2012 IL App (1st) 113326-U

SECOND DIVISION
August 14, 2012

No. 1-11-3326

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE ESTATE OF: JOHN JOSEPH BARRETT, Deceased, _____ ELIZABETH BARRETT SWEENEY, as Administrator of the Estate of JOHN JOSEPH BARRETT, Deceased. Plaintiff-Appellant, v. STEVEN LEVIT, individually and as a partner of Levit & Lipshutz, and LEVIT & LIPSHUTZ, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 08 P 5175 Honorable Thomas Allen, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

O R D E R

¶ 1 ***Held*:** Section 2-615 dismissal of plaintiff's complaint for failure to state a cause of action for legal malpractice was proper where plaintiff's complaint failed to sufficiently plead breach of duty by attorney.

¶ 2 This appeal was brought by Elizabeth Sweeney (plaintiff), the executor of the estate of John Joseph Barrett, deceased (decedent). The appeal is from an order entered by the circuit court, dismissing plaintiff's complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)), for failing to state a cause of action. Plaintiff now appeals, alleging that she properly stated a cause of action for legal malpractice. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 26, 2007, attorney Steven Levit, a partner at Levit & Lipshutz, drafted the "power of attorney for property" on behalf of the decedent. The decedent signed and dated the document, naming Michael Peterson as the holder of the power of attorney.

¶ 5 Paragraph 3 of the document states in pertinent part:

> "My agent shall have the power to make gifts, execute contracts, deeds, notes, mortgages, trust deeds, affidavits, bills of sale and other instruments and to endorse and negotiate checks giving and granting unto said agents full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as he might or could do if personally present, at the doing thereof, with full power of substitution and revocation, hereby ratifying and confirming that said agents, said attorney or his substitute shall lawfully do or cause to be done by virtue hereof."

¶ 6 Sometime thereafter, the decedent's mental and physical health deteriorated.

¶ 7 On July 2, 2008, Peterson met with attorney Levit to discuss decedent's matters, including the power of attorney document. After the meeting, on July 3, 2008, Levit wrote a letter to Peterson, in which he stated in pertinent part:

> "As you know, [the decedent] did execute a Power of Attorney for property, naming you as his agent. He granted you broad powers in the Power of Attorney for property, including the power to make gifts. However, as I indicated to you, be very careful in exercising your powers, especially the power to make gifts, since they could be subject to scrutiny."

¶ 8 Thereafter, Peterson allegedly made gifts to himself and his family, in amounts totaling approximately $111,000, prior to decedent's death on July 8, 2008.

¶ 9 On January 31, 2011, plaintiff filed an amended complaint naming Levit and his law firm, Levit & Lipshutz, as defendants. In her complaint, plaintiff alleged that upon information and belief, Peterson asked Levit about making gifts to himself and to his family from the decedent's funds that he controlled. Plaintiff alleged that Levit had a duty during that meeting to properly advise Peterson on the limits of the power of attorney and to advise Peterson that his fiduciary duty prevented Peterson from making self-serving gifts. Plaintiff alleged that the power of attorney did not provide for self-serving gifts, and that Levit's advice merely cautioning Peterson about making self-serving gifts, rather than telling him it was prohibited, caused Peterson to make self-serving gifts. Plaintiff also claimed in her complaint that Levit negligently failed to advise the decedent's financial institutions and family members of Peterson's plan to make gifts,

in violation of Rule 1.14 of the Rules of Professional Conduct.

¶ 10 Defendants filed a section 2-615 motion to dismiss plaintiff's complaint, stating that plaintiff failed to allege facts to support a claim for legal malpractice because the power of attorney specifically authorized Peterson to make gifts, and because defendants' advice to Peterson was consistent with the power of attorney and Illinois law.

¶ 11 On June 14, 2011, following briefing and oral argument on defendants' motion to dismiss, the trial court dismissed plaintiff's complaint pursuant to section 2-615 of the Code. On October 3, 2011, the trial court denied plaintiff's motion to reconsider the judgment. Plaintiff now appeals.

¶ 12 II. ANALYSIS

¶ 13 On appeal, plaintiff contends that the trial court erred in dismissing her complaint because Levit rendered erroneous and negligent advice to Peterson, which caused injury to the decedent's estate.

¶ 14 1. Standard of Review

¶ 15 Plaintiff's complaint was dismissed on the pleadings pursuant to section 2-615 of the Code. Section 2-615 provides for a judgment on the pleadings when the pleadings are substantially insufficient in law. 735 ILCS 5/2-615 (West 2010). A motion for judgment on the pleadings tests the sufficiency of the pleadings by determining whether the plaintiff is entitled to the relief sought by her complaint. *Pekin Ins. Co. v. Allstate Ins. Co.*, 329 Ill. App. 3d 46, 49 (2002). The motion requires the trial court to examine the pleadings and determine whether there is an issue of fact or whether the controversy can be resolved as a matter of law. *Village of*

Worth v. Hahn, 206 Ill. App. 3d 987, 990 (1990).

¶ 16 On appeal, the reviewing court must accept as true all well-pled facts and all reasonable inferences that may be drawn from those facts, and construe the allegations of the complaint in the light most favorable to the plaintiff. *Marshall v. Burger King Corp*., 222 Ill. 2d 422, 429 (2006). However, Illinois is a fact-pleading jurisdiction, which demands that plaintiff allege facts sufficient to bring a claim within a legally recognized cause of action. *Marshall*, 222 Ill. 2d at 429-30. A plaintiff may not rely on conclusions of law or fact unsupported by specific factual allegations. *Pooh-Bah Enterprises, Inc. v County of Cook*, 232 Ill. 2d 463, 473 (2009). In reviewing a dismissal on a section 2-615 motion, both parties agree that the standard of review is *de novo*. *Marshall,* 222 Ill. 2d at 429.

¶ 17 2. Legal Malpractice

¶ 18 At the outset, we are compelled to note that at trial, plaintiff brought a claim for negligence and malpractice. However, plaintiff makes no argument on appeal, nor cites to any authority, that explains the elements that must be proven to succeed on either a claim for negligence or a claim for malpractice. We found one citation in the portion of plaintiff's brief that purportedly deals with negligence and malpractice, which states: "A legal opinion that is relied upon and is erroneous and leads to damage is actionable." Plaintiff cites to *Superior Bank FSB v. Golding*, 152 Ill. 2d 480 (1992), in support of this proposition, with no pin cites. The issue before the court in *Superior Bank* was "whether the Bank's claims against Lord, Bissell & Brook and Williams were filed within the applicable limitations period." *Superior Bank*, 152 Ill. 2d at 484. The claims against Lord, Bissell & Brook and Williams appear to have been a claim

for negligence, and one for misrepresentation. However, neither of those claims are discussed in *Superior Bank*, as the only issue was whether those claims were time barred.

¶ 19 Therefore, we find that plaintiff has forfeited her claims of negligence and malpractice by failing to supply proper argument as required by Illinois Supreme Court Rule 341(e)(7). See *Chicagoland Chamber of Commerce v. Pappas*, 378 Ill. App. 3d 334, 365 (2007) (quoting *Eckiss v. McVaigh*, 261 Ill. App. 3d 778, 786 (1994) (" 'A reviewing court is *** entitled to have issues clearly defined with pertinent authority cited and coherent arguments presented; arguments inadequately presented on appeal are waived. [Citation.] Mere contentions without argument or citation of authority do not merit consideration on appeal [citation], nor do statements unsupported by argument or citation of relevant authority.' ")) Additionally, we stress that a reviewing court should not have to do the work for the attorneys. " 'A reviewing court is entitled to have the issues before it clearly defined and is not simply a repository in which appellants may dump the burden of argument and research; an appellant's failure to properly present his own arguments can amount to waiver of those claims on appeal.' " *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 117 (2010) (quoting *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005)).

¶ 20 Without a clear presentation of the issues by plaintiff, defendants chose to address the legal malpractice claim. Because our review is *de novo*, and because plaintiff did not object to defendants' focus on legal malpractice, that is the only issue we will address on appeal. We further note that plaintiff seems to have abandoned her claims regarding the Rules of Professional Conduct, and thus we will not address those on appeal either. See Ill. S. Ct. R. 341(e)(7) (points not argued are waived and shall not be raised in the reply brief, in oral

argument, or on petition for rehearing).

¶ 21 To prevail on a claim for legal malpractice, a plaintiff must plead and prove the following elements: (1) the defendant attorney owed the client a duty of due care arising from the attorney-client relationship, (2) the defendant breached that duty, and (3) as a proximate result, the client suffered injury. *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 748 (2008). The existence of actual damages is essential to a cause of action for legal malpractice. *Id.* Even if negligence on the part of the defendant attorney is proven, a plaintiff cannot recover for legal malpractice unless she also proves that the attorney's negligence proximately caused her damages. *Id.*

¶ 22 Here, it is undisputed that Levit owed the decedent a duty of care. It has also been properly alleged, when the facts are viewed in a light most favorable to plaintiff, that Peterson participated in transactions that resulted in a depletion of the decedent's estate by $111,000. The issue at stake, however, is whether plaintiff properly pled that Levit breached his duty of care to the decedent.

¶ 23 Plaintiff contends on appeal that Levit breached his duty to decedent by failing to advise Peterson that: (1) Peterson did not have authority to make self-benefitting gifts, and (2) that there was a presumption of fraud if Peterson were to make self-benefitting gifts. We first note that plaintiff did not allege in her amended complaint that Levit was negligent for failing to advise Peterson that there was a presumption of fraud if Peterson made self-serving gifts. Rather, the amended complaint specifically alleges several times that Levit was negligent by: "not stating that self serving gifts were not permitted by the power of attorney document"; "that self-serving gifts *** were a breach of fiduciary duty"; "that Peterson did not have authority to make self

serving gifts to himself and to his family"; and that Levit failed "to positively direct Michael Peterson generally and specifically that he was prohibited from using the power of attorney to justify or to make gifts to himself or for his benefit." It is well-settled that any arguments not made in the trial court cannot be brought for the first time on appeal, and thus the issue is forfeit. See *Darnall v. City of Monticello*, 168 Ill. App. 3d 552, 553 (1988) ("[A]n issue not presented to or considered by the trial court cannot be raised for the first time on review").

¶ 24 Accordingly, the only issue properly before this court is whether Levit, and his law firm, breached a duty to the decedent by failing to advise Peterson that he was prohibited under the power of attorney from making self-serving gifts. We find that he did not.

¶ 25 Rather, Peterson was expressly authorized under the power of attorney to make gifts, and there is no dispute that the decedent was competent when he signed the power of attorney document. The power of attorney specifically states, "[M]y agent shall have the power to make gifts." See *Friedman v. Gingiss*, 182 Ill. App. 3d 293, 295 (1989) (exhibits attached to a complaint are considered part of the complaint, and if there is any conflict between allegations of the complaint and the exhibits, the exhibits control). There is no language in the power of attorney limiting the gifts only to individuals other than Peterson and Peterson's family.

¶ 26 Plaintiff is correct, however, that in Illinois, a power of attorney creates a fiduciary relationship between the principal (the decedent) and the agent (Peterson). *Deason v. Gutzler*, 251 Ill. App. 3d 630, 637 (1993). Once a fiduciary relationship has been shown, the law presumes that any transaction between the parties by which the fiduciary has profited is fraudulent. *In re Estate of Rothenberg*, 176 Ill. App. 3d 176, 178 (1988). But this does not end

the inquiry. The burden then shifts to the agent (Peterson) to prove by clear and convincing evidence that the transaction was not the result of undue influence. *Id*. If the agent cannot meet this burden, the transaction will be set aside. *Id*. It follows then, that if the agent *can* meet this burden, the transaction will be considered valid. Importantly, to rebut the presumption fo fraud, "a fiduciary must establish that the transfer was a gift." *Deason*, 251 Ill. App. 3d at 637.

¶ 27 Accordingly, any transaction between the decedent and Peterson, in which Peterson profits, would be presumed to be fraudulent. The burden would then shift to Peterson to show that the transaction was not fraudulent, and rather was a proper gift made without undue influence. Because of this multi-step, burden-shifting process, we cannot say that Levit breached a duty if he failed to advise Peterson that he was prohibited from making self-serving gifts under the power of attorney or otherwise. Peterson was simply not *prohibited* from doing such things under the power of attorney, nor was he under Illinois law. Rather, once he makes those gifts, he may have to rebut claims of fraud with proof of validity and undue influence.

¶ 28 Moreover, even if plaintiff had properly alleged that Levit breached his duty by failing to advise Peterson that there would be a presumption of fraud associated with self-serving gifts, we would nevertheless find that the trial court properly dismissed the claim pursuant to section 2-615. It can be seen from the July 3, 2008, letter from Levit to Peterson that Levit did in fact warn Peterson that while he was authorized to make gifts under the power of attorney, he should use caution as they could be subject to scrutiny. Levit's advice is consistent with Illinois law and would therefore not be considered legal malpractice.

¶ 29 III. CONCLUSION

¶ 30 The judgement of the circuit court of Cook County is affirmed.

¶ 31 Affirmed.