FIFTH DIVISION
March 4, 2011

No. 1-09-2285

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FRANK J. CACCIATORE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois.
	)	
v.	)	No. 08 CH 015813
	)	
JENNIFER F. CACCIATORE,	)	Honorable
	)	Mary Anne Mason,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

HELD: Plaintiff brought suit against his sister, alleging that she exerted undue influence over their now-deceased father in order to induce him to transfer certain property interests to her and execute a will naming her as sole beneficiary. Trial court's grant of summary judgment in favor of defendant affirmed where her unrebutted evidentiary submissions demonstrated that she had not exerted undue influence.

Plaintiff Frank J. Cacciatore (Frank Jr.) brought the instant suit against his sister, Jennifer Cacciatore, alleging, in essence, that she had exerted undue influence over their father, Frank S. Cacciatore (Frank Sr.), in order to induce Frank Sr. to execute a will materially benefitting her and transfer certain property interests to her.

Frank Sr. had five children: the plaintiff Frank Jr., the defendant Jennifer, and three sons who are not parties to the instant action, named Jon Cacciatore, James Cacciatore, and Joseph Cacciatore. It is undisputed that from 1977 until his death in 2006, Frank Sr. resided with Jennifer, who cared for the home and assisted him as needed. On March 4, 2002, Frank Sr. executed a will (the 2002 will) which named Jennifer as the sole beneficiary. On that same date, Frank Sr. also executed a power of attorney naming Jennifer as his agent and attorney in fact.

After Frank Sr.'s death, Frank Jr. brought the instant suit against Jennifer, alleging that she wrongfully exerted influence and control over Frank Sr. in order to procure the 2002 will, to induce Frank Sr. to convert various bank accounts and investment accounts to joint accounts in his and Jennifer's name or to accounts solely in Jennifer's name, and to obtain sole ownership of properties at 18-20 East Bellevue, Chicago, Illinois (Bellevue Property) and 3235-37 South Halsted, Chicago, Illinois (Halsted Property). He therefore requested that the court award him monetary relief for tortious interference with his inheritance expectancy, declare null the conversion of Frank Sr.'s accounts, and create a constructive trust over the Bellevue and Halsted Properties.

The trial court granted summary judgment in favor of Jennifer. Frank Jr. now appeals. For the reasons that follow, we affirm.

I. BACKGROUND

Frank Jr.'s verified complaint, filed on April 29, 2008, alleged the following. During Frank Sr.'s lifetime, he and Frank Jr. entered into a number of joint business transactions wherein they bought and sold commercial real estate in and around Chicago. Among these transactions were the purchases of the Bellevue Property and the Halsted Property. According to Frank Jr., although title to these properties was exclusively held in Frank Sr.'s name, the two of them agreed that the ownership of these properties would be shared equally between them, and these agreements were memorialized in writings kept in Frank Sr.'s family office.

Frank Sr. died on May 1, 2006, at the age of 90. Frank Jr. alleged that in the six years before his death, Frank Sr.'s mental and physical health began to decline, and he became increasingly dependent on Jennifer to assist him in his personal affairs. As a result, according to Frank Jr., Jennifer acquired "a position of trust, influence and control" over her father. She purportedly used that control to induce him to execute the 2002 will, which named her as sole beneficiary of his estate, and to make unspecified *inter vivos* transfers of personal property to her.

Frank Jr. further averred that in early 2002, a personal dispute arose between him and Jennifer. As a result of this dispute, Jennifer allegedly caused Frank Jr. to be locked out of the family office, thus preventing him from accessing the documents that memorialized his agreements with his father regarding the real estate that they had purchased. Jennifer also allegedly used her influence over Frank Sr. to induce him to give her the documents, which she then either hid or destroyed.

Frank Jr. sought relief in four counts. In Count I, which was later voluntarily dismissed

and is not at issue in this appeal, Frank Jr. sought to have the 2002 will set aside. In Count II, entitled "Tortious Interference With Inheritance Expectancy," Frank Jr. alleged that prior to 2002, he had a close and loving relationship with his father and therefore had a reasonable expectation that he would inherit a share of his father's estate. He further alleged that Jennifer was aware of this, but nevertheless exercised her "influence and control" over their father to induce him to change his will and effectively disinherit Frank Jr. He therefore sought monetary damages "in an amount equivalent to that sum which may be hereafter demonstrated to have been lost by the Plaintiff, as a result of the Defendants [*sic*] tortious interference."

In Count III, entitled "Set Aside of Inter Vivos Transfers," Frank Jr. alleged that his father had owned "one or more bank accounts and investment accounts" that at "various times" were converted to joint accounts in the name of Frank Sr. and Jennifer, or were converted to accounts solely in the name of Jennifer. He further alleged that at the time of these transfers, Jennifer was a fiduciary of Frank Sr. "by virtue of her position of trust, confidence, and influence over her father." Frank Jr. therefore contended that Jennifer breached her fiduciary duty to her father in procuring these *inter vivos* transfers and that requested that the court declare all such transfers to be a nullity.

Finally, in Count IV, entitled "Constructive Trust," Frank Jr. alleged that Jennifer had assumed sole control over the titles to the Bellevue and Halsted Properties through her "wrongful misconduct," namely, retaining or destroying the files memorializing the agreement between Frank Sr. and Frank Jr. with regard to those properties and inducing Frank Sr. to make her the sole beneficiary of his will. Thus, he contended, Jennifer had been unjustly enriched by her

receipt of those properties. He therefore requested that the court impose a constructive trust upon the Bellevue and Halsted Properties.

On February 6, 2009, Jennifer filed a motion for summary judgment "on the basis that no facts exist to support Plaintiff's contention that the will and inter vivos transfers made by Frank S. Cacciatore were the result of undue influence by Defendant." On the contrary, she said that, up until the time of his death in May 2006, Frank Sr. was an intelligent, savvy individual who showed no signs of dementia, severe memory loss, or severe mental impairment and who fully understood what he was doing in bequeathing his entire estate to his daughter.

According to Jennifer, Frank Sr. was the sole proprietor of Frank S. Cacciatore Real Estate, handling real estate transactions ranging from residential closings to multimillion-dollar commercial deals. He was a licensed real estate broker for approximately 70 years, and he continued to work as a real estate broker almost until the time of his death in May 2006. For instance, she said, he handled a sale of property that closed in December 2005 and another that closed in February 2006. He maintained an active real estate broker's license as well as licenses with the Division of Insurance of the State of Illinois which were renewed in September 2005.

In support of her motion for summary judgment, Jennifer attached the deposition of James Murphy, Frank Sr.'s attorney, as well as affidavits of his primary care physician Dr. John Panozzo, his sons James and Jon, and her own affidavit.

In his deposition, Murphy testified that he was the attorney who drafted the 2002 will in which Frank Sr. bequeathed his entire estate to Jennifer. He also represented Frank Sr. in connection with various real estate transactions in the five-year period before Frank Sr.'s death,

including Frank Sr.'s transferral of his interest in the Bellevue Property to a joint tenancy between Jennifer and himself.

With regard to the drafting of the 2002 will, Murphy stated that Frank Sr. called him and said that he was interested in updating his will. Jennifer subsequently also called him and said that she was interested in making a new will. Murphy had three meetings with them. During the first meeting, on February 12, 2002, he met with both of them together for a general discussion. At this meeting Murphy noted that Frank Sr.'s mental acuity was "very good for a man his age." During the second meeting, Murphy spoke separately with Frank Sr. and Jennifer about their respective wills. It was at that second meeting that Frank Sr. stated that he wanted his entire estate to go to Jennifer. Nothing in either meeting indicated to Murphy that Frank Sr. was being influenced by Jennifer, nor was there any indication that Frank did not understand the nature of his estate or what he was doing with that estate. "[I]t was clear that he was favoring [Jennifer] over the four boys in the family because of her years of service on his behalf," Murphy said. He explained that after the death of Frank Sr.'s wife, Jennifer had moved "back home" with him and became the person who "ran the house." She also assisted her father with his real estate business. Frank Sr. was the sole proprietor of Frank S. Cacciatore Realty, and Jennifer served as an office assistant for him, although she was not a licensed broker.

During the third meeting, on March 4, 2002, Frank Sr. executed the will that Murphy had prepared for him. When the will was signed, Murphy said, the only people present in the room were Murphy, Frank Sr., and two secretaries. On that same date, Frank Sr. executed a power of attorney in favor of Jennifer.

Murphy also testified about his representation of Frank Sr. in connection with the Bellevue Property. He explained that Frank Sr. had a fractional interest in a limited liability corporation known as 20 East Bellevue, LLC. That company originally owned the property located at 20 East Bellevue, Chicago, Illinois, and it later acquired the adjoining property at 18 East Bellevue (collectively, the Bellevue Property). To the best of Murphy's knowledge, Frank Jr. was never a member of that company, although Frank Sr. said that Frank Jr. had been helpful in connection with the initial investment. Sometime in 2002, after Murphy had completed his estate planning work for Frank Sr., Frank Sr. told Murphy that he wished to give his interest in 20 East Bellevue, LLC, to Jennifer. Murphy saw this as part of Frank Sr.'s estate plan: Frank Sr. wished to minimize the assets that would have to pass through probate. Murphy suggested that instead of simply giving his interest to Jennifer, Frank Sr. should transfer it to a joint tenancy between himself and Jennifer. Frank Sr. agreed, and the transfer was eventually approved on February 27, 2004. Murphy testified that Frank Sr. had full knowledge of what he was doing in effecting this transfer.

Murphy testified that he was not involved in any other transactions where Frank Sr.'s potential probate assets were converted to joint tenancies. When asked about bank accounts that had been placed in joint tenancy between Frank Sr. and Jennifer, Murphy replied that to his understanding, those joint tenancies had already been in place prior to the execution of the 2002 will, and he did not play any role in that conversion.

Murphy stated that he last spoke with Frank Sr. in or around February 2006, three months before his death, in a 10 to 15 minute phone conversation. In his opinion, Frank Sr. had not

experienced any diminished mental capacity over the past four years. He further stated that, in his opinion, Jennifer did not control Frank Sr.'s business or make business decisions on his behalf; she did not exercise control over his estate plan or dictate the terms of his will; and she did not exert undue influence over him.

Dr. John Panozzo stated that he was the primary care physician of Frank Sr. from January 15, 2003, through October 26, 2005. During that time period, he stated that he found Frank Sr. to be "a highly functioning, rational elderly man" who did not exhibit any signs of dementia, severe memory loss, or severe mental impairment. On the contrary, he said, Frank Sr. was capable of handling decisions himself.

Jennifer also attached the affidavits of James and Jon Cacciatore, sons of Frank Sr. who were not parties to the lawsuit. Both stated that Frank Sr. did not exhibit any signs of dementia, severe memory loss, or severe mental impairment and that he continued to maintain his business, Frank S. Cacciatore Real Estate, almost up until the time of his death in May 2006. Jon additionally stated that "our father was independent and capable of caring for himself and managing his own affairs."

Both James and Jon stated that Jennifer had taken care of Frank Sr. for nearly 20 years before Frank Sr.'s death. They both testified that Jennifer had not made any statements to Frank Sr. in their presence that were manipulative or controlling. James averred, "I always assumed our father, Frank S. Cacciatore, would leave his entire estate to Jennifer Cacciatore. *** [I]t was implied by our father, Frank S. Cacciatore, that Jennifer Cacciatore would be the sole beneficiary of our father's will." Jon stated that in March 2002, he, Jennifer, and Frank Sr. all met with

Murphy for the purpose of preparing Frank Sr.'s will. Murphy spoke with Frank Sr. individually, outside of the presence of Jon and Jennifer. The resulting will provided that the entirety of Frank Sr.'s estate would be given to Jennifer, and, in the event that she did not survive Frank Sr., the entirety of the estate would go to Jon.

Finally, Jennifer attached her own affidavit in support of her motion for summary judgment. Jennifer stated that beginning in 1977, she resided with her father, during which time "I was primarily responsible for caring for the home and assisted with day to day tasks as needed." She averred that her father did not at any time exhibit any signs of dementia, severe memory loss, or severe mental impairment. On the contrary, she said, "our father was independent and capable of caring for himself and managing his own affairs."

With regard to the Bellevue and Halsted Properties, Jennifer stated the following. On November 25, 2003, Frank Sr. assigned his membership interest in 20 East Bellevue, LLC, from himself individually to himself and Jennifer as joint tenants. This assignment was prepared by Murphy at Frank Sr.'s request, and, according to Jennifer, she did not initiate the preparation of this assignment. As for the Halsted Property, Jennifer averred, neither Frank Sr. nor Frank Jr. ever had an ownership interest in that property. Rather, she said, on June 9, 1998, she executed a real estate sales contract to purchase the Halsted Property directly from a third party. A copy of the real estate sales contract is attached. Thus, she said, she had the sole ownership interest in the property. She further averred that she had not hidden or destroyed any documents memorializing alleged joint real estate investments of Frank Sr. and Frank Jr.

With regard to the creation of the 2002 will, Jennifer stated that sometime before 2002,

she suggested that her father prepare a will, but she never made any suggestion as to how his estate should be disbursed. On March 4, 2002, Jennifer, her brother Jon, and Frank Sr. met with Murphy to discuss the preparation of a will. According to her, Murphy met with Frank Sr. individually and outside the presence of Jennifer and Jon. She averred that Frank Sr. executed the resulting will of his own accord and that she did not pressure or manipulate him into executing the will.

Frank Jr. filed a response to Jennifer's motion to summary judgment in which he argued that, notwithstanding Jennifer's arguments, material issues of fact remained with respect to two issues: first, whether Jennifer was a fiduciary of Frank Sr., thus giving rise to a presumption of fraud in the transactions between the two of them, and second, whether Jennifer had procured the will and the various *inter vivos* transfers of property through undue influence. Frank Jr. did not attach any evidentiary submissions in support of his response.

On July 1, 2009, after hearing oral argument by the parties, the trial court granted summary judgment for Jennifer on all the outstanding counts of the complaint, that is, counts II, III, and IV. It explicitly found that there was no evidence that the 2002 will had been procured through undue influence, stating,

> "And there just isn't anything here that I can see from the materials that I have reviewed that [Jennifer] had any input or say-so in how her father's estate was distributed. *** I can't say that there is any fact that leads me to conclude that there is any question but that [the will] was the product of Mr. Cacciatore, Sr.'s free will."

The trial court further found that Frank Jr. had failed to produce any evidence that he had any

interest in the Halsted Property or that there was undue influence involved in Frank Sr.'s 1999 decision to transfer his interest in the Bellevue Property to himself and Jennifer as joint tenants.

It is from this judgment that Frank Jr. now appeals.

II. ANALYSIS

On appeal, Frank Jr. contends that the trial court erred in granting summary judgment in favor of Jennifer because there is a material issue of fact as to whether she wrongfully profited by abusing a fiduciary relationship with her father. Frank Jr. does not raise any freestanding claim of undue influence on appeal; rather, he premises his argument upon his allegations regarding Jennifer's status as fiduciary. Specifically, he alleges that, during the time that Jennifer was a fiduciary of Frank Sr., she induced him to (1) create the 2002 will naming her as the sole beneficiary, (2) convert various bank accounts of his to joint accounts with her, and (3) transfer his interests in the Bellevue and Halsted Properties to her. He contends that all of these transfers are presumptively fraudulent by virtue of their fiduciary relationship and that Jennifer has not adduced evidence sufficient to rebut that presumption of fraud or, at least, that issues of material fact exist as to whether she can do so, such that summary judgment for her was improper.

In reviewing Frank Jr.'s contentions, we are mindful that summary judgment is appropriate where, "when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002), citing 735 ILCS 5/2-1005(c) (West 2006). Accordingly, where fair-minded persons could draw different

inferences from the facts, summary judgment should not be granted. *In re Estate of Roeseler*, 287 Ill. App. 3d 1003, 1013 (1997). We review the trial court's entry of summary judgment *de novo*. *General Casualty Insurance*, 199 Ill. 2d at 284.

A. Existence of a Fiduciary Relationship

As Frank Jr.'s argument with regard to all of the challenged transactions is premised upon his allegation of a fiduciary relationship between Jennifer and Frank Sr., we must begin by considering whether there is an issue of material fact as to whether Jennifer was, in fact, her father's fiduciary.

A fiduciary relationship exists where one party places such confidence in the other that the latter gains superiority and influence over the former. *Crichton v. Golden Rule Ins. Co.*, 358 Ill. App. 3d 1137, 1149 (2005); *Citicorp Savings of Illinois v. Rucker*, 295 Ill. App. 3d 801, 809 (1998). The fiduciary, as the superior party is called, is prohibited from using the relationship for self-gain. *Kurtz v. Solomon*, 275 Ill. App. 3d 643, 651 (1995). The existence of a fiduciary relationship must be shown by clear and convincing evidence (*Kurtz*, 275 Ill. App. 3d at 651), and the burden of proving its existence lies with the party seeking to establish it (*Citicorp Savings*, 295 Ill. App. 3d at 809).

A fiduciary relationship may arise as a matter of law, such as between a beneficiary of a trust and a trustee (*Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1006 (2010)), between an insured and his broker acting as the insured's agent (*Black v. Illinois Fair Plan Ass'n*, 87 Ill. App. 3d 1106, 1110 (1980)), and between the grantor and the grantee of a power of attorney (*Zachary v. Mills*, 277 Ill. App. 3d 601, 607 (1996)). A fiduciary relationship may also arise out of moral, social,

domestic, or personal circumstances. *Citicorp Savings*, 295 Ill. App. 3d at 809; *Kurtz*, 275 Ill. App. 3d at 651. Frank Jr. argues that both of these principles apply to the present case. First, he contends that a fiduciary relationship existed between Jennifer and Frank Sr. as a matter of law due to the power of attorney that Frank Sr. executed in favor of Jennifer. Second, he contends that there is an issue of material fact as to whether a fiduciary relationship existed due to the other circumstances surrounding their relationship, namely, that Jennifer lived with him, she helped take care of him, and he gave her various assets, both through *inter vivos* transfers and through his will. We consider each of these contentions in turn.

1. Impact of the Power of Attorney

Frank Jr.'s first contention is that a fiduciary relationship existed between Frank Sr. and Jennifer as a matter of law by virtue of the power of attorney that Frank Sr. executed in favor of Jennifer on March 4, 2002, the same day that Frank Sr. executed the 2002 will.

It is well settled that a power of attorney creates a fiduciary relationship between the grantor and the grantee as a matter of law. *Zachary*, 277 Ill. App. 3d at 607; *In re Estate of Jessman*, 197 Ill. App. 3d 414, 420 (1990). However, the fiduciary relationship created by a power of attorney does not apply to transactions that occur before the power of attorney was granted. *In re Estate of Miller*, 334 Ill. App. 3d 692, 702 (2002); *Teall*, 329 Ill. App. 3d at 88; see *In re Estate of Harms*, 236 Ill. App. 3d 630, 640 (1992) (no presumption of fraud where joint account was created before the beginning of the fiduciary relationship and deposits made during the relationship followed procedure established before the relationship began). In this regard, the case of *Miller*, 334 Ill. App. 3d at 700-02, is instructive. In 1996, Miller signed a form giving his

sister Emma Ford a power of attorney. Between that date and Miller's death a year later, numerous transactions occurred between them which benefitted Emma Ford. *Miller*, 334 Ill. App. 3d at 694. The court held that, as a result of the fiduciary relationship arising from the power of attorney, these transactions were presumptively fraudulent. *Miller*, 334 Ill. App. 3d at 700. However, the court also held that no such presumption would apply to proceeds that Emma Ford obtained from certificates of deposit that she had held jointly with Miller prior to her obtaining the power of attorney. *Miller*, 334 Ill. App. 3d at 701; see also *Teall*, 329 Ill. App. 3d at 87-88 (discussing the distinction between transactions occurring prior to and subsequent to the execution of a power of attorney).

Applying the standard articulated in *Miller* to the challenged transactions in the present case, we find that the impact of the power of attorney would not be significant with respect to the bank accounts that Frank Sr. converted to joint ownership between himself and Jennifer, since James Murphy, the attorney who handled the execution of the power of attorney given to Jennifer, testified in his deposition that these accounts had already been transferred prior to March 4, 2002, when the power of attorney was executed.[1] Murphy's testimony in this regard was neither challenged nor contradicted in any other submissions. Accordingly, as stated in *Miller*, the grant of the power of attorney would not apply retroactively to these transfers. *Miller*, 334 Ill. App. 3d at 701.

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[1] While it was suggested at oral argument that Murphy was silent in his deposition as to the *inter vivos* transfers between Jennifer and Frank Sr., our examination of the record reveals this to be incorrect.

Nor would the power of attorney have any impact with regard to the Halsted Property, since there is no evidence in the record that Frank Sr. ever transferred any interest in the Halsted Property to Jennifer, either before or after the power of attorney was executed. Jennifer states in her affidavit that she purchased the Halsted Property directly from a third party in 1998, that ever since that date she has retained sole ownership of the Halsted Property, and that Frank Sr. never held any interest whatsoever in the Halsted Property. In support, she attaches a document entitled "Installment Agreement for Warranty Deed" wherein Pusateri Enterprises, Inc. and Mary Ann Monahan agree to sell the Halsted Property to Trust No. 124481-06 of the American National Bank and Trust Company of Chicago. She also attaches a copy of a trust agreement listing her as the sole beneficiary of American National Land Trust No. 124481-06. Jennifer's averments and documentary submissions in this regard are uncontradicted by any evidence in the record and must therefore be taken as true. *Baird & Warner, Inc*, 53 Ill. App. 3d at 343. Although plaintiff alleged in his complaint that Frank Sr. held title to the Halsted Property before it passed into Jennifer's hands, plaintiff has submitted no evidence in support of that assertion. Unsupported allegations in a complaint do not raise an issue of fact where those allegations are traversed by affidavits and depositions in support of a summary judgment motion that contain evidentiary facts to the contrary. *Lesnik v. Estate of Lesnik*, 82 Ill. App. 3d 1102, 1106 (1980); *Baird*, 53 Ill. App. 3d at 343.

During oral argument, counsel for plaintiff contended that Jennifer has not sufficiently traversed the allegation in plaintiff's complaint that Frank Sr. had an agreement to share half of his ownership interest in the Halsted Property with Frank Jr. We disagree. Plaintiff's allegation

in this regard is necessarily contingent upon his allegation that Frank Sr. held an ownership interest in the Halsted Property in the first instance, an allegation that is directly denied by Jennifer in her affidavit. In that affidavit, she avers that "neither Plaintiff nor our father, Frank S. Cacciatore, have ever had an ownership interest in 3235-37 South Halsted Street, Chicago, Illinois." Thus, since plaintiff cannot rely upon the allegations of his complaint to raise an issue of fact once those allegations have been contradicted by an affidavit, and since he has made no independent submissions in that regard, it remains uncontroverted for summary judgment purposes that Frank Sr. never had any ownership interest in the Halsted Property, and therefore the existence of a fiduciary relationship between him and Jennifer, whether stemming from the power of attorney or from any other source, would not be of any consequence concerning that property.

However, the fiduciary relationship flowing from the power of attorney would impact Frank Sr.'s assignment of his interest in the Bellevue Property to himself and Jennifer as joint tenants, since it is undisputed in the record that this transfer occurred after Frank Sr. executed the power of attorney. (Frank Sr. apparently signed the paperwork for the assignment on November 25, 2003, but the assignment was not approved until February 27, 2004. In any event, both dates are well past the date that the power of attorney went into effect.) Thus, under the undisputed facts, the fiduciary relationship created by the power of attorney would apply to this transaction. See *Teall*, 329 Ill. App. 3d at 88.

We reach a similar conclusion with regard to Frank Jr.'s claim that Jennifer tortiously

interfered with his inheritance expectancy by inducing Frank Sr. to execute the 2002 will.[2] At the outset, we note that there is no dispute that the will and the power of attorney were executed on the same date, March 4, 2002. Neither side, however, indicates which was executed first, nor does the record offer any indication as to which preceded the other on that date. Rather, both of the parties state in their briefs that the power of attorney was executed "at the time his will was executed," in apparent willingness to treat the events as if they occurred simultaneously. However, even if the documents were both executed on the same date, it would appear that one must have been signed before the other, even if by a negligible span of time. Because the record is unclear on this point, and because, on a motion for summary judgment, we must construe all evidence strictly against the movant and liberally in favor of the nonmoving party (*Espinoza v. Elgin, Joliet and Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)), we must conclude, at the very least, that an issue of fact exists as to whether Jennifer was a fiduciary of Frank Sr. by virtue of the power of attorney at the time that Frank Sr. executed the 2002 will.

Nevertheless, although the parties do not raise this point in their briefs, strong argument could be made that, regardless of the existence of a fiduciary relationship between Jennifer and Frank Sr. or any presumption arising therefrom, plaintiff would still not be entitled to recover on his claim for tortious interference with inheritance expectancy, because he has not raised an issue of fact as to whether Jennifer intentionally interfered with his expectancy. To prevail in a suit for

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[2] We note that plaintiff is not directly contesting the validity of the will. Indeed, he voluntarily dismissed count I of his complaint, in which he originally sought to have the 2002 will set aside.

tortious interference with inheritance expectancy, a plaintiff must establish the following elements: "(1) the existence of an expectancy; (2) defendant's intentional interference with the expectancy; (3) conduct that is tortious in itself, such as fraud, duress, or undue influence; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages." *In re Estate of Ellis*, 236 Ill. 2d 45, 52 (2009).[3] Plaintiff contends that, by virtue of the fiduciary relationship existing between Frank Sr. and Jennifer, all transactions between them are presumed to be fraudulent, a presumption which, if unrebutted, would serve to satisfy the third element of this tort. However, plaintiff has presented no law to demonstrate that such presumption would extend to the second element, namely, defendant's intentional interference with plaintiff's expectancy, which plaintiff would be required to establish as part of his *prima facie* case. Nor could it be argued that plaintiff has presented evidence that would create an issue of fact as to that second element, since it was Murphy's unrebutted testimony that it was in a private meeting with Frank Sr., outside Jennifer's presence, that Frank Sr. expressed his desire to

[3] We note in passing that Jennifer argues that, with regard to the 2002 will, the existence of a fiduciary relationship alone is insufficient to raise a presumption of undue influence in the absence of evidence that she procured the preparation of the will. However, the cases that she cites on this point all involve direct contests to the validity of a will and are therefore inapplicable here, where plaintiff is not contesting the will but, rather, raising a claim of tortious interference with inheritance expectancy. See *In re Estate of Letsche*, 73 Ill. App. 3d 643, 646 (1979); *Herbolsheimer v. Herbolsheimer*, 46 Ill. App. 3d 563, 566 (1977); *Schmidt v. Schwear*, 98 Ill. App. 3d 336, 344 (1981); *Swenson v. Wintercorn*, 92 Ill. App. 2d 88, 99 (1968).

leave his entire estate to Jennifer, and Murphy saw no indication that Jennifer was dictating the terms of Frank Sr.'s will or exercising control over his estate plan. Such testimony was consistent with Dr. Panozzo's testimony that Frank Sr. was "rational" and capable of making his own decisions, as well as the testimony of Jon and Jennifer that Frank Sr. was "independent and capable of caring for himself and managing his own affairs." This testimony is further consistent with Jennifer's own averment in her affidavit that she never made any suggestion as to how her father's estate be disbursed in his will and did not pressure or manipulate her father into executing that will.

Nevertheless, we need not reach this issue, because the existence of any fiduciary relationship, whether with regard to the Bellevue Property or the 2002 will, is not dispositive but merely creates a rebuttable presumption of fraud. Jennifer claims to have overcome this presumption via the evidence she submitted in connection with her motion for summary judgment. See *Drinane v. State Farm Mutual Automobile Insurance Co.*, 153 Ill. 2d 207, 217 (1992) (defendant's evidentiary submissions sufficient to overcome rebuttable presumption against him at summary judgment stage). As shall be more fully fleshed out and discussed in the final section of this decision, based upon the submissions of the movant and the lack of any countersubmissions by the nonmovant, that presumption of fraud has, in fact, been overcome.

2. Impact of the Relationship Between Frank Sr. and Jennifer

Frank Jr. contends that, even with respect to transactions that predate the issuance of the power of attorney, there is an issue of material fact as to whether Jennifer had been a fiduciary of Frank Sr. "for years" prior to the execution of the power of attorney on March 4, 2002, since she

lived with him, she helped take care of the house, and he made various transfers of property to her. This contention would only be significant with respect to Frank Sr.'s transferred bank accounts, since these transfers, as discussed above, predated the execution of the power of attorney. It would not impact our analysis of the Halsted Property, since plaintiff has presented no evidence to contradict the testimony that the Halsted Property never belonged to Frank Sr. in the first place. Nor would this contention be significant with respect to the 2002 will, since, as discussed above, there is no evidence that Jennifer intentionally interfered with any inheritance expectancy that Frank Jr. might have had with regard to the creation and execution of that will.

Where no fiduciary relationship exists as a matter of law, the party seeking to establish the existence of such a relationship bears the burden of showing that one party placed trust and confidence in the other so that the latter gained influence and superiority over the former. *Simon v. Wilson*, 291 Ill. App. 3d 495, 503 (1997); *Citicorp Savings*, 295 Ill. App. 3d at 809. The mere fact that one party trusts another is insufficient to create a fiduciary relationship. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 21 (1995). Rather, "[t]he essence of a fiduciary relationship is that one party is dominated by the other. [Citation.] Indeed, in the absence of dominance and influence there is no fiduciary relationship regardless of the level of trust between the parties." *Lagen*, 274 Ill. App. 3d at 21; see also *Paskas v. Illini Federal Savings & Loan Ass'n*, 109 Ill. App. 3d 24, 31 (1982) (affirming dismissal of breach of fiduciary duty claim where plaintiffs alleged that they reposed trust in defendant but there was no indication that plaintiffs were subject to "domination and control" of defendant). Likewise, a blood relationship, by itself, is insufficient to establish the existence of a fiduciary relationship in the

absence of evidence that one party had a dominant or authoritative position over the other party. *Beelman v. Beelman*, 121 Ill. App. 3d 684, 689 (1984) (holding that it was against the manifest weight of the evidence for the trial court to conclude that a fiduciary relationship existed between brothers Eugene and Raymond, despite testimony that they "enjoyed a trusting relationship," where "[t]here is no evidence that Eugene played any dominant role in Raymond's personal or financial life").

In determining whether a fiduciary relationship exists, courts consider a number of factors: degree of kinship; disparity in age, health, mental condition, education, and business experience; the extent to which the party entrusts his business and financial matters to the alleged fiduciary; and the extent to which the party places his faith and confidence in him. *Simon v. Wilson*, 291 Ill. App. 3d 495, 503-04 (1997); *Crichton*, 358 Ill. App. 3d at 1149; *In re Estate of Kieras*, 167 Ill. App. 3d 275, 283-84 (1988).

In the present case, the record does not create any question of fact as to whether Jennifer dominated Frank Sr. so as to achieve superiority and influence over him, as is required for the existence of a fiduciary relationship. *Lagen*, 274 Ill. App. 3d at 21; *Paskas*, 109 Ill. App. 3d at 31; *Beelman*, 121 Ill. App. 3d at 689. No evidence exists from which the conclusion could be drawn that Frank Sr. entrusted his business and financial matters to Jennifer. On the contrary, Murphy's uncontroverted deposition testimony states that Jennifer did not control Frank Sr.'s business or make business decisions on his behalf. This is consistent with the affidavits of his son Jon and of Jennifer, both of which stated that Frank Sr. was "independent and capable of caring for himself and managing his own affairs." Moreover, although Frank Sr. was elderly, the

record is devoid of indication that he was at a disadvantage with regard to Jennifer in terms of his mental condition, education, or business experience. Murphy stated that Frank Sr.'s mental acuity was "very good for a man his age" in 2002 and did not diminish over the next four years. Frank Sr.'s primary care physician, Dr. Panozzo, stated that Frank Sr. was both "highly functioning" and "rational," displaying no signs of dementia, severe memory loss, or severe mental impairment and being capable of making his own decisions. James, Jon, and Jennifer likewise testified to their father's lack of severe mental impairment. The record also reflects that Frank Sr. was an experienced businessman, having been a licensed real estate broker for approximately 70 years, and he remained the sole proprietor of Frank S. Cacciatore Real Estate. Although Jennifer helped him with his business, it was Murphy's testimony that she did so merely as an office assistant and was not a licensed broker.

The only facts that plaintiff claims could create a contrary inference are that Jennifer lived with Frank Sr. since 1977, she helped to take care of the house, and he made transfers of property to her. However, none of this evinces dominance and control, as is the essence of a fiduciary relationship. *Lagen*, 274 Ill. App. 3d at 21. Although it could be inferred that Frank Sr. held affection for Jennifer and reposed a certain degree of trust in her, there is nothing in the record to indicate that Jennifer gained superiority and influence over her father and thereby became her father's fiduciary. *Paskas*, 109 Ill. App. 3d at 31 (trust alone, in the absence of domination and control, is insufficient to establish the existence of a fiduciary relationship).

The case of *Jessman*, 197 Ill. App. 3d at 420, which plaintiff seeks to rely upon, is distinguishable. In *Jessman*, the respondent Connie moved the elderly Helena into her home,

because Helena's sister had suggested placing her in a nursing home and Helena was apparently strongly opposed to the idea. *Jessman*, 197 Ill. App. 3d at 417. The *Jessman* court explained the situation as follows: "Helena was dependent upon Connie, a dominant party who took Helena into her home at a time of need. Helena entrusted Connie to handle her financial affairs and most of the affairs of her day-to-day existence." *Jessman*, 197 Ill. App. 3d at 420. After the move, Helena executed a broad power of attorney in favor of Connie. *Jessman*, 197 Ill. App. 3d at 418. Helena subsequently executed a will bequeathing all of her property to Connie and also made various *inter vivos* transfers of property to Connie. *Jessman*, 197 Ill. App. 3d at 418. Under these set of facts, the *Jessman* court found there to be a fiduciary relationship between Connie and Helena. *Jessman*, 197 Ill. App. 3d at 420. It further found that there was an issue of material fact as to whether Helena's will and *inter vivos* transfers of property were procured through undue influence. *Jessman*, 197 Ill. App. 3d at 420.

There are crucial differences between *Jessman* and the instant case. First, the *inter vivos* transfers at issue in *Jessman* occurred after a power of attorney was executed in favor of respondent, thus creating a fiduciary relationship as a matter of law. As discussed, such is not the case with regard to the transfers of Frank Sr.'s bank accounts at issue here. Second, *Jessman* involved a dependent party who trusted respondent, a dominant party, to handle her financial affairs and daily needs. Because Helena was in a state of dependence, particularly with regard to her financial affairs, it was possible to infer that respondent exerted superiority and influence over her. By contrast, in the present case, there is no evidence to suggest that, on the one hand, Frank Sr. was a dependent party, or, on the other hand, that Jennifer was a dominant party. On

the contrary, the uncontroverted evidence is that Frank Sr., despite his age, was an independent and rational businessman capable of making his own decisions and caring for himself, and he continued to conduct his own business without entrusting his business decisions to Jennifer. *Jessman* therefore does not support the conclusion that the trial court erred in finding that the evidence presented regarding the relationship between Jennifer and Frank Sr. did not create an issue of material fact as to whether she was his fiduciary.

B. Whether Jennifer Has Overcome the Presumption of Fraud

Finally, we consider whether there is an issue of material fact as to whether Jennifer has successfully overcome the presumption of fraud engendered with respect to the Bellevue Property and the 2002 will by the prior execution of the power of attorney. See *Drinane*, 153 Ill. 2d at 217 (defendant's evidentiary submissions sufficient to overcome rebuttable presumption against him at summary judgment stage).

Once the existence of a fiduciary relationship between two parties has been proven by clear and convincing evidence, a rebuttable presumption of fraud arises as to any transaction between those parties in which the fiduciary profits. *Miller*, 334 Ill. App. 3d at 698; *Jessman*, 197 Ill. App. 3d at 420 (1990). The fiduciary then has the burden of overcoming that presumption by proving, by clear and convincing evidence, that the transaction was fair and equitable and did not result from her undue influence over the principal. *Miller*, 334 Ill. App. 3d at 698; *Simon*, 291 Ill. App. 3d at 504. In *Rizzo v. Rizzo*, 3 Ill. 2d 291, 305 (1954), our supreme court stated that significant factors in overcoming the presumption of fraud are frank disclosure by the fiduciary of all information relevant to the transaction, fair value paid by the fiduciary for

the property obtained, and competent and independent advice received by the principal. See also *In re Estate of Teall*, 329 Ill. App. 3d 83, 88 (2002). Legal competency of the principal does not, by itself, serve to rebut the presumption of fraud. *Miller*, 334 Ill. App. 3d at 698.

Under these criteria, when Frank Sr. converted his interest in the Bellevue Property into a joint tenancy between himself and Jennifer, such conversion was presumptively the result of fraud on Jennifer's part. His execution of the 2002 will is likewise presumptively fraudulent for summary judgment purposes. Jennifer, however, contends that she has met her burden to rebut this presumption of fraud. She argues that the record presents no issue of material fact as to whether Frank Sr.'s actions in this regard were fair, equitable, and without any indication that they resulted from any undue influence over him. We agree with Jennifer.

Under the undisputed facts, the *Rizzo* factors point toward Jennifer having overcome the presumption of fraud. There is not a scintilla of evidence in the record that would raise the inference that Jennifer procured her father's agreement with transactions that he did not fully understand or approve of. On the contrary, with regard to the Bellevue Property, Murphy stated in his deposition that Frank Sr. fully understood what he was doing when he agreed to transfer his interest to himself and Jennifer as joint tenants. He explained that Frank Sr. told him that he wished to give his interest in the Bellevue Property to Jennifer. Murphy then advised him to instead transfer the interest to the two of them as joint tenants, and Frank Sr. agreed. Murphy further stated that he saw this as part of Frank Sr.'s estate plan, since Jennifer was already slated to receive all of Frank Sr.'s possessions under his will, and Frank Sr. wished to minimize the assets that would have to pass through probate. Thus, it is apparent from the face of the record

that disclosure of information on the part of Jennifer was not at issue in this transaction, since it was Frank Sr. who initiated the transaction by contacting his attorney, and since Frank Sr. fully understood the consequences of his actions. Frank Sr. also received legal advice from Murphy regarding the transaction. All of this would compel the conclusion that the presumption of fraud has been overcome. See *Rizzo*, 3 Ill. 2d at 305. This conclusion is buttressed by the fact that, as discussed, the affidavits and deposition testimony presented by Jennifer establish that Frank Sr. was not controlled by her in his business dealings but, rather, was an independent and able-minded man capable of making his own business decisions. Nor did Frank Jr. present any evidentiary submissions that would controvert such claims, or, indeed, any evidentiary submissions at all.

Likewise, with regard to the 2002 will, Murphy stated in his deposition that it was during his second estate planning meeting with Frank Sr., where he spoke alone with Frank Sr. about his will, that Frank Sr. informed him that he wished to bequeath his entire estate to Jennifer. Based upon their discussion on that date, Murphy opined that Frank Sr. understood the nature of his estate and what he was doing with that estate. He additionally testified that he saw no indication that Jennifer exercised any control over the terms of Frank Sr.'s will or his estate plan. None of Murphy's testimony in this regard was contradicted in the record. See *Baird & Warner, Inc. v. Stuparits*, 53 Ill. App. 3d 338, 343 (1977) (at summary judgment stage, well alleged facts in affidavit must be taken as true in the absence of any counteraffidavit). Indeed, it was corroborated by Jennifer's own statement Jennifer's own assertion that she never made any suggestion as to how her father's estate be disbursed in his will and did not pressure or

manipulate her father into executing that will. The record therefore makes plain that, just as with his transfer of the Bellevue Property, Frank Sr. received the advice of counsel in setting forth the terms of his 2002 will, and he did not act out of confusion or lack of information but, rather, understood the import of his actions.

Consequently, on the basis of Jennifer's evidentiary submissions, which are not contradicted by any evidentiary submissions proffered by Frank Jr. or otherwise contradicted in the record, we find there to be no issue of material fact as to whether Jennifer has rebutted the presumption of fraud attached to the transaction between herself and her father. See *In re Estate of Trampenau*, 88 Ill. App. 3d 690, 694 (1980) (if a transaction between people in a fiduciary relationship is shown to be open, fair, and honest, it is as valid as a transaction between strangers); *Drinane*, 153 Ill. 2d at 217. The trial court was therefore correct in granting summary judgment in favor of Jennifer.

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.