2013 IL App (1st) 113132-U

THIRD DIVISION
DECEMBER 31, 2013

No. 1-11-3132

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE *ex rel*. LISA MADIGAN, Attorney General of Illinois, Plaintiff-Appellee, v. MAXWELL MANOR, an Illinois Not-for-Profit Corporation, JOEANN McCLANDON, CEOLA M. BANKS, and ANNIE GARRETT-WILLIAMS, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 02 CH 16474 The Honorable Kathleen M. Pantle, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *HELD*: The court affirmed the circuit court's grant of summary judgment in favor of the Attorney General and against a charitable nursing home and its officers and directors in an action for violations of the Illinois Charitable Trust Act for failing to maintain registration (760 ILCS 55/6 (West 1996)), failing to file annual reports and failing to file an accounting for sale of the nursing home (760 ILCS 55/7 (West 1996)), and breach of fiduciary duties (760 ILCS 55/15 (West 1996)), where it was undisputed that the

organization and its officers and directors did not file annual reports, did not maintain registration, and did not report the sale. The court also affirmed a grant of partial summary judgment in the amount of $2,000,000 and a subsequent full grant of summary judgment against the former director for breach of fiduciary duty under section 15 of the Act (760 ILCS 55/15 (West 1996)), misuse of charitable assets intentionally and in breach of fiduciary duty with malice under section 16 (760 ILCS 55/16 (West 1996)), and intentional breach of fiduciary duty in intentionally disbursing charitable funds to be used for one's personal benefit with malice and without lawful authority under section 17 (760 ILCS 55/17 (West 1996)) for her misappropriation of the nursing home's assets because she failed to present any genuine issue of material fact where her affidavit stating that the money taken was for repayment of loans she made to the organization was self-serving and conclusory. The court held that the circuit court properly denied the defendants' motion to reconsider the summary judgment based on allegedly new evidence in the form of an affidavit from other officers of the nursing home and loan documents where there was no showing that the evidence was unavailable at the time of the original motion for summary judgment hearing. The court also affirmed summary judgment on the claim for an accounting where there was no genuine issue of material fact regarding the need for an accounting, despite the fact that the circuit court's summary judgment order did not order an accounting and instead ordered the collection and distribution of any remaining assets to other bona fide charities pursuant to *cy pres*. The Attorney General could pursue its right to an accounting if it chose to. The court vacated summary judgment on the common-law claim for removal of trustees because the Attorney General had already sought and obtained removal of trustees pursuant to the Act.

¶ 2 BACKGROUND

¶ 3 This case was brought by the People of the State of Illinois *ex rel*. Lisa Madigan, Attorney General of Illinois (Attorney General), against the defendant nursing home and its officers and directors in a four-count second amended complaint for an accounting and various violations of the Illinois Charitable Trust Act (760 ILCS 55/1 *et seq*. (West 1996)). The case is on appeal from a grant of summary judgment in favor of the Attorney General against the defendant nursing home, Maxwell Manor, and its defendant owner and officers, JoeAnn McClandon, Ceola M. Banks, and Annie Garrett-Williams, for failure to file annual reports and maintain registration, as well as for breach of fiduciary duty and misappropriation of charitable assets by

McClandon.

¶ 4 In analyzing the summary judgment in this case, we clarify the claims that were alleged in each count. Count I of the second amended complaint alleges five claims against defendants Maxwell Manor and JoeAnn McClandon. For the sake of clarity we will denote each claim numerically. Count I alleged the following violations of the Illinois Charitable Trust Act: (1) section 6, requiring trustees to register with the Attorney General (760 ILCS 55/6 (West 1998)); and (2) section 7, requiring filing annual financial reports with the Attorney General (760 ILCS 55/7 (West 1998)). Count I alleged that defendants Maxwell Manor and McClandon failed to file any reports after 1997, specifically for the years 1998, 1999, 2000, 2001, and 2002.

¶ 5 Count I also alleged: (3) that defendants Maxwell Manor and McClandon breached their fiduciary duties under section 15 of the Act (760 ILCS 55/15(a) (West 1998)). Count I alleged that defendant Maxwell Manor breached its fiduciary duty as a holder and trustee of charitable assets. Count I alleged that defendant McClandon breached her fiduciary duties as Maxwell Manor's president and executive director, and thus as a trustee and fiduciary of Maxwell Manor. As a remedy for this violation, count I sought the removal of defendants Maxwell Manor and McClandon as trustees pursuant to section 16(b) of the Illinois Charitable Trust Act.

¶ 6 Count I also alleged: (4) a claim against defendant McClandon under section 16 of the Act (760 ILCS 55/16 (West 1998)).

¶ 7 Count I further alleged: (5) a claim against McClandon under section 17 of the Act (760 ILCS 55/17 (West 1998)).

¶ 8 Count I sought various relief against defendants McClandon and Maxwell Manor for

these claims, including directing Maxwell Manor and McClandon to make a strict accounting; imposition of a constructive trust over Maxwell Manor's assets; surcharging McClandon and Maxwell Manor for all Maxwell Manor assets that were used for other than charitable purposes; temporarily restraining and permanently enjoining Maxwell Manor and McClandon from soliciting, receiving or holding assets for any charitable entity; removing McClandon from any fiduciary position with Maxwell Manor; appointing a receiver for Maxwell Manor; dissolving and liquidating Maxwell Manor and directing the transfer of its assets to another charitable organization pursuant to the doctrines of equitable deviation and/or *cy pres*; and a judgment against McClandon of at least $13 million and for the costs of investigating and prosecuting the action.

¶ 9 Count I alleged that defendants Maxwell Manor and McClandon have a duty to account for the $1,104,670 of charitable assets shown on Maxwell Manor's 1997 financial report, the sale of Maxwell Manor for more than $12 million in proceeds, and the $1,367,022.40 of escrowed funds sought by and released to Maxwell Manor and BMJ Enterprises (BMJ). Count I alleged that the precise amount of assets held in Maxwell Manor and use of those assets (at least $13 million) were presently unknown, and without a full and complete accounting of all assets, receipts, costs, expenses and disbursements to date by the defendants, the Attorney General "cannot determine the full extent of any waste or misuse of charitable assets, self-dealing, and breach of fiduciary duty that has occurred."

¶ 10 Count I also specifically sought punitive damages against McClandon pursuant to section 17 of the Act (760 ILCS 55/17 (West 1998)) and alleged: "In the event that [McClandon] is

found and adjudged, after an accounting, to have knowingly and intentionally caused the disbursement of more than $1,000.00 of MAXWELL MANOR's assets without right for her own personal use or benefit within a 3-year period, imposing civil punitive damages in an amount equal to the amount so disbursed as well as a civil penalty fine of not less than $50,000.00 for each such disbursement against [McClandon] pursuant to Sections 16(a) and 17 of the Charitable Trust Act (760 ILCS 55/16(a) [(West 1998)] and 760 ILCS 55/17 [(West 1998)])."

¶ 11 Count II was for "Unfitness of Charitable Trustees – Wilful Failure to Comply With Statutory Requirements," against Maxwell Manor and McClandon and repeated the allegations of count I. Count II was also based on violations of sections 7 of the Charitable Trust Act for the failure to file the statutorily required annual financial reports and asked for the same relief. Count II additionally alleged that, because defendants Maxwell Manor and McClandon filed a registration statement and annual financial reports for several years ending with 1997, their failure to file annual reports for subsequent years "cannot be excused by ignorance of the law but appears to be willful." Count II sought a finding that defendants Maxwell Manor and McClandon "have wilfully [*sic*] violated the Charitable Trust Act," citing generally to the Act, "760 ILCS 55/1 *et seq*. (1999)." Count II also sought a finding that defendants Maxwell Manor and McClandon breached their fiduciary duties (claim (3) from count I). Count II repeated the prayer for punitive damages in count I against McClandon "[i]n the event that [McClandon] is found and adjudged, after an accounting, to have knowingly and intentionally caused the disbursement of more than $1,000.00 of MAXWELL MANOR's assets without right for her own personal use or benefit within a 3-year period, imposing civil punitive damages in an amount

equal to the amount so disbursed as well as a civil penalty fine of not less than $50,000.00 for each such disbursement against [McClandon] pursuant to Sections 16(a) and 17 of the Charitable Trust Act (760 ILCS 55/16(a) and 55/17 (West 1998))" (claims (4) and (5) from count I). Count II sought the same relief as count I: a judgment directing Maxwell Manor and McClandon to make a strict accounting; imposition of a constructive trust over Maxwell Manor's assets; surcharging McClandon and Maxwell Manor for all Maxwell Manor assets that were used for other than charitable purposes; temporarily restraining and permanently enjoining Maxwell Manor and McClandon from soliciting, receiving or holding assets for any charitable entity; removing McClandon from any fiduciary position with Maxwell Manor; appointing a receiver for Maxwell Manor; dissolving and liquidating Maxwell Manor and directing the transfer of its assets to another charitable organization pursuant to the doctrines of equitable deviation and/or *cy pres*; and a judgment against McClandon of at least $13 million and for the costs of investigating and prosecuting the action.

¶ 12 Count III was for "Unfitness of Charitable Trustees – Failure to Exercise Necessary Fiduciary Oversight," against defendant Ceola M. Banks, Maxwell Manor's secretary and treasurer and one of its three directors as stated on the most recent annual report filed on June 18, 2003, and against Annie Garrett-Williams, one of Maxwell Manor's directors and secretary on its most recent annual report filed on June 18, 2003. Count III alleged that Banks and Garrett-Williams also failed to re-register Maxwell Manor and failed to cause accountings and annual reports to be filed with the Attorney General for 1990, 1999, 2000, 2001, and 2003. Count III also alleged that Banks and Garrett-Williams, as officers and/or directors of Maxwell Manor,

failed to prevent Maxwell Manor from commingling its claim of entitlement in circuit court jointly and without separate legal representation from BMJ Enterprises, a private for-profit entity partially owned by defendant McClandon, for release of $1,367,022.40 of escrowed funds to Maxwell Manor in the chancery action (No. 01 CH 2410) and without reporting or accounting to the Attorney General. Count III further alleged the above constituted a breach of Banks' and Garrett-Williams' fiduciary duty. Count III sought relief similar to counts I and II and sought the removal of Banks and Garrett-Williams from any fiduciary positions with Maxwell Manor.

¶ 13 Count IV was for "Accounting, Equitable Surcharge, and Removal of Trustees Under the Common Law," again alleging that Maxwell Manor and McClandon failed to file any financial reports after 1997 and the failure to report and account for the sale of Maxwell Manor for over $12 million to the Attorney General. Count IV alleged that McClandon breached her fiduciary duty to not engage in any self-dealing. Count IV again repeated the allegation in count I that the precise amount of assets held in Maxwell Manor and use of those assets (at least $13 million) were presently unknown, and without a full and complete accounting of all assets, receipts, costs, expenses and disbursements to date by the defendants, the Attorney General "cannot determine the full extent of any waste or misuse of charitable assets, self-dealing, and breach of fiduciary duty that has occurred." Count IV further sought that if, after an accounting, McClandon cannot explain or account for the use of Maxwell Manor's funds and/or if facts show that McClandon or any other trustee or fiduciary of Maxwell Manor intentionally caused any of Maxwell Manor's assets to be disbursed without right for McClandon or such other trustee's or fiduciary's own personal use, defendant McClandon and/or such other trustee or fiduciary should be held to hold

such assets and/or their proceeds in constructive trust for Maxwell Manor and the State and should be surcharged in the amount so disbursed.

¶ 14 The circuit court initially granted partial summary judgment against defendant JoeAnn McClandon in the amount of $2 million based on a personal check found in discovery that was written by the nursing home to her and deposited by her. Thereafter, the court granted summary judgment to the Attorney General on all remaining counts against all defendants.

¶ 15 The facts of this case are convoluted and complex due to the fact that the individuals and entities which owned Maxwell Manor changed several times and also due to the fact that Maxwell Manor was in financial disarray and received not only financial assistance from the State, but also alleged personal loans from defendant McClandon. We recite the facts necessary for a resolution of the appeal from the grant of summary judgment in favor of plaintiff, focusing on whether there are any genuine questions of material fact.

¶ 16 McClandon was a general partner of BMJ, which owned the land and the building at 4357 Drexel Blvd. in Chicago. McClandon held a 50% interest in BMJ, which was a family-owned partnership. Prior to 1990, BMJ leased the property to a third party (uninvolved in this lawsuit), who operated a nursing home in the building which, at the time, was called "Bethune Plaza." The nursing home was dedicated to the care and treatment of indigent patients, the majority of whom had some form of mental illness.

¶ 17 In 1989 the Illinois Department of Public Health alleged that there were poor conditions at Bethune Plaza and in October 1989 forced Bethune Plaza to surrender control of the property. The Department of Public Health placed Coregan, Inc. (Coregan), in charge of the facility.

Coregan began to run the nursing home under the name "DuSable Plaza." BMJ's only interest through this time period continued to be solely as a landlord leasing the premises for the facility. The Illinois Department of Public Aid also made "C-13" advances to Bethune Plaza in the amount of about $800,000.

¶ 18 On February 27, 1990, Coregan abandoned the nursing home, leaving unpaid wages to more than 150 employees and unpaid bills from vendors, as well as the liability for repayment of the $800,000 owed to the Department of Public Aid, which resulted in litigation with the Department. BMJ intervened in the pending litigation and obtained a temporary restraining order, allowing the residents to remain in the facility, and convinced the staff to remain and continue providing care to the patients. BMJ contacted the Health Care Financing Authority (HCFA) in Washington, D.C., and requested an independent inspection of the facility. BMJ paid back wages to the staff, unpaid property taxes on the building, and the vendors to restore food supplies and services to the patients. By April 1990 BMJ had paid more than $475,000 for the debts of its predecessor. The HCFA conducted an inspection and awarded BMJ a probationary license to operate the facility, thereby enabling the facility to receive federal funds through the state public aid office. The Illinois Department of Public Aid did not make payments to BMJ, however, instead applying payments to pay down the C-13 loans to BMJ's predecessors, including Coregan. BMJ continued paying for the operation of the nursing home.

¶ 19 In March 1990, BMJ formed Maxwell Manor, Inc. (Maxwell Manor), to operate the nursing home, and the name of the nursing home was changed to Maxwell Manor. The Department of Public Health litigation to close the facility was still pending. According to

defendants, because Maxwell Manor was not receiving payments from the Department of Public Aid toward its operating costs, BMJ agreed to loan Maxwell Manor up to $600,000 at the prime rate of interest pursuant to a written loan agreement.

¶ 20 On the advice of accountants and attorneys, Maxwell Manor sought and obtained not-for-profit status for the purpose of serving the healthcare and financial needs of the elderly and mentally impaired and, as necessary, to waive the fees and charges for such care for indigent patients. In July 1990, Maxwell Manor submitted a comprehensive financial information form to the Attorney General's office which included its projected revenue for 1990-93, its articles of incorporation, a registration statement which described its organization and charitable mission, and a certified copy of its bylaws. The initial officers and directors of Maxwell Manor were Helen Jett, Roy Cogdell, Vickey Pasley and Veloid Cotton. McClandon served as the executive director of Maxwell Manor from March 3, 1990 through 1996. Maxwell Manor was in operation from March 1990 to October 1998.

¶ 21 On July 11, 1990, the Department of Health's case was resolved in an agreed order whereby Maxwell Manor was permitted to take over the operation of the facility (from BMJ). The order entered by the court expressly directed Maxwell Manor and JoeAnn McClandon to "take all necessary steps to make such necessary corrections to the operation and condition of the facility."

¶ 22 Maxwell Manor registered with the Attorney General on August 6, 1990, pursuant to section 6 of the Charitable Trust Act (760 ILCS 55/6 (West 1990)). It also filed annual financial reports with the Attorney General through 1997. In the 1997 financial report, Maxwell Manor

stated it held "net assets or fund balances" of $1,104,670. The section requiring disclosure of any loans from any of its officers, directors, trustees, or key employees, did not contain any disclosure of any such loans. No financial reports were filed after 1997.

¶ 23 On October 15, 1998, Maxwell Manor sold its operating assets and goodwill in a joint-sale venture along with BMJ to National Voluntary Health Facility #4, Inc. (National Voluntary Health Facility), a corporation that formerly employed McClandon. McClandon signed the addendum to the sale agreement on behalf of both BMJ and Maxwell Manor. The total amount of the sale was $13,500,000. The sale was not reported to the Attorney General, despite the entity's not-for-profit charitable organization status. In 2001, Maxwell Manor and BMJ brought a chancery action against National Voluntary Health Facility to obtain the funds held in escrow from the sale. *BMJ Partners & Maxwell Manor, Inc. v. National Voluntary Health Facility*, No. 01 CH 2410.

¶ 24 On July 1, 2002, Maxwell Manor was involuntarily dissolved as a not-for-profit corporation by the Illinois Secretary of State for failure to maintain its registration, but was reinstated on August 19, 2002. In January 2003, in the chancery action, Maxwell Manor and BMJ obtained $1,367,022.40 in funds held in escrow from the sale.

¶ 25 The State, through the Attorney General, filed this action against defendants seeking an accounting of over $13 million in assets of Maxwell Manor, including the net assets identified in the 1997 financial report, proceeds from the sale to National Voluntary Health Facility, and also the money obtained from escrow in the litigation against National Voluntary Health Facility. The Attorney General also sought a surcharge against Maxwell Manor and McClandon for any

amount of charitable assets that had been misappropriated. Additionally, the Attorney General alleged that the individual defendants failed to maintain Maxwell Manor's registration and failed to file financial reports with the Attorney General after 1997, in violation of sections 6 and 7 of the Charitable Trust Act (760 ILCS 55/6, 7 (West 1996)). The Attorney General further sought the removal of the individual defendants as directors/trustees of Maxwell Manor.

¶ 26 On April 14, 2004 the Attorney General filed its second amended complaint, which is the operative complaint on which the motion for summary judgment was based and which we have summarized above. The second amended complaint sought injunctive relief, an accounting, appointment of a receiver, *cy pres* of charitable assets, and other equitable relief.

¶ 27 During discovery, the Attorney General propounded the following interrogatory on defendants:

> "2. Identify any and all bank accounts wherever situated that were held by, for or in the name of MAXWELL MANOR and/or into which assets of or belonging to MAXWELL MANOR were deposited between January 1, 1997 and the present, and for each such bank account, state the account number and the name of the depository bank."

¶ 28 The Attorney General also made the following requests for document production:

> "1. Any and all financial records of MAXWELL MANOR for the period of January 1, 1997 through the present, including but not limited to financial statements prepared internally and/or by outside accountants; trial balances; general ledgers; receipts and disbursements journals; check registers; bank

statements; deposit tickets; copies of deposited checks; cancelled checks (front and back); wire transfers; invoices and/or receipts for expenses paid or incurred; and payroll records, including (but not limited to) copies of all W-2 and 1099 Forms.

* * *

26. Any and all cancelled checks (front and back) and/or other documents identifying any and all payment(s) in excess of $1,000.00 made from MAXWELL MANOR to MCCLANDON or to any other officer and/or member of the board of directors of MAXWELL MANOR at any time during the period January 1, 1997 through the present, along with an explanation identifying the purpose(s) of any and all such payment(s)."

¶ 29 McClandon answered the interrogatories under oath by identifying three bank accounts held by Maxwell Manor with Chase Bank: Account Nos. 8026238, 8026246, and 1115000204574. The Attorney General then subpoenaed Chase Bank for all bank records corresponding with any accounts held by Maxwell Manor. There is no indication in the record that McClandon responded to the requests for production and McClandon did not provide any cancelled checks of any payments made by Maxwell Manor to her.

¶ 30 Pursuant to that subpoena, Chase Bank provided records for the above three bank accounts, and also provided records for a fourth undisclosed bank account, account No. 1006565699. This account was opened on February 1, 2000, with McClandon as an authorized signatory. The records for this account included a canceled check in the amount of $2 million,

signed by and made payable to McClandon, dated September 22, 2001. The word "Loan" appears to the left of McClandon's signature on the front of the check, and McClandon's endorsement was on the back. The back of the check indicated it was deposited into an account at Sun Trust Bank, Inc. No records from either this fourth account at Chase Bank or from the account at Sun Trust Bank were disclosed by McClandon during discovery.

¶ 31 The Attorney General then subpoenaed records at Sun Trust Bank in an effort to trace the $2 million. Sun Trust Bank refused to comply with the subpoena, asserting that the subpoena was not enforceable because the bank did not have any branches in Illinois.

¶ 32 On April 22, 2008, the Attorney General filed a motion for partial summary judgment on the claims against McClandon for at least $2 million, or, in the alternative, for discovery sanctions against her. The Attorney General argued that McClandon was unable to account for the $2 million in charitable assets transferred to her from Maxwell Manor's fourth account with Chase Bank. The Attorney General requested that the court surcharge McClandon and sanction her for failing to disclose the fourth bank account and the $2 million check.

¶ 33 In her response, McClandon filed an affidavit dated July 16, 2008, attesting that the $2 million check constituted repayment of loans she had personally made to Maxwell Manor between August 1990 and August 1996. McClandon claimed that Maxwell Manor's board of directors authorized her to make the transfer. In her affidavit, McClandon stated the following:

> " I did not know of any other bank account numbers Maxwell Manor owned ***. [The Board] requested that I apply the funds to pay down the loans that had been made to Maxwell Manor that were years over due. I wrote the check for that purpose and has [*sic*]

used additional funds of my own to pay Maxwell Manor legal fees ***. The Board of Directors of Maxwell Manor assigned this account over to me long before this transfer, for the purpose of paying down some of its debt. The account did not belong to Maxwell Manor at the time. I had failed to take immediate action to close the account for several reasons ***."

¶ 34 In reply, the Attorney General repeated the arguments regarding McClandon's failure to disclose the fourth bank account and the $2 million. The Attorney General further argued that legally McClandon, as a fiduciary, was presumed to have fraudulently misused the $2 million, and that she did not rebut this presumption.

¶ 35 On September 25, 2008, the circuit court entered an order granting partial summary judgment to the Attorney General and entering judgment against McClandon. The court found that, despite the notation of the word "Loan" on the check and McClandon's affidavit, there were no genuine issues of material fact that defendants, specifically McClandon, could not account for the $2 million and could not show that the $2 million was properly expended for the purposes or activities of Maxwell Manor. The Court granted the motion for partial summary judgment and also granted discovery sanctions in the form of attorneys' fees and costs.

¶ 36 The court also found that McClandon had committed discovery violations by failing to disclose the fourth bank account with Chase Bank and the $2 million check. The court found that McClandon's claim that she was unaware of the bank account was "highly suspect," especially in light of the fact that she withdrew a significant amount of money from that same account. The Attorney General had sought punitive damages and striking McClandon's answer

to the second amended complaint and entering a default judgment against her as discovery sanctions pursuant to Supreme Court Rule 219(c) (Ill. S. Ct. R. 219(c) (eff. July 1, 2002)), but the court deemed these sanctions "too drastic" and instead granted the Attorney General's motion for discovery sanctions only for its reasonable attorneys' fees and costs associated with the bringing of the motion.

¶ 37 On October 24, 2008, McClandon filed a motion to reconsider and vacate the court's order granting partial summary judgment to the State. As newly discovered evidence in support of her motion to reconsider, McClandon attached a second, more detailed affidavit on her behalf wherein she attested to the details of loans she made to Maxwell Manor in 1990 and 1991, which she claimed had gone unpaid. In this second affidavit, McClandon also reiterated that she was unaware of the fourth bank account at the time she answered the State's discovery requests. McClandon also attached as additional new evidence an affidavit from Maxwell Manor former chairperson Helen Jett, in which Jett corroborated the unpaid loans made by McClandon. Copies of the alleged loan agreements were attached to Jett's affidavit. McClandon also argued the motion to reconsider should be granted because the court misapplied the law. On February 18, 2009, the circuit court entered an order denying McClandon's motion to reconsider, finding that McClandon's new affidavit, the Jett affidavit, and the attached loan documents did not constitute newly discovered evidence because McClandon did "not give any explanation, much less a reasonable one, as to why these materials were not available prior to the first [summary judgment] hearing." The court also found it did not misapply the law in its prior ruling.

¶ 38 The original September 25, 2008 partial summary judgment order against McClandon did

not include a specific money judgment provision specifying the $2 million against McClandon, nor any amount for attorney fees and costs. On October 17, 2008, the Attorney General moved for entry of a monetary judgment pursuant to the September 25, 2008 partial summary judgment order, including its fees and costs. On September 24, 2009, the court entered a money judgment pursuant to the September 25, 2008 partial summary judgment order against McClandon in the amount of $2,026,278.70. On November 5, 2009, the Attorney General moved to also modify the original partial summary judgment order of September 25, 2008 to incorporate a provision for the accrual of interest on the judgment and to reflect that the amount entered was in two components: (1) $2,000,000 against McClandon; and (2) $26,278.70 for fees and costs. On November 23, 2009, the court entered a separate order awarding the Attorney General $26,278.70 in fees and costs associated with its motion and in discovering the fourth bank account. The court also entered a modified judgment against McClandon in the amount of $2,026,278.70 with a provision for the accrual of interest on unpaid portions of the judgment and a provision that the judgment money be deposited into the Attorney General's State Projects And Court Ordered Distribution Fund for distribution to *bona fide* Illinois charitable organizations.

¶ 39 On September 22, 2010, the State filed a second motion for summary judgment, moving for full summary judgment on all remaining claims in its second amended complaint against Maxwell Manor, McClandon, Banks, and Garrett-Williams. The State argued that, based on the defendants' answers to the second amended complaint, it was undisputed that, after 1997, the individual defendants failed to maintain Maxwell Manor's registration or file financial reports with the Attorney General, as required by sections 6 and 7 of the Act (760 ILCS 55/6, 7 (West

1996)). The Attorney General requested an order confirming and restating the $2 million judgment and the $26,278.70 fees and costs discovery sanction against McClandon and summary judgment against all defendants as to the equitable relief requested in counts I, II, III and IV. The Attorney General requested that, pursuant to section 5(c) of the Act (760 ILCS 55/5(c) (West 2010)), all of the individual defendants be removed as trustees of Maxwell Manor and that Maxwell Manor should be dissolved and its remaining assets distributed pursuant to the doctrines of equitable deviation and/or *cy pres*.

¶ 40 Defendants responded that the individual defendants were not "trustees" under the meaning of the Act and were therefore not subject to the Act's requirements, including filing annual financial reports on behalf of Maxwell Manor after 1997. In the alternative, defendants argued that if they were considered trustees they could not be removed as trustees without an evidentiary hearing. Defendants also maintained there was no evidence that McClandon had misappropriated $2 million, and attached a third affidavit by McClandon, detailing Maxwell Manor's entire history, years of financial trouble, and unpaid loans owed to McClandon.

¶ 41 On August 19, 2011, the circuit court granted full summary judgment to the Attorney General on all its remaining claims against defendants. The court found that the individual defendants were trustees and that there was no dispute of fact regarding whether the individual defendants violated sections 6 and 7 of the Act by failing to maintain Maxwell Manor's registration and failing to file annual financial reports with the Attorney General. The court ruled that section 16(b) requires only a "hearing," and not an evidentiary hearing and that equitable relief under section 5(c) of the Act does not require any hearing. The court declined to

reconsider its grant of summary judgment concerning the misappropriation of $2 million from Maxwell Manor by McClandon.

¶ 42 The court specifically found that defendants were trustees and that defendants breached their fiduciary duties as follows:

> "Maxwell Manor joined with the private partnership BMJ partners in 1998 in a conjoined $13 million sale of the assets which both owned to an outside purchaser, via a purchase-and-sale contract which was executed by McClandon on behalf of and in the name of both BMJ and McClandon. Moreover, in September 2001 McClandon negotiated a check by which she transferred $2 million in cash from Maxwell Manor's bank account to herself.
>
> *** Given the admissions that Defendants were directors, that Defendants handled the assets of Maxwell Manor, and that Maxwell Manor had net assets, the Defendants therefore were charitable trustees within the meaning of section 3 of the Act and at common law. [Citation omitted.]
>
> *** Moreover, at all relevant time[s] Maxwell Manor was a not-for-profit corporation with exclusively charitable purposes. Therefore, Defendants were under an obligation to meet their fiduciary duties."

¶ 43 The court also entered summary judgment on the Attorney General's common-law claim for an accounting. The Attorney General's prayer for relief in this second summary judgment motion made no mention of accounting for the remainder of the $13 million that the Attorney General previously alleged as believed to be the amount of Maxwell Manor's assets. The court's

order granting full summary judgment did not enter judgment on the alleged $13 million claimed by the State, and did not enter judgment in any monetary amount on any of the remaining claims against the other defendants, Maxwell Manor, Banks, and Garrett-Williams.

¶ 44 The court entered a final, appealable judgment on October 11, 2011, confirming the final judgment in the total amount of $2,026,278.70 in the partial summary judgment against McClandon, providing that the amount recovered on the $2 million judgment shall be deposited into the Attorney General's State Projects And Court Ordered Distribution Fund for distribution to *bona fide* Illinois charitable organizations. The judgment order removed McClandon, Banks, and Garrett-Williams as officers and directors and permanently enjoined them from acting as officers and directors. The court further permanently enjoined Maxwell Manor from acting as a charitable trustee and dissolved Maxwell Manor. Finally, the court ordered that Maxwell Manor's remaining assets be equitably distributed pursuant to the *cy pres* doctrine. The court did not order an accounting and did not enter any further judgment for a surcharge against defendants for any misappropriation of the remaining money sought by the Attorney General (up to $13 million). Defendants timely appealed.

¶ 45 ANALYSIS

¶ 46 Some background of the Charitable Trust Act and of each of the claims under the Charitable Trust Act brought in this case is helpful. Generally, the Attorney General is responsible for ensuring that "charitable assets are properly devoted to their governing charitable purposes." *Buntrock v. Terra*, 348 Ill. App. 3d 875, 887 (2004). The Act requires trustees to maintain registration and file annual financial reports with the Attorney General, so he or she is

aware of the existence and financial conditions of the various charitable organizations. 760 ILCS 55/6, 7 (West 2010). "The purpose of the Act [is] to assist the Attorney General in carrying out [his or her] common law powers and duties to enforce charitable trusts and to assure that their funds [are] applied to their intended charitable use." *In re Estate of Stern*, 240 Ill. App. 3d 834, 837 (1992).

¶ 47 There is a relative dearth of precedent interpreting the provisions of the Illinois Charitable Trust Act. However, the plain language of each provision of the Act underlying each cause of claim is clear.

¶ 48 Section 6 requires that every trustee of a charitable organization maintain registration for the organization with the Attorney General. 760 ILCS 55/6 (West 1996).

¶ 49 Section 7(a) requires that "in addition to filing copies of the instruments previously required" (by reference including the requirement of filing registration in section 5), every trustee must also file annual written reports with the Attorney General. 760 ILCS 55/7(a) (West 1996).

¶ 50 Section 5(c) of the Act provides for the following relief for a violation of either section 6 or section 7 as follows:

> "(c) If a person or trustee fails to register or maintain registration of a trust or organization as provided in this Section, the person or trustee is subject to injunction, to removal, to account, and to appropriate other relief before a court of competent jurisdiction exercising chancery jurisdiction." 760 ILCS 55/5 (West 1996).

¶ 51 The remedy for "wilfully" failing to comply with section 7 is found within section 7, and

it is to cancel the organization's registration and distribute its assets:

"(g) The Attorney General shall cancel the registration of any trust or organization that wilfully fails to comply with subsections (a), (b), (c) or (d) of this Section within the time prescribed, and the assets of the organization may through court proceedings be collected, debts paid and proceeds distributed under court supervision to other charitable purposes upon an action filed by the Attorney General as law and equity allow." 760 ILCS 55/7(g) (West 1996).

¶ 52 Section 15 sets forth a charitable organization trustee's fiduciary duties as follows:

"§ 15. (a) Charitable trustees are subject to certain duties otherwise defined in Illinois statutes and case law, which include but are not limited to the following:

(1) To avoid 'self-dealing' and conflicts of interest;

(2) To avoid wasting charitable assets;

(3) To avoid incurring penalties, fines, and unnecessary taxes;

(4) To adhere and conform the charitable organization to its charitable purpose;

(5) To not make non-program loans, gifts, or advances to any person, except as allowed by the General Not For Profit Corporation Act of 1986 [805 ILCS 105/101.01 *et seq*.];

(6) To utilize the trust in conformity with its purposes for the best interest of the beneficiaries;

(7) To timely file registration and financial reports required by this Act; and

(8) To comply and to cause the charitable organization to comply with this Act

and, if incorporated, the General Not For Profit Corporation Act of 1986 [805 ILCS 105/101.01 *et seq*.].

(b) Every person subject to this Act shall maintain accurate and detailed books and records at the principal office of the organization to provide the information required in this Act. All books and records shall be open for inspection at all reasonable times by the Attorney General or his authorized representative." 760 ILCS 55/15 (West 1996).

¶ 53 Section 16 provides:

"§ 16. (a) Any person who, intentionally and in breach of fiduciary duty with malice, misuses charitable assets is subject to punitive damages in an appropriate amount upon a trial on the issue.

(b) Upon an application to the chancery division of the circuit court in which the Attorney General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and injunctive relief and removal of the trustees is sought, the Court shall exercise its discretion as the equities require and may, as part of the injunctive relief, and after a hearing where the trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest." 760 ILCS 55/16 (West 1996).

¶ 54 Finally, section 17 provides the following:

> "Any trustee who with malice and without lawful authority, in violation of the trust purposes or by intentional breach of fiduciary duty, intentionally disburses or causes charitable trust funds to be used for his personal benefit or personal use in an amount in excess of $ 1,000 within a 5 year period is guilty of a Class 2 felony and is subject to punitive damages up to or equal to the amount misused and is subject to a civil penalty of up to $ 50,000 for each intentional knowing violation." 760 ILCS 55/17 (West 1996).

¶ 55 I. Count I

¶ 56 A. Summary Judgment on Claims (1) through (3)
Against Defendants Maxwell Manor and McClandon

¶ 57 As noted above, count I actually alleges five separate claims: (1) a violation of by both Maxwell Manor and McClandon of section 6, which requires that a charitable organization maintain registration; (2) a violation of section 7 by both Maxwell Manor and McClandon requiring annual reports; (3) a violation of fiduciary duties under section 15 by both Maxwell Manor and McClandon ; (4) a violation of section 16 by McClandon for intentional misuse of charitable funds; and (5) a violation of section 17 by McClandon for intentional breach of fiduciary duty in using charitable funds for one's own benefit, with malice.

¶ 58 We hold the court appropriately granted summary judgment against defendants Maxwell Manor and McClandon and in favor of the Attorney General for the causes of action for violations of sections 6, 7 and 15 under the Act (count I, claims (1), (2), and (3)). There is no genuine dispute of material fact that defendants failed to maintain the registration and file annual

reports for Maxwell Manor. In failing to maintain registration and file annual reports, they also breached their fiduciary duties under section 15 of the Act. Defendants offered no controverting evidence to dispute that such failure was not willful. Accordingly, we affirm the grant of summary judgment on the claims for violations of sections 6 and 7 of the Charitable Trust Act and also, based on these violations, section 15.

¶ 59 B. Motion for Partial Summary Judgment for $2 million Against McClandon and Attorneys' Fees and Costs

¶ 60 The court granted partial summary against McClandon for $2 million on the claims alleged against her for violations of sections 15, 16 and 17 of the Act (count I, claims (3), (4) and (5)), based on McClandon's misappropriation of $2 million. Section 15 is for breach of fiduciary duties, including the duty to avoid self-dealing, file financial reports, maintain accurate and detailed books and records, and avoid wasting charitable assets. 760 ILCS 55/15 (West 1996). " ' "A trustee owes a fiduciary duty to the 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 good faith." ' " (Citations omitted.) *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1009 (2010). Section 16 is for misuse of charitable assets, intentionally and in breach of fiduciary duty with malice. 760 ILCS 55/16 (West 1996). Section 17 is for an intentional breach of fiduciary duty in intentionally disbursing charitable funds to be used for one's personal benefit in an amount over $1,000, with malice and without lawful authority. 760 ILCS 55/17 (West 1996).

¶ 61 We must determine whether this grant of partial summary judgment was appropriate given the evidence before the court at the time the court ruled. "The scope of appellate review of

a summary judgment motion is limited to the record as it existed at the time the trial court ruled." *McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 947 (1993) (" 'upon appellate review of a summary judgment ruling the appellant may only refer to the record as it existed at the time the trial court ruled, outline the arguments made at that time, and explain why the trial court erred in granting summary judgment' ") (quoting *Rayner Covering Systems, Inc. v. Danvers Farmers Elevator Co*., 226 Ill. App. 3d 507, 509-10 (1992). See also *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 42 (scope of the appellate court's review "is limited to the record as it existed when the circuit court ruled on the summary judgment"). Accordingly, we review only the evidence in the record at the time of the first summary judgment motion in determining whether the initial partial grant of summary against McClandon was proper.

¶ 62 Regarding count I, claim (3) as to McClandon, at the time of the court's ruling granting partial summary judgment, the evidence opposing summary judgment consisted only of McClandon's affidavit, and the $2 million check with the notation, "Loan." We find this evidence failed to create a genuine issue of material fact and the grant of partial summary judgment against McClandon for the amount of $2 million was appropriate.

¶ 63 The court found as follows:

> "The only evidence Defendants offer to support the proposition that the $2 million dollar check was a loan is a copy of the actual check which states 'LOAN' in the 'For' line on the front of the check. This does not given [*sic*] any direction with respect to the actual purpose of the $2 million dollar check. There are numerous questions as to what type of

loan the language on the front of the check might be referencing, such as: whether $2 million clears the balance of an existing loan; perhaps it is a loan to McClandon and not repayment; is it a loan for someone else, etc. Other than the check and McClandon's own statement, Defendants have offered no further evidence that would aid in instructing this Court on the purpose of the $2 million check or what was actually done with the funds after their withdrawal.

* * *

Defendants have not offered any evidence related to specific transactions to which the $2 million could be related, McClandon's statement that it was repayment for money she had lent over the years is not enough; there is no evidence of when she lent these funds, how much she lent each time, how many loans did the $2 million actually repay, etc."

¶ 64 Defendants argue that the grant of partial summary judgment under sections 15, 16 and 17 of the Act against McClandon in the amount of $2 million based on the $2 million check was error because there are genuine issues of material fact as the check itself bore the notation "Loan" and McClandon attested in her affidavit that the check to her was repayment for personal loans she made to Maxwell Manor. The Attorney General argues that summary judgment on these claims was appropriate because there was no genuine issue of material fact that McClandon could not account for the $2 million and that her affidavit did not create any genuine issue of material fact. Defendants also argue that further evidence regarding the loans was supplied after the grant of summary judgment in their motion for reconsideration, in the Jett affidavit and

supporting copies of loan documents.

¶ 65 Illinois Supreme Court Rule 191(a) governs affidavits in summary judgment motions and provides that "[a]ffidavits in support of and in opposition to a motion for summary judgment *** shall not consist of conclusions but of facts admissible in evidence." Ill. S. Ct. R. 191(a) (eff. July 1, 2002). "[S]ummary judgment affidavits must contain not conclusions but only evidentiary facts to which the affiant is capable of testifying." *Gassner v. Raynor Mfg. Co.*, 409 Ill. App. 3d 995, 1005 (2011) (citing *Jones v. Dettro*, 308 Ill. App. 3d 494, 499 (1999), citing Ill. S. Ct. R. 191(a) (eff. Aug.1, 1992)). " 'The mere suggestion that a genuine issue of material fact exists without supporting documentation does not create an issue of material fact precluding summary judgment.' " *In re Marriage of Heroy*, 385 Ill. App. 3d 640, 669 (2008) (quoting *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 568 (1995)). "Unsupported assertions, opinions, and self-serving or conclusory statements do not comply with the rule governing summary judgment affidavits." *Gassner*, 409 Ill. App. 3d at 1005 (citing *Jones*, 308 Ill. App. 3d at 499).

¶ 66 In a summary judgment case involving a similarly conclusory affidavit, *Hagar v. State Farm Fire & Casualty Co.*, 154 Ill. App. 3d 689, 692 (1987), the appellate court held that the "bald statement" in an affidavit that a sum of money was due was too conclusory to be entitled to consideration in support of a motion for summary judgment. *Hagar*, 154 Ill. App. 3d at 692. Plaintiff appealed a summary judgment in favor of defendant, State Farm Fire & Casualty Company (State Farm), in her suit requesting payment of additional compensation for a loss covered by a fire insurance policy issued by State Farm covering a building owned by her. In its answer, State Farm affirmatively stated that it had paid plaintiff all sums due under the policy

Hagar, 154 Ill. App. 3d at 689. State Farm filed a motion for summary judgment supported by an affidavit of one of its agents attaching and proof of loss document. A proof of loss document was attached to the affidavit of State Farm's claims superintendent. *Hagar*, 154 Ill. App. 3d at 690. Another affidavit of a State Farm agent averred the amount of final payment and attached a copy of a check. *Hagar*, 154 Ill. App. 3d at 691. The proof of loss document, however, did not remove genuine issues of material fact because it contained no language whereby plaintiff released State Farm or agreed to do so upon the payment of the additional sum of money and thus did not operate as a release of any future amounts owed. *Id*. *Hagar*, 154 Ill. App. 3d at 691-92. The court also held that the State Farm agent's affidavit with the check attached regarding the money due was too conclusory. *Hagar*, 154 Ill. App. 3d at 692. The court held: "We find nothing in Hancock's affidavit indicating any calculation of the amount due under the policy other than his bald statement that the sum of $34,836 was due. That statement would be too conclusionary to be entitled to consideration in support of a motion for summary judgment." *Hagar*, 154 Ill. App. 3d at 692 (citing 87 Ill. 2d R. 191(a)). Thus, the grant of summary judgment in State Farm's favor based on this affidavit was improper and reversed.

¶ 67 Similarly, McClandon's affidavit made a claim of an amount owed to her, allegedly as repayment for loans, and attached a check. Also similarly, the affidavit is only a "bald statement" that the $2 million check was the repayment to McClandon of various unidentified and undocumented loans made by her to Maxwell Manor. As such, McClandon's affidavit was too conclusory to be entitled to consideration in support of her opposition to the Attorney General's motion for summary judgment.

¶ 68 McClandon failed to show a genuine issue of material fact regarding her breach of fiduciary duty regarding the $2 million check (count I, claim (3)). McClandon's own self-serving conclusory statements in her affidavit do not comply with Rule 191(a) governing summary judgment affidavits. We hold the court appropriately granted partial summary judgment against defendant McClandon on count I, claim (3) for breach of her fiduciary duty. We affirm the grant of partial summary judgment for the $2 million against defendant McClandon.

¶ 69 Defendants also argue it was error for the circuit court to deny their motion for reconsideration based on the "new evidence" consisting of the Jett affidavit and copies of loan documents. A trial court's decision on a motion to reconsider an order will not be disturbed absent abuse of discretion. *Woolums v. Huss*, 323 Ill. App. 3d 628, 639 (2001). The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available at the time of the first hearing, changes in the law, or errors in the court's previous applications of existing law. *Gardner v. Navistar International Transportation Corp.*, 213 Ill. App. 3d 242, 248 (1991). Submission of new matter on a motion to reconsider summary judgment lies in the discretion of the trial court and should not be allowed absent a reasonable explanation of why it was not available at the time of the original hearing. *Delgatto v. Brandon Associates, Ltd*., 131 Ill. 2d 183, 195 (1989). Defendants provided no excuse for their delay in obtaining this evidence in response to the motion for partial summary judgment. This alone warranted rejection of the motion for reconsideration.

¶ 70 Nor do we believe consideration of this "newly discovered" evidence would have changed the outcome. The existence of loan documents, standing alone, is insufficient to rebut

the presumption that the $2 million paid to McClandon and deposited by her into her own account violated her fiduciary duties to Maxwell Manor and constituted self-dealing. Even a cursory examination of the loan documents reveals that they do not add up to $2 million. Furthermore, defendants produced no records – as they were required to maintain under the Act – showing that Maxwell Manor actually received the proceeds of the loans, how those proceeds were applied, and how they were repaid. In the absence of the required records, the trial court could conclude, as it did, that the State was entitled to summary judgment with respect to this payment. Partial summary judgment was properly granted against defendant McClandon.

¶ 71 We also hold the court appropriately granted summary judgment against defendant McClandon for a violation of section 16 and removal as trustee under the Act (count I, claim (4)) even though it did not hold an evidentiary hearing. The court found that an evidentiary hearing was not required for an action under section 16:

> "[S]ection 16(b) does not state that an evidentiary hearing is required; only a hearing is required. Had the legislature wanted to mandate an evidentiary hearing, it could have easily done so. As the language of the statute only requires a hearing wherein the trustees have an opportunity to be heard, an evidentiary hearing is not required."

¶ 72 Section 16(b) provides:

> "(b) Upon an application to the chancery division of the circuit court in which the Attorney General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and injunctive relief and removal of the trustees is sought, the Court shall

> exercise its discretion as the equities require and may, as part of the injunctive relief, and after a hearing where the trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest." 760 ILCS 55/16(b) (West 1996).

¶ 73 McClandon had the opportunity to be heard on the motion for summary judgment. In this case, it was undisputed that McClandon failed to file annual reports, maintain registration, and also breached her fiduciary duty regarding the $2 million check to herself. The Act does not specifically require an evidentiary hearing, and holding such a hearing when the breach of fiduciary duty was undisputed was unnecessary. See *Russell v. SNFA*, 2011 IL App (1st) 093012, ¶ 27 (holding there was no need for an evidentiary hearing where the facts relied on by the court in finding specific personal jurisdiction were not contested by defendant); *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 567-58 (1995) ("Where there are sufficient, uncontroverted, admitted facts before a court of review warranting the vacation of a judgment for dissolution, it is 'senseless' to remand the matter to the trial court for an evidentiary hearing."); *In re Marriage of Frazier*, 203 Ill. App. 3d 847, 854 (1990) (same). We affirm the grant of summary judgment on the claim under section 16 of the Charitable Trust Act.

¶ 74 The circuit court also appropriately granted summary judgment against McClandon on the claim for a violation of section 17 of the Act (count I, claim (5)). The claim against McClandon

for a violation of section 17 of the Act was also based on the allegations concerning the $2 million check. Section 17 provides:

> "Any trustee who with malice and without lawful authority, in violation of the trust purposes or by intentional breach of fiduciary duty, intentionally disburses or causes charitable trust funds to be used for his personal benefit or personal use in an amount in excess of $1,000 within a 5 year period is guilty of a Class 2 felony and is subject to punitive damages up to or equal to the amount misused and is subject to a civil penalty of up to $50,000 for each intentional knowing violation." 760 ILCS 55/17 (West 1996).

¶ 75 The $2 million-dollar judgment against McClandon was for repayment of the amount misappropriated by her in violation of sections 16 and 17. The court did not award any punitive damages. In any event, "a prayer for punitive damages is not, itself, a cause of action. Punitive damages are merely a type of remedy." *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill. 2d 495, 504 (2011). The undisputed facts established that McClandon intentionally disbursed or caused charitable trust funds to be used for her personal benefit or personal use with malice and without lawful authority, in violation of the trust purposes or by intentional breach of fiduciary duty, in violation of section 17. We affirm the grant summary judgment on the claim for a violation of section 17 against McClandon.

¶ 76 We also affirm the award of the Attorney General's attorney fees and costs in bringing the motion for partial summary judgment against defendant McClandon as a discovery sanction pursuant to Supreme Court Rule 219(c) (Ill. S. Ct. R. 219(c) (eff. July 1, 2002)). Rule 219(c) provides that, in addition to the other remedies provided therein, "the court, upon motion or upon

its own initiative, may impose upon the offending party or his or her attorney, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred as a result of the misconduct, including a reasonable attorney fee, and when the misconduct is wilful, a monetary penalty." Ill. S. Ct. R. 219(c) (eff. July 1, 2002). "Rule 219 clearly envisions a sanction of a reasonable attorney fee and expenses." *New v. Pace Suburban Bus Service*, 398 Ill. App. 3d 371, 387 (2010). "The only restriction imposed by Rule 219(c) is that the award of attorney fees must be related to misconduct arising from failure to comply with procedural rules relating to discovery." *Jordan v. Bangloria*, 2011 IL App (1st) 103506, ¶ 19. "The imposition of sanctions against a party for noncompliance with discovery rules is a matter within the broad discretion of the trial court. It is a needed tool for the trial court for case management. We will not disturb the trial court's exercise of its discretion unless an abuse is apparent." (Internal citations omitted.) *Reyes v. Menard, Inc*., 2012 IL App (1st) 112555, ¶ 22 (2012). We readily find that the court in this case did not abuse its discretion in imposing the award of attorney fees and costs as a sanction for defendant McClandon's clear discovery violation in failing to disclose the fourth Chase account, which necessitated the Attorney General's needless expenditure to discover that account and its ensuing motion for partial summary judgment based on the $2 million in that undisclosed account that McClandon failed to account for.

¶ 77 II. Count II

¶ 78 The circuit court's order of August 19, 2011, granted summary judgment on all counts in the Attorney General's second amended complaint, including count II, which alleged that the

defendants' failure to file annual reports was "willful." The Attorney General requested that the court dissolve Maxwell Manor and collect and distribute its proceeds pursuant to *cy pres* to other charitable purposes.

¶ 79 The remedy for "wilfully" failing to comply with section 7 is found within section 7, which is to cancel the organization's registration, and the court may additionally distribute its assets:

> "(g) The Attorney General shall *cancel the registration* of any trust or organization that *wilfully* fails to comply with subsections (a), (b), (c) or (d) of this Section within the time prescribed, and *the assets of the organization may through court proceedings be collected*, debts paid *and proceeds distributed under court supervision to other charitable purposes* upon an action filed by the Attorney General as law and equity allow." (Emphasis added.) 760 ILCS 55/7(g) (West 1996).

¶ 80 We find that there was no genuine issue of material fact regarding the allegations in count II. Thus, we also affirm the grant of summary judgment in favor of the Attorney General on count II.

¶ 81 III. Count III

¶ 82 Count III alleges unfitness of charitable trustees based on the failure to exercise necessary fiduciary oversight, alleged against defendants Banks and Garrett-Williams. Count III alleged that Banks and Garrett-Williams also failed to maintain Maxwell Manor's registration and failed to cause accountings and annual reports to be filed with the Attorney General for 1990, 1999, 2000, 2001, and 2003. Count III also alleged that Banks and Garrett-Williams, as officers and/or

directors of Maxwell Manor, failed to prevent Maxwell Manor from commingling its claim of entitlement in circuit court jointly and without separate legal representation from BMJ, a private for-profit entity partially owned by defendant McClandon, for release of $1,367,022.40 of escrowed funds to Maxwell Manor in the chancery action (No. 01 CH 2410) and without reporting or accounting to the Attorney General. Count III further alleged the above constituted a breach of Banks' and Garrett-Williams' fiduciary duties. The allegations constitute claims for violations of section 6 (failure to maintain registration), section 7 (failure to file annual reports), and section 15 (fiduciary duties).

¶ 83 As defendants did not offer any evidence in opposition to these allegations, they are undisputed. There is no genuine issue of material fact that defendants Banks and Garrett-Williams indeed failed: (1) to maintain Maxwell Manor's registration; (2) to file accountings and annual reports; (3) to prevent the commingling of assets; and (4) to account to the Attorney General in connection with the sale of Maxwell Manor. The grant of summary judgment on the claims against defendants Banks and Garrett-Williams based on violations of sections 6, 7, and 15, is affirmed.

¶ 84 IV. Count IV

¶ 85 A. Summary Judgment on Count IV for Common-Law Accounting and Equitable Surcharge

¶ 86 Count IV is a separate count for accounting, equitable surcharge and removal of trustees, the same relief requested in the other counts, and is based on the same allegations as in count I, but brought under the common law. The circuit court granted summary judgment to the Attorney

General on the entire second amended complaint, which included its common-law accounting cause of action and request for an equitable surcharge in count IV. We determine the court appropriately granted summary judgment in favor of the Attorney General on this claim.

¶ 87 In order to state a common-law cause of action for an accounting,"the complaint must establish that there is no adequate remedy at law and one of the following: (1) a breach of a fiduciary relationship between the parties; (2) a need for discovery; (3) fraud; or (4) the existence of mutual accounts which are of a complex nature." (Internal quotation marks omitted.) *Landers v. Fronczek*, 177 Ill. App. 3d 240, 245 (1988). See also *Newton v. Aitken*, 260 Ill. App. 3d 717, 722 (1994) ("Generally, to obtain an accounting, a plaintiff must establish the existence of a fiduciary relationship between her and the person required to account, a need for discovery, and the existence of mutual accounts which are of a complex nature."). "The right to an accounting is not an absolute right, but one which should be accorded only on equitable principles." *Tarin v. Pellonari*, 253 Ill. App. 3d 542, 555 (1993) (citing *Netisingha v. End of the Line, Inc.*, 107 Ill. App. 3d 275, 278 (1982), and *Nieberding v. Phoenix Manufacturing Co.*, 31 Ill. App. 2d 350, 356 (1961)). "There are no guidelines for determining when an accounting is warranted because the need for such relief is dependent upon the particular facts of each case." *Tarin*, 253 Ill. App. 3d at 555 (citing *Agrimerica, Inc. v. Mathes*, 199 Ill. App. 3d 435, 452 (1990), and *Ferrara v. Collins*, 119 Ill. App. 3d 819, 822 (1983)). We affirm the grant of summary judgment on the count IV claim for an accounting. There remained no genuine issue of material fact in this case regarding the elements for an accounting that there was (1) a breach of fiduciary duties; (2) a need for discovery; (3) fraud; or (4) the existence of mutual accounts which were of a complex

nature.

¶ 88 Here, however, the court's summary judgment order did not also specifically order that an accounting be held. The court entered judgment in the specific monetary amount of $2 million, plus fees and costs of $26,278.70, against McClandon. The Attorney General's summary judgment motion made no mention of an accounting for the remainder of the $13 million that the Attorney General previously alleged as believed to be the amount of Maxwell Manor's assets. The court's summary judgment order simply ordered that the $2 million judgment against McClandon be deposited into the Attorney General's fund and distributed pursuant to *cy pres* to other *bona fide* Illinois charitable organizations, and dissolved Maxwell Manor. The court did not order an accounting and did not enter any further judgment for a surcharge against defendants for any misappropriation of the remaining money sought by the Attorney General (up to $13 million). The Attorney General did not ask for the relief of an accounting in its motion for summary judgment and, after summary judgment was entered, did not request that the circuit court enter an order specifically ordering that an accounting be held, apparently satisfied with the outcome of the summary judgment order. Yet, the court granted summary judgment on the Attorney General's motion on the entire complaint, including the count IV claim for an accounting without ordering an accounting. The parties do not address this inconsistency on appeal.

¶ 89 We find that the circuit court's summary judgment order regarding the disposition of Maxwell Manor's assets pursuant to *cy pres* was appropriate. *Cy pres* applies to property given in trust to be applied to a particular charitable purpose which has become impossible,

impracticable, or illegal to carry out; in such a case, the court will direct the application of the property to some charitable purpose falling within the general purpose of the charity. *Firemen's Annuity & Benefit Fund of the City of Chicago v. Municipal Employees', Officers', and Officials' Annuity and Benefit Fund of Chicago*, 219 Ill. App. 3d 707, 712 (1991) (citing *City of Aurora ex rel. Egan v. YMCA*, 9 Ill. 2d 286, 294 (1956)). *Cy pres* may be applied in cases involving a charitable beneficiary where the charity no longer exists, and where the settlor evidenced a general charitable intent. In such a case the court will award the gift to the charity which would most closely achieve the settlor's intent. *First National Bank v. Canton Council of Campfire Girls, Inc*., 85 Ill. 2d 507, 513 (1981). Here, Maxwell Manor was specifically formed with a general charitable intent and no longer exists as an entity, making it impossible to carry out the charitable intent. Further, the court's order dissolved Maxwell Manor and Maxwell Manor no longer exists. Thus, ordering disbursement of any remaining assets pursuant to the *cy pres* doctrine was appropriate.

¶ 90 We clarify that although the court ordered the disbursement of Maxwell Manor's assets pursuant to *cy pres* and did not also order an accounting, there is no genuine issue of material fact that the facts of this case established a need for an accounting, and the Attorney General may wish in the future to pursue its right to an accounting. We therefore affirm the grant of summary judgment on the common law claim for an accounting and equitable surcharge.

¶ 91 B. Summary Judgment on Removal of Trustees

¶ 92 The Attorney General sought removal of the trustees not only under section 16(b) of the Illinois Charitable Trust Act, but also in count IV under the common law. As trustees of a

charitable organization, defendants are within the purview of the Act. Section 16(b) specifically provides:

> "(b) Upon an application to the chancery division of the circuit court in which the Attorney General alleges that a charitable trust needs to be protected or the trustees of a charitable organization or trust have engaged in a breach of fiduciary duty toward the organization, and injunctive relief and removal of the trustees is sought, the Court shall exercise its discretion as the equities require and may, as part of the injunctive relief, and after a hearing where the trustees shall have an opportunity to be heard, appoint temporarily or permanently a receiver or additional trustees to protect and operate the organization and may temporarily, or as ultimate relief for breach of duty or to protect the trust, permanently remove any charitable organization's trustees, corporate officers, directors and members from office and appoint replacements to protect the public interest." 760 ILCS 55/16(b) (West 1996).

¶ 93 " ' "The well-established rule * * * is that where a statute gives a new remedy and contains no negative, express or implied, of the remedy which previously existed, the new remedy is to be regarded as cumulative and not exclusive and a party may elect as between the two." [Citations].' " *Eads v. Heritage Enterprises, Inc.*, 325 Ill. App. 3d 129, 137-38 (2001) (*quoting Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 365 (1986)). The Act states that it "applies to any and all trustees, as defined in Section 3 [760 ILCS 55/3], holding property of a value in excess of $ 4,000," and does not contain any exclusive remedy provision. 760 ILCS 55/2 (West 1996).

¶ 94 Here the Attorney General specifically applied to the chancery division of the circuit court to remove the trustees of Maxwell Manor, and the court indeed removed the trustees under section 16(b) of the Illinois Charitable Trust Act. 760 ILCS 55/16(b) (West 1996). The Attorney General obtained relief under section 16(b). Because the Attorney General elected to proceed under section 16(b) and the common law claim in count IV for the same relief is cumulative, we vacate the award of summary judgment on that count.

¶ 95 CONCLUSION

¶ 96 We affirm the grant of summary judgment on count I against defendants Maxwell Manor and McClandon based on sections 6, 7, and 15 of the Illinois Charitable Trust Act (count I, claims (1), (2) and (3)). There is no dispute that defendants failed to maintain the registration and file annual reports as required under the Act.

¶ 97 We affirm the grant of partial summary judgment on count I on the claims against defendant McClandon in the amount of $2 million brought under sections 15, 16 and 17 of the Act (count I, claims (3), (4) and (5)). The conclusory and self-serving affidavit offered by McClandon in opposition to summary judgment was insufficient under Illinois Supreme Court Rule 191(a) and did not create any material issue of genuine fact.

¶ 98 We affirm the grant of summary judgment on count II, as there is no genuine dispute of material fact regarding the allegations therein that defendants' violations of the Act in failing to file annual reports was willful.

¶ 99 We affirm the grant of summary judgment on count III against defendants Banks and Garrett-Williams for claims for violations of section 6, section 7, and sections 15(a)(7) and

15(a)(8) of the Act. Defendants offered no evidence to dispute that they indeed failed to maintain the registration and file annual reports, thereby also violating these fiduciary duties under section 15.

¶ 100 We affirm the summary judgment granted on the count IV claim for an accounting and also the portion of the court's summary judgment order ordering Maxwell Manor's remaining assets (currently unknown) to be deposited in the Attorney General's State Projects And Court Ordered Distribution Fund and distributed to other Illinois *bona fide* charities. The State can pursue its right to an accounting if it chooses to.

¶ 101 We vacate the grant of summary judgment on count IV based on the common-law claim for removal of trustees, as the Attorney General sought removal of charitable organization trustees by seeking relief under section 16(b) of the Illinois Charitable Trust Act (760 ILCS 55/16(b) (West 1996)), and the court did so under the Act.

¶ 102 Affirmed in part; vacated in part.