 1098.

¶ 44 Finally, the *Heritage County Bank* court rejected the trustee's argument that its failure to sell the premises for 10 years was unreasonable as a matter of law. *Id.* The court noted that, after 10 years, the father acquired a right to compel the trustee to act. *Id.* If the trust specified a termination date, the property interests vest even if a beneficiary dies before distribution. *Id.* However, there is no equitable vesting of legal title when a land trust does not have a specific termination date. *Id.* *Breen* instructs, the court stated, that the beneficiaries have no legal or equitable right to the real estate; they have only the right to compel the trustee to act. *Id.*

¶ 45 We reject Faber's argument that *Heritage County Bank* is unhelpful because it did not involve a necessary party. The case is directly relevant because it stands for the proposition that the Susman's land trust did *not* terminate in 1981, as Faber theorizes, and the real estate did not revert to her parents' estates. Therefore, her assertion that she is a necessary party, which depends on the claim that the trust *res* reverted to her parents' estates, fails. In light of the land trust's language and the case law, she cannot allege any facts to survive a dismissal of her complaint.

¶ 46 The cases upon which Faber relies, *Lain* and *Lakeview*, do not persuade us to hold otherwise. In *Lain*, an action to recover the proceeds of an insurance policy, the insured had initially listed his wife as the beneficiary, but, 41 years later, purportedly assigned the policy to an individual to whom he was financially indebted and who claimed necessary-party status when the administrator of the widow's estate sought to recover the proceeds of the policy. The court reversed denial of a motion to dismiss for failure to join a necessary party, holding that the insurance policy beneficiary was a necessary party because he had a substantial and present interest in the policy; thus, the trial court abused its discretion when it failed to require the joinder of that necessary party. *Lain*, 79 Ill. App. 3d at 269-70. Here, in contrast, Faber is not, and has never been, a beneficiary of the land trust. Similarly, *Lakeview* held that a mortgagor who had not been joined because of confusion as to its correct name was a necessary party to an action to quiet title to the property. *Lakeview Trust*, 134 Ill. App. 3d at 813-15. Here, there is no confusion concerning Faber's capacity *vis-a-vis* the land trust—she was never a beneficiary of the trust.

¶ 47 We also reject outright Faber's argument that she has been denied certain procedural rights, such as the ability to conduct discovery, that were granted to her siblings. She complains that she has been held to a higher standard than her brothers. Controlling case law forecloses her argument that she has any claim to the trust *res*. Discovery would prove pointless and wasteful.

¶ 48 In summary, the trial court did not err in dismissing Faber's complaint and its judgment is affirmed.

¶ 49 B. Appeal No. 2-14-1213 – Section 2-1401 Petition

¶ 50 In appeal No. 2-15-0472, the Susman defendants seek reversal of the court's November 3, 2014, order denying their section 2-1401 petition, wherein they sought to set aside the April

12, 2011, settlement agreement order and certain other orders (including the January 6, 2011, order dissolving the land trust) based upon the absence of Faber as a necessary party. We review *de novo* the denial of a section 2-1401 petition seeking to vacate an allegedly void order. *Cavalry Portfolio Services v. Rocha*, 2012 IL App (1st) 111690, ¶ 9. Given that we find Faber's necessary-party argument unavailing, we affirm the trial court's denial of the Susman defendants' petition.

¶ 51 C. Appeal No. 2-14-0242 – Attorney Fees

¶ 52 In appeal No. 2-14-0242, the Susman defendants seek reversal or adjustment of the January 2, 2014, attorney fees award in the Executor's and Diane's favor for Robert's breaches of the settlement agreement. For the following reasons, we affirm.

¶ 53 On June 26, 2013, the Executor and Diane each petitioned for attorney fees, claiming breach of the settlement agreement. On September 26, 2013, the trial court allowed Diane's fees to be reimbursed from the Estate. The court also ruled at this hearing that the Estate was entitled to attorney fees pursuant to the settlement agreement, but set another hearing date to determine the amount of the fees to be awarded. Nevertheless, it also stated during the hearing that, although Robert had the right to appeal parts of the case, certain portions could have been combined but were not (*i.e.*, Robert urged that the three initial appeals be separately briefed), thereby, resulting in additional attorney fees for the parties.

¶ 54 On November 20, 2013, the court held an evidentiary hearing on the fee petitions, of which there is no transcript or bystander's report in the record on appeal; however, there is an exhibit list specifying the fees sought. On January 2, and February 11, 2014, the trial court granted the fee petitions, awarding fees in the Estate's and Diane's favor and against Robert. It also found that Robert breached the settlement agreement by not dismissing the two pending

appeals (*Susman I* and *Susman II*) and not purchasing the Susman Linoleum stock within the 30 days specified in the settlement agreement. It further found that the fees were reasonable and necessary.

¶ 55 Initially, the parties disagree over the import of the lack of a transcript or bystander's report from the November 20, 2013, hearing, with the Executor arguing that the breach issue is necessarily resolved against the Susman defendants. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) ("an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant"). The Susman defendants urge that the breach issue was determined at an earlier hearing, on September 26, 2013, for which there *is* a transcript in the appellate record. At that hearing, the court stated that Robert "owes *** fees based on the agreement." In its written order, the court: (1) granted Diane's fee petition (from the Estate); and (2) found that the Estate was entitled to attorney fees "pursuant to the Settlement Agreement," but granted the Susman defendants 28 days to object to any specific entries and to file any response. However, in its January 2, 2014, order[2] (following the November 20, 2013, hearing), the court specifically found, again, that Robert breached the settlement agreement. It also specifically noted that he did so by: (1) "not dismissing the two pending appeals"; and (2) failing to purchase the Susman Linoleum stock within 30 days. It also found that the attorney fees were reasonable and necessary.

[2] In their notice of appeal, the Susman defendants stated that they appealed from the January 2, and February 11, 2014, orders.

¶ 56 We find troubling the lack of a complete record, but we need not resolve the fee issue on this basis. The question whether a breach of contract occurred is a factual question reviewed under the manifest-weight-of-the-evidence standard. *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24. We conclude that the trial court did not err in finding that Robert breached the agreement by undisputedly failing to dismiss the two pending pre-settlement appeals (*Susman I* and *Susman II*) and by, again, undisputedly failing to purchase the Susman Linoleum stock within 30 days, as specified in the settlement agreement. The Susman defendants contend that non-dismissal of the two pre-settlement appeals was not contrary to the settlement agreement because the third appeal (*Susman III*), challenging the agreement's validity was timely filed. This is of no import, nor is their assertion that the fact that the three earlier appeals were consolidated necessarily implies that they were interconnected. We reject their argument because the terms of the agreement they entered into required them to dismiss all pending appeals, and the Susman defendants *themselves* urged, as the trial court noted during the September 26, 2013, hearing, that the earlier appeals proceed simultaneously and be fully briefed, thereby resulting in additional attorney fees.

¶ 57 Next, the Susman defendants challenge the trial court's fee award, arguing that it was excessive and largely related to the third appeal (*Susman III*), which was not part of the settlement agreement. They also contend that Diane is not entitled to fees because she was not a party to the agreement. For the following reasons, we reject their arguments.

¶ 58 Here, the settlement agreement provides that, if any party breaches the order and litigation ensues, the litigation costs, "including reasonable attorney fees of the non-breaching parties," will be assessed against and paid by the breaching party.

¶ 59 A settlement agreement is a contract, the construction and enforcement of which is governed by contract law principles. *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 18. If a statute or contractual agreement expressly authorizes an award of attorney fees, the court may award fees "so long as they are reasonable." *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (2007). We review *de novo* the trial court's construction of a contract. *In re Estate of Trevino*, 381 Ill. App. 3d 553, 556 (2008). "A trial court's decision whether to award attorney fees is a matter within its discretion and will not be disturbed absent an abuse of that discretion." *Central Illinois Electrical Services, L.L.C. v. Slepian*, 358 Ill. App. 3d 545, 550 (2005). Factors to be considered in setting the proper amount of an award are the skill and standing of the attorney employed, the nature of the case, the degree of responsibility required, the usual and customary charges for the same or similar services in the community, and the reasonable connection between the fee charged and the litigation. See *Plambeck v. Greystone Management & Columbia National Trust Co.*, 281 Ill. App. 3d 260, 273 (1996). The fee petitioner must specify and document the services performed, by whom they were performed, the time expended and an hourly rate charged therefore. *Id.* at 273-74.

¶ 60 As noted, the record on appeal does not contain a transcript of the November 20, 2013, hearing, but it does contain an exhibit list specifying the fees sought. To the extent we can assess the merits of their claim from the exhibit list and other portions of the record, we find the Susman defendants' arguments unavailing. The Susman defendants argue that the fees awarded here were unreasonable. They only specifically point to fees allegedly incurred by Diane, arguing that they predate the settlement agreement and include those for the pursuit of *Susman III*. However, in her fee petition, Diane explicitly requested that any award *exclude* fees for

work prior and unrelated to Robert's breach of the settlement agreement and for preparation and presentation of a fee petition. We also reject the Susman defendants' argument that the fees Diane sought included fees for pursuit of litigating the original appeals. Diane did not participate in the original appeals and sought to recover only for fees incurred at the trial court.

¶ 61 The Susman defendants also misstate that Diane is not entitled to any fees from them. In this respect, they are incorrect because Diane's fees are payable from Donald's estate (and for which the Executor sought recovery from the Susman defendants), not from the Susman defendants. They also argue that the fact that Diane did not sign the settlement agreement or the related order reflects that her involvement was not necessary and that any indirect interest she had was adequately protected by the Executor. We disagree. As Diane notes, attorney fees may be awarded to an attorney not hired by an executor or administrator if the legal services provided by that attorney were in the estate's interest. *In re Estate of Roselli*, 70 Ill. App. 3d 116, 123 (1979). On June 18, 2009, Diane was granted leave to participate as an interested person. The Susman defendants did not appeal this particular ruling or challenge it on appeal. In her petition, Diane had argued that her counsel, while acting on her behalf, had advocated for the estate's interest, including: participating in settlement discussions, strategizing trial court proceedings to address the Susman defendants' breach of the settlement agreement, participating in court proceedings on post-settlement motions in efforts to enforce the agreement, etc. The Susman defendants do not specifically address how these efforts were duplicative of the Executor's efforts. Accordingly, their argument fails.

¶ 62 Finally, we find no error with the trial court's award to the Executor of fees incurred in litigating *Susman III*. The settlement agreement provides for the award of attorney fees to the non-breaching party where there has been a breach of the agreement and litigation ensues. The

Susman defendants narrowly read "litigation ensues" and argue that pursuit of the post-settlement appeal, which challenged the validity of the settlement agreement itself, did not constitute a breach of the settlement agreement and, therefore, no fees should have been awarded that were incurred for this appeal. We disagree that the circumstances here absolve the Susman defendants of liability for these costs. As noted, the Susman defendants themselves pressed for the consolidation and separate briefing of the original appeals, two of which (*Susman I* and *Susman II*) were ultimately dismissed as moot by this court and the third of which (*Susman III*) resulted in a rejection of their challenge to the settlement agreement. They opposed the Executor's attempt to separate and stay the first and second appeals pending the outcome of the third. Even in their briefs, the Susman defendants characterize the original appeals as being "interconnected." We conclude that, under these circumstances, the fees related to *Susman III* were part of the ensuing litigation following the breach of the settlement agreement.

¶ 63 In summary, the trial court did not err in awarding attorney fees to the Executor and Diane.

¶ 64 III. CONCLUSION

¶ 65 For the reasons stated, the judgments of the circuit court of Lake County in appeal Nos. 2-14-0242, 2-14-1063, and 2-14-1213 are affirmed.

¶ 66 Affirmed.