

NOTICE
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NO. 4-10-0442

Order Filed 3/11/11

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

DONALD JUDY,)	Appeal from
Plaintiff-Appellant and)	Circuit Court of
Cross-Appellee,)	Champaign County
v.)	No. 07L137
BANK CHAMPAIGN, N.A.,)	
Defendant-Appellee and)	Honorable
Cross-Appellant.)	Michael Q. Jones,
)	Judge Presiding.

JUSTICE MYERSCOUGH delivered the judgment of the court.
Justices Turner and Appleton concurred.

ORDER

Held: (1) Trial court erred by dismissing claims that defendant breached its fiduciary duty when it took prospective attorney fees from the two trust accounts and termination fees from the two trust accounts and the guardianship account.

(2) Trial court erred by entering judgment on the pleadings on plaintiff's claim that defendant breached its fiduciary duty when it took prospective attorney fees from the guardianship account.

In April 2009, plaintiff, Donald Judy, filed a second amended complaint against defendant, Bank Champaign, N.A., alleging Bank Champaign breach its fiduciary duty when it withdrew termination fees and prospective attorney fees from two trust accounts and a guardianship account. In October 2009, the trial court dismissed Donald's claims regarding the trust accounts and the termination fees. In June 2010, the court granted

Bank Champaign's judgment on the pleadings on the remaining claim regarding the guardianship account on the basis that Donald could not allege a fiduciary duty between himself and Bank Champaign.

Donald appeals both rulings. Bank Champaign cross-appeals, asserting the trial court erred by denying its motion to dismiss on statute-of-limitation grounds. For the reasons that follow, we reverse the court's orders granting Bank Champaign's motion to dismiss and motion for judgment on the pleadings and remand for further proceedings.

I. BACKGROUND

In August 1997, Durward and Sara Judy, Donald's parents, entered into separate trusts (collectively referred to as the Judy trust accounts). Durward's trust and Sara's trust each provided, in relevant part, as follows:

"After the death of the Settlor and at such time as the Corporate Successor Trustee undertakes its duties herein, it shall prepare annual accountings and shall distribute to the income beneficiary and/or beneficiaries of the [t]rust such accountings which, in the absence of written objection made thereto made within sixty (60) days of the receipt of such annual accountings, shall be final, binding and conclusive upon all persons then

or thereafter beneficially interested in the within Trust. *** Such Corporate Successor Trustee shall be entitled to compensation to be paid it for services on an annual basis in accordance with its schedule of compensation as published by it with regard to the administration of Trusts similar in nature to that herein established."

In May 1999, Durward died. In December 1999, Sara was declared "disabled" in Champaign County case No. 99-P-308 (the guardianship case). This court takes judicial notice of the docket entries in the guardianship case. See, e.g., *N B D Highland Park Bank, N.A. v. Wien*, 251 Ill. App. 3d 512, 520, 622 N.E.2d 123, 130 (1993) (noting that public documents, including court records, are subject to judicial notice).

In December 1999, Bank Champaign was appointed successor trustee of the Judy trust accounts. Bank Champaign was also appointed guardian of Sara's estate. Patricia Johnson, Sara's daughter, was appointed guardian of Sara's person.

On December 28, 2001, and December 31, 2001, Bank Champaign withdrew funds from the Judy trust accounts and the Sara guardianship account totaling \$262,632.92, which Bank Champaign identified as "termination fee per published schedule" (termination fees) and "Retainer for Kirchner litigation" (pro-

spective attorney fees). Specifically, Donald's second amended complaint alleged that Bank Champaign withdrew the following funds: (1) \$13,333.33 and \$33,333.33 for prospective attorney fees and a \$45,016 termination fee from the Sara trust account; (2) \$13,333.33 and \$33,333.33 for prospective attorney fees and a \$42,049.97 termination fee from the Durward trust account; and (3) \$13,333.33 and \$33,333.32 for prospective attorney fees and a \$35,566.96 termination fee from the Sara guardianship account. According to documents attached to Bank Champaign's motion to dismiss, the funds for attorney retainers were made because (1) the successor coguardians were threatening legal action over Bank Champaign's services as guardian and (2) the contingent beneficiaries were threatening legal action regarding the Judy trust accounts. On December 31, 2001, Bank Champaign resigned from its responsibilities related to the Judy trust accounts and the Sara guardianship account.

In January 2002, Bank Champaign sent Donald and the other trust beneficiaries an annual accounting of the Judy trust accounts and the Sara guardianship account. This accounting documented the withdrawal of the termination fees and prospective attorney fees from each account.

On February 6, 2002, Daniel Holder, executive vice president of Strategic Capital Trust Company (Strategic), the successor trustee of the Judy trust accounts, sent a letter to

Mark Ballard, senior vice president of Bank Champaign, expressing "concern regarding these fees."

On the same date, Donald, in his capacity as coguardian of Sara's estate, filed a petition for emergency relief in the guardianship case. The docket entries in the guardianship case, while not clear, suggest that in January 2002, Donald became coguardian of Sara's estate. In the petition for emergency relief, Donald alleged the withdrawals of termination fees and prospective attorney fees from the Judy trust accounts and the Sara guardianship account were unauthorized.

A. The 2003 Complaint Filed Against Bank Champaign
Was Voluntarily Dismissed

In May 2003, Strategic, as trustee of the Judy trust accounts, and Donald, Patricia Johnson, and Dorsey Packard, as coguardians of Sara's estate, sued Bank Champaign for the withdrawal of the termination fees and the prospective attorney fees (Champaign County case No. 03-L-140). The two-count complaint alleged breach of contract and breach of fiduciary duty. The plaintiffs sought reimbursement of the funds withdrawn, punitive damages, and reasonable attorney fees. On July 7, 2006, the trial court granted plaintiff's motion for voluntary dismissal pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2006)).

Sara died in April 2006. In November 2006, Hickory Point Bank was then appointed successor trustee of the Judy trust

accounts. In December 2006, in the guardianship case, Sara's coguardians--Donald, Patricia, and Dorsey--were discharged as coguardians. All unresolved matters were ordered to be addressed in the estate proceedings (Champaign County case No. 06-P-135).

B. Donald Files the 2007 Complaint
Against Bank Champaign

On July 9, 2007, Donald filed a two-count complaint against Bank Champaign. Count I alleged breach of contract for Bank Champaign's withdrawal of termination fees from the Judy trust accounts and the Sara guardianship account. Count II alleged breach of fiduciary duty for Bank Champaign's withdrawal of termination fees and prospective attorney fees from the Judy trust accounts and the Sara guardianship account. Donald sought judgment against Bank Champaign in an amount sufficient to "compensate" and "reimburse" the estates, punitive damages, and reasonable attorney fees.

Thereafter, Bank Champaign filed a motion to dismiss, and Donald filed various amended pleadings. As is relevant to this appeal, in April 2009, the parties stipulated that Donald amended his pleadings to "clarify that all such claims are being brought in his individual capacity."

C. Donald Files a Second Amended Complaint

In April 2009, Donald filed the one-count second amended complaint that is the subject of this appeal. The second amended complaint alleged that Bank Champaign breached its

fiduciary duty by improperly withdrawing termination fees and prospective attorney fees from the Judy trust accounts and the Sara guardianship account. Donald alleged he was a beneficiary of the estate of both Sara and Durward. He also alleged Bank Champaign owed Donald a fiduciary duty in the management and administration of the accounts. Donald sought judgment "sufficient to compensate him for all loss and damage sustained by reason of" Bank Champaign's conduct, as well as punitive damages and reasonable attorney fees.

In June 2009, Bank Champaign filed a combined motion to dismiss. Bank Champaign sought to dismiss the second amended complaint on the basis that (1) the complaint was founded upon a written instrument but Donald failed to attach the written instrument (735 ILCS 5/2-606 (West 2008)) and (2) the claims were barred by the statute of limitations. Bank Champaign also asserted that (1) the claims relating to the Judy trust accounts must be dismissed because those claims were untimely under the terms of the trusts and (2) the claims relating to the termination fees must be dismissed because those fees were specifically allowed by the fee schedules.

Those fee schedules were reflected in two documents. The first, alleged to relate to guardianship account, provided for "Termination Fee" of "1% of market value." The second, entitled "Trust and Investment Services Fee Schedule," provided

for an "Account Termination Fee":

"1% of market value may be charged upon the closing of any account due to the labor intensive nature of the activity."

In response to Bank Champaign's motion to dismiss, Donald attached the affidavit of Holder, Strategic's executive vice president, asserting that in February 2002, Strategic objected to Bank Champaign taking the funds and that during Strategic's tenure as trustee, Bank Champaign never received court approval for taking those funds. Donald also attached his own affidavit asserting that in February 2002, he had filed objections to Bank Champaign taking the funds by filing a petition for emergency relief in the guardianship case. Finally, Donald attached the affidavit of Mike McCormick, the attorney for Donald as coexecutor of Sara's estate in the probate case (Champaign County case No. 06-P-135). McCormick explained that (1) Durwood's and Sara's wills each provided that, except for joint-tenancy property, automobiles, personal jewelry, clothing, and tangible personal property, the remainder of Durwood's and Judy's property passed to the trustee of their respective trusts; (2) Donald was one of the beneficiaries of both Durwood's and Sara's trusts; and (3) Donald was one of the beneficiaries of Sara's estate.

D. Trial Court Grants Bank Champaign's
Motion To Dismiss in Part

In October 2009, following a hearing, the trial court struck as barred by the terms of the trusts the allegations against Bank Champaign regarding administration of the Judy trust accounts and the withholding of termination fees in all three accounts. Specifically, the court held (1) written objections were necessary under the terms of the trusts, and no timely objections were made regarding the funds taken from the Judy trust accounts; and (2) the fee schedules authorized the termination fees in all of the accounts.

The trial court also held that Donald was required to attach the trust documents to his complaint and failed to do so. The court granted Donald leave to amend the complaint to attach the necessary trust documents, but upon noting that the claims pertaining to the Judy trust accounts had been dismissed, did not require that Donald amend the complaint to attach those documents. Finally, the court rejected Bank Champaign's argument that the statute of limitations barred Donald's claims. The court found Donald complied with the statute of limitations by refiling the lawsuit within one year of the voluntary dismissal in Champaign County case No. 03-L-140. The only claim remaining was Donald's claim that Bank Champaign breached its fiduciary duty by taking prospective attorney fees from the Sara guardianship account.

E. Trial Court Grants Bank Champaign's Motion
for Judgment on the Pleadings on the Remaining Claim

In April 2010, Bank Champaign filed a motion for judgment on the pleadings challenging Donald's remaining claim. Bank Champaign asserted that Donald, in his individual capacity, was not owed a fiduciary duty by Bank Champaign. In June 2010, following a hearing, the trial court agreed with Bank Champaign, finding Donald did not and could not allege a fiduciary relationship between Bank Champaign and himself. The court granted Bank Champaign's motion for judgment on the pleadings.

Donald appealed, and Bank Champaign filed a cross-appeal.

II. ANALYSIS

On appeal, Donald argues the trial court erred by (1) dismissing his claims relating to the Judy trust accounts because written objection to the withdrawals was, in fact, timely made; (2) finding the termination fees taken from the Judy trust accounts and Sara guardianship account were authorized as a matter of law; and (3) entering judgment on the pleadings regarding the prospective attorney fees taken from the Sara guardianship account on the basis that Bank Champaign did not owe Donald a fiduciary duty. Bank Champaign cross-appeals, arguing the court erred in denying its motion to dismiss Donald's second amended complaint as time-barred. Bank Champaign also argues the court properly dismissed the claims pertaining to the Judy trust accounts and the termination fees because Donald failed to attach

the appropriate documents to his second amended complaint.

Because resolution of the statute-of-limitation issue presented on cross-appeal could be dispositive of all issues on appeal, that issue will be examined first. Thereafter, this court will address whether (1) the trial court erred by dismissing (a) the claims relating to the Judy trust accounts on the basis that written objections were not made and (b) the termination-fee claims on the basis that such fees were authorized; (2) the court erred by granting judgment on the pleading on the basis that Donald could not allege a fiduciary relationship between himself and Bank Champaign; and (3) dismissal of claims relating to the Judy trust accounts is warranted for Donald's failure to attach certain documents to his second amended complaint.

A. The Statute-of-Limitations Defense Raised on Cross-Appeal Does Not Bar Donald's Claims

In its cross-appeal, Bank Champaign argues the trial court erred when it denied Bank Champaign's motion to dismiss the second amended complaint on the basis that the claim was barred by the statute of limitations. We disagree.

1. *Standard of Review Is De Novo*

Motions to dismiss pursuant to section 2-615 of the Code attack the legal sufficiency of the complaint by pointing to defects that appear on the face of the complaint. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 456, 845

N.E.2d 792, 802 (2006). The question presented on review of a motion to dismiss is whether sufficient facts are alleged in the complaint which, if established, could entitle the plaintiff to relief. *Cangemi*, 364 Ill. App. 3d at 456, 845 N.E.2d at 802.

Generally, the statute of limitations is an affirmative defense properly put forth only in a section 2-619 motion to dismiss. *Cangemi*, 364 Ill. App. 3d at 456, 845 N.E.2d at 802. However, where it appears on the face of the complaint that the statute of limitations has run, such a defense can also be raised in a section 2-615 motion to dismiss. *Cangemi*, 364 Ill. App. 3d at 456, 845 N.E.2d at 802. We review the denial of a motion to dismiss under either section 2-615 or 2-619 *de novo*. *Cangemi*, 364 Ill. App. 3d at 456, 845 N.E.2d at 803.

The statute of limitations for a claim alleging breach of a fiduciary duty is five years. *Armstrong v. Guigler*, 174 Ill. 2d 281, 290, 673 N.E.2d 290, 295 (1996). The statute of limitations begins to run when the plaintiff knew or reasonably should have known of the injury and that it was wrongfully caused. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 618, 863 N.E.2d 743, 756 (2007). The issue of whether a plaintiff knew or should have known is generally a question of fact, but when the answer is clear from the pleadings, it is one of law. *Fuller*, 371 Ill. App. 3d at 618, 863 N.E.2d at 757.

2. *The Complaint Was Voluntarily Dismissed But Timely Refiled Within One Year Pursuant to Section 13-217 of the Code*

Bank Champaign recognizes that the plaintiffs in the 2003 case had, pursuant to section 13-217 of the Code (735 ILCS 5/13-217 (West 2006)), one year following the voluntary dismissal to refile the action. Bank Champaign argues, however, that Donald was a plaintiff in the 2003 case in his representative capacity. Therefore, according to Bank Champaign, when Donald filed the 2007 lawsuit in his individual capacity, the claim was not subject to the provisions of section 13-217 of the Code.

This court first notes that Illinois courts have "recognized that an action seeking damages for breach of fiduciary duty is an equitable action." *Bank One, N.A. v. Borse*, 351 Ill. App. 3d 482, 488, 812 N.E.2d 1021, 1026 (2004) (finding the trust beneficiary did not have a constitutional right to a jury trial on her counterclaim alleging breach of fiduciary duty). Statutes of limitations are not directly controlling in suits seeking equitable relief but "courts follow statutes of limitations as convenient measures for determining the length of time that ought to operate as a bar to an equitable cause of action." *Meyers v. Kissner*, 149 Ill. 2d 1, 12, 594 N.E.2d 336, 340-41 (1992). Therefore, this court will address the statute of limitations issue.

In the case at bar, the alleged unauthorized withdrawals from the Judy trust accounts and the Sara guardianship

account occurred on December 28, 2001, and December 31, 2001. Donald received from Bank Champaign a final accounting of the Judy trust accounts and the Sara guardianship account on January 25, 2002. On February 6, 2002, Donald filed a petition for emergency relief in the guardianship case, alleging the withdrawal of termination fees and prospective attorney fees from the Judy trust accounts and Sara guardianship account were not authorized. Clearly, Donald was aware no later than February 6, 2002, of Bank Champaign's alleged breaches of fiduciary duty. As such, any action arising therefrom should have been brought by February 6, 2007. Donald filed the 2007 complaint on July 9, 2007, five months after that statute of limitations had run.

Donald argues his cause of action against Bank Champaign is saved by the provisions set forth in section 13-217 of the Code. Section 13-217 states, in pertinent part, that

"where the time for commencing an action is limited, if *** the action is voluntarily dismissed by the plaintiff, *** then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is

greater[.]" Ill. Rev. Stat. 1983, ch. 110,
par. 13-217.

This version of section 13-217 preceded the amendments of Public Act 89-7, section 15, effective March 9, 1995 (1995 Ill. Laws 286, 309). The supreme court has found Public Act 89-7 unconstitutional in its entirety in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 689 N.E.2d 1057 (1997). The version of section 13-217 currently in effect is, therefore, the version that preceded the amendments of Public Act 89-7. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n.1, 889 N.E.2d 210, 214 n.1 (2008).

Section 13-217 is a "savings statute," which permits a plaintiff to refile the identical cause of action within one year of a voluntary dismissal. See *Frankenthal v. Grand Trunk Western R.R. Co.*, 120 Ill. App. 3d 409, 417, 458 N.E.2d 530, 537 (1983). A plaintiff may only refile one action after voluntarily dismissing the original action. *Gendek v. Jehangir*, 119 Ill. 2d 338, 343-44, 518 N.E.2d 1051, 1053 (1988). Section 13-217 is "remedial in nature and should be liberally construed in favor of hearing the plaintiff's claim." *Bryson v. News America Publication, Inc.*, 174 Ill. 2d 77, 106, 672 N.E.2d 1207, 1223 (1996).

Donald argues the 2007 complaint, and the subsequent amendments thereto, was a permitted refiling of the 2003 complaint brought against Bank Champaign by Strategic, as trustee of the Judy trust accounts, and Donald, Johnson, and Packard in

their capacity as coguardians of Sara's estate. The 2003 complaint was voluntarily dismissed on July 7, 2006. Therefore, under the provisions set forth in section 13-217 of the Code, Donald argues he had until July 7, 2007, in which to refile the complaint. Because July 7, 2007, was a Saturday, Donald argues he was permitted to refile the action on the court's next business day, Monday, July 9, 2007.

Bank Champaign argues that the 2007 complaint was not a permitted refiling of the 2003 complaint because the 2003 complaint was brought by different plaintiffs, namely Strategic, as trustee of the Judy trust accounts, and Donald, Johnson, and Packard in their representative capacities. In contrast, the 2007 complaint was brought by Donald in his individual capacity. As such, Bank Champaign contends the 2007 complaint was a new action filed outside the statute of limitations. We disagree.

For a complaint to be considered a permitted refiling under section 13-217, the first complaint must be for the "identical claim and cause of action" as put forth in the second complaint. *Hamilton v. Chrysler Corp.*, 281 Ill. App. 3d 284, 288, 666 N.E.2d 758, 761 (1996) (quoting *Gibbs v. Crane Elevator Co.*, 180 Ill. 191, 196, 54 N.E. 200, 201 (1899)).

Bank Champaign argues the "identical claim and cause of action" requirement mandates an identity of parties. In support thereof, Bank Champaign cites *Hamilton*, 281 Ill. App. 3d 284, 666

N.E.2d 758. In *Hamilton*, the plaintiff, in his capacity as shareholder of a corporation, filed a timely complaint against the defendant. *Hamilton*, 281 Ill. App. 3d at 285-86, 666 N.E.2d at 759. The plaintiff voluntarily dismissed that action. *Hamilton*, 281 Ill. App. 3d at 286, 666 N.E.2d at 759. Subsequently, the plaintiff, in his individual capacity, filed another action outside the statute of limitations, naming the same parties as defendants. *Hamilton*, 281 Ill. App. 3d at 285-86, 666 N.E.2d at 759. The defendant moved for judgment on the pleadings, contending the second complaint was time-barred. *Hamilton*, 281 Ill. App. 3d at 285-86, 666 N.E.2d at 759. On appeal, the defendant argued the second complaint did not assert the same cause of action as the first complaint, and consequently, the savings provision of section 13-217 of the Code did not apply. *Hamilton*, 281 Ill. App. 3d at 288, 666 N.E.2d at 761. The *Hamilton* court found that although the two complaints arose out of the same transaction or occurrence and named the same defendants, the causes of action were not identical because the first complaint was brought by the plaintiff in his capacity as shareholder on behalf of a corporation, and the second complaint was brought by the plaintiff as an individual. *Hamilton*, 281 Ill. App. 3d at 289-90, 666 N.E.2d at 761-62. The case *sub judice* is distinguishable.

The guardian of an estate "shall appear for and repre-

sent the ward in all legal proceedings." 755 ILCS 5/11a-18(c) (West 2008). Donald first brought suit in 2003 against Bank Champaign in his capacity as coguardian of Sara's estate for and on behalf of the ward, Sara. That action was voluntarily dismissed. Sara died in 2006, terminating the guardian relationship.

However, section 13-217 allows "the plaintiff, his or her heirs, executors or administrators" to refile, within one year, an action timely filed and then voluntarily dismissed. Because Sara had since died, section 13-217 permitted Donald, Sara's heir, to refile the complaint as beneficiary for breach of fiduciary duty within one year of its voluntary dismissal. Donald's 2007 complaint was filed within one year of the voluntary dismissal of the 2003 complaint, and therefore, the claims asserted in the 2007 complaint and amendments thereto are not time-barred.

B. The Trial Court Erred in Dismissing the Portions of Donald's Second Amended Complaint Relating to the Judy Trust Accounts and the Termination Fees

The trial court dismissed, pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2008)), the (1) claims relating to the Judy trust accounts because objections were not timely made as required by the trusts and (2) termination-fee claims on the basis that such fees were authorized by the fee schedules.

1. Standard of Review Is De Novo

A motion to dismiss brought pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2008)) admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matter that appear on the face of the complaint or are established by external admissions, which act to defeat the plaintiff's claim. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584, 736 N.E.2d 1174, 1178 (2000). A section 2-619 proceeding allows a trial court to dismiss a complaint after considering issues of law or easily proved issues of fact. *Neppl*, 316 Ill. App. 3d at 585, 736 N.E.2d at 1179.

The trial court accepts as true all well-pleaded facts and reasonable inferences therefrom. *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405, 895 N.E.2d 1102, 1108 (2008). If a cause of action is dismissed pursuant to section 2-619(a)(9), the question on appeal is whether there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 30, 861 N.E.2d 1103, 1109 (2003). We review *de novo* claims dismissed under section 2-619. *Neppl*, 316 Ill. App. 3d at 583, 736 N.E.2d at 1178.

*2. Because Timely Written Objections Were Made,
the Trial Court Erred by Dismissing the Claims
Relating to the Judy Trust Accounts*

The trust documents required that a corporate successor trustee provide annual accountings and that any objections to the

accountings be made in writing within 60 days:

"After the death of the Settlor and at such time as the Corporate Successor Trustee undertakes its duties herein, it shall prepare annual accountings and shall distribute to the income beneficiary and/or beneficiaries of the [t]rust such accountings which, in the absence of written objection made thereto made within sixty (60) days of the receipt of such annual accountings, shall be final, binding and conclusive upon all persons then or thereafter beneficially interested in the within Trust."

The record reflects timely objections were asserted here. On February 6, 2002, Holder, executive vice president of Strategic, penned a letter to Ballard, senior vice president of Bank Champaign, expressing some "concern" with the "substantial fees" charged to the Judy trust accounts and the Sara guardianship account. Also on February 6, 2002, Donald filed a petition for emergency relief in the guardianship case (case No. 99-P-308), alleging Bank Champaign's breach of fiduciary duty by the unauthorized withdrawal of prospective attorney fees from the Judy trust accounts and the Sara guardianship account. The February 6, 2002, letter and the petition for emergency relief

constitute "written objections" as required by the terms of the trusts.

3. *Question of Fact Exists Regarding Termination Fees*

The trial court also dismissed Donald's claims regarding the termination fees taken by Bank Champaign from the Judy trust accounts and the Sara guardianship account. The court erred because whether Bank Champaign is entitled to those termination fees is a question of fact.

Bank Champaign asserted its fee schedules permitted the termination fees. Those fee schedules were reflected in two documents. The first, allegedly pertaining to guardianship accounts, provided for "Termination Fee" of "1% of market value." The second, entitled "Trust and Investment Services Fee Schedule", provided for an "Account Termination Fee":

"1% of market value may be charged upon the closing of any account due to the labor intensive nature of the activity."

At oral arguments, the parties conceded no *signed* agreement regarding termination fees existed. Therefore, it remains unclear whether the fee schedules even applied to the accounts. Moreover, what is meant by "termination" is unclear--whether the termination refers to termination of the trust or termination of the accounts. Apparently, the accounts were transferred to another trustee, not closed or terminated. In

addition, the fee schedule states a termination fee *may be* imposed due to the intensive nature required in the closing of an account, not that a 1% fee was mandated. See, e.g., *In re Estate of Rumoro*, 90 Ill. App. 3d 383, 388-89, 413 N.E.2d 70, 74 (1980) (compensation for services may be refused if there has been wilful misconduct in the administration of an estate); *People v. Birket*, 254 Ill. App. 96, 108 (1929) (noting "compensation may be refused if the administrator has been guilty of wilful default or misconduct in the administration of the estate"), *aff'd*, 342 Ill. 333, 174 N.E. 388 (1930). The trial court therefore erred in dismissing these claims under section 2-619(a)(9) and ruling as a matter of law that Bank Champaign was entitled to termination fees because a question of fact remains.

C. The Trial Court Erred in Granting Judgment on
the Pleadings on the Remaining Portions
of Donald's Complaint

Donald argues the trial court erred by granting Bank Champaign's motion for judgment on the pleadings regarding Donald's remaining claim--that Bank Champaign had breached its fiduciary duty in withdrawing prospective attorney fees from the guardianship account.

1. *Standard of Review Is De Novo*

A motion to dismiss brought pursuant to section 2-615 of the Code challenges the legal sufficiency of a complaint and alleges only defects that appear on the face of that complaint. *Neppl*, 316 Ill. App. 3d at 584, 736 N.E.2d at 1178. Such a motion to dismiss admits all well-pleaded facts and all reasonable inferences drawn therefrom. *Neppl*, 316 Ill. App. 3d at 584, 736 N.E.2d at 1178.

A party may move for judgment on the pleadings pursuant to section 2-615(e). 735 ILCS 5/2-615(e) (West 2008). Judgment on the pleadings is proper where the pleadings disclose no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Bennett v. Chicago Title & Trust Co.*, 404 Ill. App. 3d 1088, 1094, 936 N.E.2d 1068, 1074 (2010). We review *de novo* an order granting a motion for judgment on the pleadings pursuant to section 2-615(e). *Bennett*, 404 Ill. App. 3d at 1094, 936 N.E.2d at 1074.

2. *Trial Court Erred by Granting
Judgment on the Pleadings*

Donald argues the trial court erred by finding Bank Champaign did not owe him a fiduciary duty on the guardianship account. A successful claim for breach of fiduciary duty alleges that (1) a fiduciary duty exists, (2) the fiduciary duty was breached, and (3) that breach proximately caused the plaintiff's injury. *Neade v. Portes*, 193 Ill. 2d 433, 444, 739 N.E.2d 496, 502 (2000).

""[A] trustee owes a fiduciary duty to a trust's beneficiaries and is obligated to carry out the trust according to its terms and to act with the highest degrees of fidelity and utmost good faith." [citations.]" *Fuller*, 371 Ill. App. 3d at 615, 863 N.E.2d at 754. See also *Stuart v. Continental Illinois National Bank & Trust Co.*, 68 Ill. 2d 502, 523, 369 N.E.2d 1262, 1271 (1977); *Chicago Title & Trust Co. v. Chief Wash Co.*, 368 Ill. 146, 155, 13 N.E.2d 153, 157 (1938); *Paul H. Schwendener, Inc. v. Jupiter Electric Co.*, 358 Ill. App. 3d 65, 74, 829 N.E.2d 818, 827-28 (2005); Restatement (Second) of Trusts §2, cmt. b (1959); Restatement (Second) of Trusts §170 (1959).

Under Illinois law, it is clear a fiduciary relationship exists between a guardian of an estate and its ward. *In re Estate of Swiecicki*, 106 Ill. 2d 111, 117, 477 N.E.2d 488, 490 (1985). Further, that relationship is equivalent to the relationship between a trustee and beneficiary. *Swiecicki*, 106 Ill. 2d at 117-18, 477 N.E.2d at 490. In the case at bar, Bank Champaign owed a fiduciary duty to Sara, as ward of the estate.

In addition, Bank Champaign clearly owed a fiduciary duty to Donald as a beneficiary of the trust. Sara's trust encompassed all of her estate, and those assets were held in guardianship. As trustee of the trust, Bank Champaign had a fiduciary duty to carry out the trust according to its terms and to act with the highest degree of fidelity and the utmost good

faith. *Dick v. Peoples Mid-Illinois Corp.*, 242 Ill. App. 3d 297, 303, 609 N.E.2d 997, 1002 (1993). Because Sara's estate was a part of her trust, Bank Champaign had a duty to the trust beneficiaries to act with the highest degree of fidelity and utmost good faith in the management of the estate. See *Fuller*, 371 Ill. App. 3d at 615, 863 N.E.2d at 754. In fact, only Donald and his cobeneficiaries could have sued Bank Champaign for its breach of fiduciary duty. See Restatement (Second) of Trusts §200 (1959) ("No one except a beneficiary or one suing on his behalf can maintain a suit against the trustee to enforce the trust or to enjoin or obtain redress for a breach of trust"). The beneficiaries can maintain suit for a number of additional equitable remedies. Restatement (Second) of Trusts §199 (1959). Donald properly alleged the existence of a fiduciary duty between himself and Bank Champaign, the breach of that duty through the unauthorized withdrawal of termination fees and prospective attorney fees from the Sara guardianship account, and damages proximately caused by that breach. The trial court's dismissal of Donald's claim was, therefore, in error.

D. Dismissal of Donald's Second Amended Complaint
Not Warranted Under Section 2-606 of the Code

Finally, Bank Champaign argues the trial court's decision to dismiss the claims relating to the Judy trust accounts and the withdrawal of the termination fees can be affirmed on the basis that Donald failed to attach copies of the appropri-

ate documents to his complaint, as required by section 2-606 of the Code (735 ILCS 5/2-606 (West 2008)). Bank Champaign asserts Donald was required to attach the trust documents and the account fee schedules. We disagree.

Section 2-606 provides "[i]f a claim or defense is founded upon a written instrument, a copy thereof *** must be attached to the pleading as an exhibit." 735 ILCS 5/2-606 (West 2008). Donald's claims were not founded on the trust documents. "The fiduciary obligation of loyalty flows not from the trust instrument but from the relationship of trustee and beneficiary, and the essence of this relationship is that the trustee is charged with equitable duties toward the beneficiary." *Fuller*, 371 Ill. App. 3d at 615, 863 N.E.2d at 754. Moreover, Donald's claims were not founded on the account fee schedules, as he asserted Bank Champaign was not authorized to take the termination fees from the accounts.

Moreover, even if Donald should have attached the trust documents and fee schedules to his second amended complaint, a motion to dismiss on such grounds should only be granted without prejudice and with leave to amend. See *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 300, 922 N.E.2d 538, 541 (2010) (finding the defendant's motion to dismiss for failure to attach a copy of the document warranted dismissal without prejudice); *Cain v. Cross*, 293 Ill. App. 3d 255, 258, 687 N.E.2d 1141, 1143

(1997) ("The failure to attach a copy of a written contract as required by section 2-606 is a mere pleading deficiency that can be remedied easily by simply seeking leave to amend and then attaching a copy of the written contract"). The failure to attach the documents would not justify affirming the dismissal here.

III. CONCLUSION

For the foregoing reasons, we reverse the trial court's order dismissing Donald's claims regarding the withdrawal of termination fees from both the trust accounts and the guardianship account and the withdrawal of prospective attorney fees from the trust accounts, and we reverse the court's award of a judgment on the pleadings dismissing Donald's claim regarding the withdrawal of prospective attorney fees from the guardianship account and remand for further proceedings consistent with this order.

Reversed and remanded.