2013 IL App (1st) 110912-U

FIFTH DIVISION
March 29, 2013

Nos. 1-11-0912 & 11-2309

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VIOLET RADWILL, Plaintiff-Appellant, v. LOUIS M. ROMEO, RICHARD CAIFANO, STEVEN RADWILL, and M.B. FINANCIAL BANK, Defendants-Appellees.	) Appeal from) the Circuit Court) of Cook County)) No. 09 L 10790))) Honorable) Brigid Mary McGrath, Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The circuit court's orders dismissing plaintiff's complaint against two defendants and entering summary judgment in favor of a third defendant were affirmed.

¶ 2 Plaintiff, Violet Radwill, filed a four-count complaint against defendants. The circuit court of Cook County subsequently granted defendant Richard Caifano's motion for summary judgment, defendant MB Financial Bank's (MB) motion to dismiss the complaint pursuant to

section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2010)) and defendant Louis Romeo's motion to dismiss the complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)). Plaintiff now appeals. For the reasons that follow, we affirm.

¶ 3 Plaintiff filed the most recent version of her complaint on October 5, 2010. She alleged the following facts as being common to all counts of her complaint. Plaintiff was married to the decedent, Richard Radwill, at the time of his death on February 19, 2007. The decedent was survived by plaintiff and two adult children from a previous marriage: defendant Steven A. Radwill (Steven) and Richard A. Radwill, Jr. During his lifetime, the decedent did business with Romeo, including entrusting him with professional and personal matters. Finally, Caifano was an attorney licensed to practice law in Illinois who did business for or received referrals from Romeo.

¶ 4 Count I of the complaint asserted a breach of contract claim against Romeo. The complaint alleged that on November 12, 2006, Romeo and the decedent orally agreed that Romeo would create a trust into which all of the decedent's assets would be placed. The decedent also provided Romeo with a handwritten inventory of his estate with the intention that Romeo would retain an attorney on the decedent's behalf who would create the trust. The complaint further alleged that, "on information and belief," the decedent intended to provide plaintiff with an amount greater than she would be entitled to by law. As such, plaintiff was an intended third-party beneficiary of the agreement between the decedent and Romeo. However, between the date of the meeting and the date of the decedent's death, Romeo failed to retain an attorney to assist in the preparation of the trust and thereby breached his agreement with the decedent. Two weeks

prior to his death, the decedent instructed plaintiff to contact Romeo regarding the trust that Romeo had promised to make. Plaintiff attempted to contact Romeo but her calls were not answered until the day the decedent passed away. Plaintiff was damaged by Romeo's breach of his agreement with the decedent in that the decedent relied upon Romeo's promise and therefore did not take other steps to plan for his estate. As a result, after the decedent passed away, plaintiff received only the amount she was entitled to by law minus the expenses she incurred in "dealing with an intestate probate estate which has been plagued with contentious proceedings, as opposed to a trust."

¶ 5 Count II of the complaint asserted a legal malpractice claim against Caifano. In addition to the above allegations, plaintiff further alleged that on February 19, 2007, after the decedent passed away, Romeo contacted Caifano regarding handling the decedent's estate. Romeo was acting on behalf of the decedent's estate when he did so and he provided information regarding the estate to Caifano. Romeo contacted plaintiff that same day and told her that because he did not form a trust for the decedent's estate or hire an attorney to do so, he would deliver all documents relating to the estate to Caifano, who would help plaintiff probate the decedent's estate. Plaintiff contacted Caifano the same day and provided him with facts that would be relevant in probating the estate. They also "discussed fees" and Caifano quoted plaintiff a fee of "slightly higher than $3000." Plaintiff further alleged that during this conversation with Caifano, she was an "actual or prospective client" as those terms were defined by Rule 1.18 of the Rules of Professional Conduct. See Ill. R. P. C. 1.18(d) (eff. Jan.1, 2010). As such, Caifano owed plaintiff a duty as a client or a prospective client. Alternatively, Caifano owed plaintiff a duty

because he was acting as her agent as the presumed administrator of the decedent's estate.

¶ 6 On February 20, 2007, plaintiff met with Steven and discussed what would be involved in probating the decedent's estate. Plaintiff told Steven that she had spoken to Caifano and that he had agreed to help probate the estate. During the second week of March 2007, plaintiff contacted Caifano to discuss his services and the possibility of an installment plan for the payment of his fee. Caifano said that he could no longer speak with plaintiff because Steven was now his client for purposes of probating the decedent's estate. Plaintiff responded that it was a conflict of interest for Caifano to represent Steven, as his interests could conflict with those of plaintiff or the decedent's estate. For the next six months, plaintiff assumed Caifano had ceased contact with Steven and Caifano never told plaintiff that he would not be representing her. On September 13, 2007, plaintiff received a check from MB in the amount of $30,771.93, representing her share of the decedent's estate. She learned that MB issued the check pursuant to a small estate affidavit that had been presented to the bank by Steven.

¶ 7 Plaintiff alleged that Caifano breached his duties to plaintiff in that he prepared the small estate affidavit and instructed Steven in its use. This occurred after Romeo contacted Caifano and sent him documents detailing the decedent's estate. Plaintiff claimed that but for Caifano's representation of Steven, which was adverse to the duties he owed to plaintiff, Steven would not have been able to liquidate the decedent's accounts at MB and plaintiff would not have incurred legal expenses in order to obtain a widow's award and investigate the propriety of Steven's distribution of estate proceeds outside of probate.

¶ 8 Count IV of the complaint asserted a claim of negligence against MB.[1] Plaintiff alleged that MB knew that the decedent had passed away and therefore had a duty to ensure that the assets he held at the bank were distributed pursuant to the decedent's directions or, lacking any direction from the decedent, pursuant to Illinois law. Further, MB knew that plaintiff and Steven were seeking a distribution of the decedent's accounts at the bank and therefore MB had a duty to act with reasonable care in distributing those accounts. MB also "had a duty to pay out pursuant to Illinois law," which entitled a surviving spouse to half of the decedent's estate, and "not an Affiant's miscalculations or misreadings of Illinois law." Plaintiff alleged that MB acted negligently and breached the duty it owed to plaintiff because "had [MB] carefully reviewed the affidavit with that knowledge of Illinois law chargeable to a bank, and further given its actual knowledge that the decedent's wife was asserting a claim, it would have realized that the affidavit was incorrectly prepared." Plaintiff was damaged in that she did not receive a proper distribution of the estate and the distribution she did receive had to be used to "correct the statutory violations which [MB] permitted and helped carry out."

¶ 9 Attached to the complaint was a copy of the small estate affidavit submitted to MB by Steven. In the affidavit, which was signed under penalty of perjury, Steven stated that at the time the decedent passed away, he personally owned three accounts (the accounts) at MB totaling

[1]Count III of the complaint asserted a claim of "statutory violation" against Steven. Later in the proceedings, the circuit court granted plaintiff's "oral motion to default" Steven. The record is thereafter silent as to what, if anything, took place with respect to the count of plaintiff's complaint directed at Steven. Regardless, Steven is not a party to this appeal and we therefore need not set forth the specific allegations made against him in the complaint.

$72,315.79. The affidavit further stated that the decedent's estate was worth less than $100,000.00 and listed the amount that each heir was legally entitled to because the decedent died intestate. Specifically, plaintiff was entitled $30,771.93 and Steven and Richard Radwill were each entitled to $20,771.93.

¶ 10 MB filed a motion to dismiss the complaint pursuant to section 2-615 of the Code. MB asserted that under Illinois law, plaintiff was barred from seeking recovery of purely economic loss through a tort cause of action. Further, Illinois law provided that there was no common law duty owed by a bank to a non-customer and plaintiff did not allege an ownership interest in any of the decedent's accounts at MB. MB also claimed that plaintiff had failed to sufficiently plead a claim of negligence because she did not allege that MB owed her a duty or explain the nature of that duty. Plaintiff also did not set forth any standard of care or allege the damages that she suffered as a result of any breach. Finally, MB claimed that the Probate Act (the Act) (755 ILCS 5/1-1 *et seq*. (West 2006)) required it to distribute the funds in accordance with a properly prepared small estate affidavit. MB pointed out that plaintiff had not alleged any defect or forged signature in the small estate affidavit submitted by Steven. Additionally, the Act released MB from liability resulting from its distribution of the decedent's accounts and directed plaintiff to seek relief from the other recipients of the distribution.

¶ 11 Caifano filed a motion for summary judgment on count II of plaintiff's complaint. He argued that no attorney-client relationship existed between himself and plaintiff because there was no consensual agreement on representation, he and plaintiff only discussed fees when they spoke on February 20, 2007, and plaintiff told Caifano his estimated fee was too expensive and

she wanted to speak to other attorneys. Caifano asserted that because he did not have an attorney-client relationship with plaintiff, he did not owe her a duty of care and therefore plaintiff could not prove the existence of each required element of claim of legal malpractice. Caifano further argued that Rule 1.18 of the Rules of Professional Conduct did not impose upon him any duty to plaintiff as a "prospective client" because the rule was not in effect at the time he spoke to plaintiff and because during those conversations plaintiff did not reveal any information to Caifano that was "significantly harmful" to her.

¶ 12 Caifano supported his motion for summary judgment with an affidavit in which he attested to the following facts. Caifano initially spoke to Romeo on October 26, 2007. Romeo told him that the decedent was interested in speaking to an attorney regarding estate planning. However, because the decedent could not travel because of his health, Romeo said that he would send Caifano the decedent's financial information. Caifano had not yet received that financial information when Romeo contacted him again on February 19, 2007. During that conversation, Romeo told Caifano that the decedent had passed away, that plaintiff might call Caifano to discuss probating the decedent's estate and that Romeo would send the decedent's financial information to Caifano. Plaintiff called Caifano on February 20, 2007, "inquiring only as to the costs of probating the [e]state." Plaintiff told Caifano that she did not have much money and "her questions were limited to the costs involved in probating the [e]state." Based upon his "professional legal experiences," Caifano estimated that the combined cost of attorney fees and probating the estate would be $4500. Plaintiff responded that the cost was "too expensive and that she wanted to contact other attorneys" and "the telephone conversation ended without

plaintiff retaining [Caifano] to represent her or the [e]state."

¶ 13 On February 22, 2007, Steven called Caifano to discuss the details of the estate and the property of the decedent. Caifano told Steven that he required a retainer if Steven wanted to hire him, and "Steven said he wanted to hire me." The following day, February 23, 2007, Caifano received the documents regarding the decedent's estate from Romeo. On March 16, 2007, plaintiff again contacted Caifano to discuss the costs of probating the decedent's estate. Caifano explained to plaintiff that he could not represent her in probating the estate because he had already been hired by Steven.

¶ 14 In a verified response to Caifano's motion for summary judgment, plaintiff claimed that her first conversation with Caifano took place on February 19, 2007, and that Caifano quoted her a fee of slightly higher than $3000. Plaintiff recalled speaking with Steven on February 20 and telling him that she spoke with Caifano about what would be involved in probating the estate, including the fees, and that Caifano "would be representing the estate." Plaintiff did not dispute that Caifano received the estate documents from Romeo on February 23, 2007. Plaintiff reiterated her version of the conversation she had with Caifano on March 16, 2007. Plaintiff argued that because Caifano received enough information to quote plaintiff an estimate as to the cost of probating the estate, "[i]t cannot be argued that [plaintiff] and Caifano did not have a conversation [about] at least some of the substance of the proposed Richard Radwill estate." Plaintiff also argued that if Caifano was not working for plaintiff, then he was at least working on the estate "at the direction of Romeo, an agent for Richard Radwill" and as such owed plaintiff, who stood to benefit from the estate, a duty to administer the estate in a manner that would not

harm her.

¶ 15 Romeo filed a motion to dismiss the complaint pursuant to section 2-619 of the Code. Romeo argued that he was prohibited from practicing law and therefore could not have drafted a trust agreement for the decedent. Further, plaintiff's alleged damages were not proximately caused by Romeo's failure to retain an attorney to draft the trust but, rather, were caused by the decedent's failure to create a trust to reflect his intentions. Romeo also argued that there was no allegation that he received any consideration for assisting the decedent and that, at best, he voluntarily undertook to assist a friend. Finally, Romeo claimed that even if he breached this voluntary undertaking and thereby caused plaintiff's alleged economic damages, plaintiff could not recover under the voluntary undertaking doctrine in the absence of physical injury or damage.

¶ 16 On March 1, 2011, the circuit court entered an order granting MB's motion to dismiss and Caifano's motion for summary judgment. The court also granted "plaintiff's oral motion to default Steven Radwill." Plaintiff filed a notice of appeal from this judgment. On May 13, 2011, the court entered an order striking the count of plaintiff's complaint directed at Romeo and granting plaintiff 28 days to file an amended version of that count. On August 2, 2011, the court entered an order dismissing with prejudice the count directed at Romeo and noting that plaintiff had not filed an amended version of that count but instead had elected "to stand on her complaint." Plaintiff filed a notice of appeal from this order. This court subsequently granted plaintiff's motion to consolidate the two appeals.

¶ 17 Plaintiff contends that the trial court erred in granting MB's and Romeo's motions to dismiss and in granting Caifano's motion for summary judgment. We consider each argument in

turn.

¶ 18 Plaintiff first claims that the court erred in granting MB's motion to dismiss pursuant to section 2-615 of the Code. When ruling on a section 2-615 motion to dismiss for failure to state a cause of action, the court must accept as true all well-pleaded facts in the complaint and draw all reasonable inferences from those facts that are favorable to the plaintiff. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts, not mere conclusions, to establish her claim as a viable cause of action. *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997). A cause of action should be dismissed pursuant to section 2-615 only if it is clearly apparent that no set of facts can be proven that will entitle the plaintiff to recover. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 382 (2004). Our review of a dismissal pursuant to section 2-615 is *de novo*. *Paul H. Schwendener Inc. v. Jupiter Electric Co.*, 358 Ill. App. 3d 65, 71 (2005).

¶ 19 Plaintiff claims that she set forth a cause of action for negligence because MB "followed the form, but not the law," when it distributed the funds from the decedent's accounts pursuant to the small estate affidavit. Plaintiff asserts that in this case "an attorney made an error in preparing the small estate affidavit for his client" and that MB violated its duty owed to plaintiff "when it improperly distributed the funds of Richard Radwill which were under its control." Plaintiff also claims that MB should have investigated whether the distributions set forth in the small estate affidavit was proper and that it is an "insufficient answer" to suggest that plaintiff seek recovery for her alleged loss from Steven.

¶ 20 We find that plaintiff's negligence complaint against MB was properly dismissed.

Initially, the Act required MB to distribute the funds pursuant to the small estate affidavit and released it from any liability resulting from that distribution. Section 25-1(a) of the Act states:

> "When any person or corporation (1) indebted to or holding personal estate of a decedent *** is furnished with a small estate affidavit in substantially the form hereinafter set forth, that person or corporation *shall pay the indebtedness*, *** [or] deliver the personal estate *** to persons and in the manner specified in paragraph 11 of the affidavit." (Emphasis added.) 755 ILCS 5/25-1(a) (West 2006).

The phrase "in substantially the form hereinafter set forth" is a reference to section 25-1(b) of the Act, which sets forth what is essentially the form that a small estate affidavit should take and the information that should be included in such an affidavit. See 755 ILCS 5/25-1(b) (West 2006). "Shall" is defined as "is required to." Black's Law Dictionary 1379 (7th ed. 1999). Therefore, when an institution such as MB is presented with a small estate affidavit in substantially the form of the affidavit set forth in section 25-1(b) of the Act, that institution is required to distribute a decedent's estate in the manner specified in the affidavit.

¶ 21 In this case, plaintiff concedes that the small estate affidavit tendered to MB by Steven was "in proper form." In fact, our review establishes that the affidavit takes the exact form as provided by section 25-1(b) of the Act. See 755 ILCS 5/25-1(b) (West 2006). Thus, MB was required to distribute the funds to the decedent's heirs as those distributions were set out in the small estate affidavit.

¶ 22 Additionally, the Act released MB from any liability resulting from its distribution of the

decedent's funds. The Act states:

> "(d) Release. Upon payment, delivery, transfer, access or issuance pursuant to a properly executed affidavit, the person or corporation is released to the same extent as if the payment, delivery, transfer, access or issuance had been made or granted to the representative of the estate. Such person or corporation is not required to see to the application or disposition of the property; but each person to whom a payment, delivery, transfer, access or issuance is made or given is answerable therefor to any person having a prior right and is accountable to any representative of the estate." 755 ILCS 5/25-1(d) (West 2006).

Consistent with this section, the Act further provides:

> "(e) The affiant signing the small estate affidavit prepared pursuant to subsection (b) of this Section shall indemnify and hold harmless all creditors and heirs of the decedent and other persons relying upon the affidavit who incur loss because of such reliance. That indemnification shall only be up to the amount lost because of the act or omission of the affiant. Any person recovering under this subsection (e) shall be entitled to reasonable attorney's fees and the expenses of recovery." 755 ILCS 2/25-1(e) (West 2006).

¶ 23 These provisions of the Act contemplate the exact situation presented in this case. MB distributed the decedent's funds pursuant to a properly executed affidavit but plaintiff nevertheless seeks recovery for her alleged loss from MB. In this situation, however, the Act releases MB from liability and directs plaintiff to instead seek recovery from Steven and Richard

Radwill, Jr., the other recipients of the funds, and/or from Steven as the affiant who signed the small estate affidavit.

¶ 24 Plaintiff nevertheless claims that MB should be "required to consider the disbursement of a deceased customer's money" even when that disbursement is made pursuant to a properly executed affidavit. However, the Act imposes no such requirement. Instead, the statutory scheme created by the Act was clearly intended to allow a bank such as MB to rely on a properly executed small estate affidavit in order to expeditiously distribute a decedent's estate. For this reason, the Act directs that the affidavit be executed under "penalty of perjury." 755 ILCS 5/25-1(b) (West 2006). This is also the reason why the Act provides that the "affidavit is *prima facie* proof of the facts stated therein." 755 ILCS 5/25-3 (West 2006). To require an institution such as MB to essentially look behind a properly executed affidavit and independently investigate and confirm the facts set forth therein would place a burden on the bank that the legislature did not see fit to impose and would run counter to the scheme created by the Act.

¶ 25 Although plaintiff concedes that the affidavit was in proper form, she claims that MB "did not follow the law, but instead an affiant's erroneous or fraudulent affidavit." Plaintiff claims that the distribution set forth in the affidavit was not in accord with section 15-1 of the Act. 755 ILCS 5/15-1 (West 2006). She also claims that MB did not follow the law because section 2-1 of the Act entitles a surviving spouse to half of the real and personal estate of a decedent. See 755 ILCS 5/2-1 (West 2006).

¶ 26 Section 15-1 of the Act, entitled "Spouse's award," provides in relevant part:

"The surviving spouse of a deceased resident of this State *** shall be allowed as

> the surviving spouse's own property, *** a sum of money that the court deems reasonable for the proper support of the surviving spouse for the period of 9 months after the death of the decedent *** and an additional sum of money that the court deems reasonable for the proper support, during that period, of minor and adult dependent children of the decedent who reside with the surviving spouse at the time of decedent's death. The award may in no case be less than $10,000, together with an additional sum not less than $5,000 for each such child." 755 ILCS 755 ILCS 5/15-1 (West 2006).

Section 2-1 of the Act, entitles "Rules of descent and distribution," provides in relevant part:

> "The intestate real and personal estate of a resident decedent and the intestate real estate in this State of a nonresident decedent, after all just claims against his estate are fully paid, descends and shall be distributed as follows:
>
> > (a) If there is a surviving spouse and also a descendant of the decedent: 1/2 of the entire estate to the surviving spouse and 1/2 to the decedent's descendants per stirpes." 755 ILCS 5/2-1 (West 2006).

¶ 27 We find this point waived because plaintiff has failed to support it with any analysis of these sections of the Act or citation to authority. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (A point raised but unsupported by argument or citation to authority is waived); *Express Valet Inc. v.. City of Chicago*, 373 Ill. App. 3d 838, 847 (2007) (a point raised but unsupported by reasoned argument or citation to relevant authority fails to satisfy the requirements of Supreme Court Rule 341(h)(7) and is therefore waived). Here, plaintiff makes only a passing reference in her brief to

these two sections of the Act. She does not attempt to explain their meaning or how and why they apply to this case. Plaintiff also makes no attempt to explain how these sections of the Act work together or to resolve any apparent conflict between them. We find this insufficient to raise the issue in this court. See *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986) ("A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research").

¶ 28 Regardless, we need not consider plaintiff's argument regarding either of these two sections of the Act. For purposes of MB's liability and its motion to dismiss the complaint, the only relevant inquiry is whether the affidavit submitted to MB was in "substantially the form" of the affidavit set forth in the Act and, if so, whether MB distributed the funds to the decedent's heirs as those distributions were set out in the affidavit submitted by Steven. See 755 ILCS 5/25-1(a),(d) (West 2006). As we have already found, the affidavit submitted to MB complied with the requirements of small estate affidavit form contained in the Act and there is no dispute that MB distributed the funds in the manner specified in the affidavit. Section 25 of the Act makes no reference to either section of the Act cited to by plaintiff or impose upon MB a duty to ensure that the distributions set forth in the affidavit submitted by Steven are consistent with these sections. The argument's made by plaintiff would be appropriately raised if and when she follows the directives of the Act and seeks recovery from Steven or Richard Radwill, Jr., as the others who received payment pursuant to the affidavit, or from Steven in his capacity as the affiant of the small estate affidavit.

¶ 29 Additionally, MB did not owe a duty of care to plaintiff. To state a legally sufficient claim of negligence, a plaintiff must allege facts showing a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach. *Schultz v. Hennessy Industries, Inc.*, 222 Ill. App. 3d 532, 540 (1991). The question of whether a defendant owes a duty of care to a plaintiff is a question of law that can be determined by the court. *Keating v. 68th and Paxton, LLC*, 401 Ill. App. 3d 456, 470 (2010). The relationship between a bank and its depositor is contractual in nature, and implicit in that contract is the common-law duty of the bank to use ordinary care in disbursing the depositor's funds. *Keating*, 401 Ill. App. 3d at 692-93. Under Illinois law, a bank does not owe a common law duty of care to a non-customer. See *Thompson v. Capital One Bank, Inc.*, 375 F. Supp. 2d 681, 683 (N.D. Ill 2005).[2]

¶ 30 In this case, plaintiff makes no allegation that she was the owner of the accounts at MB or that she was otherwise a depositor at the bank. The signature cards for the three accounts at the bank, which are included in the record on appeal, show that each account was individually owned by the decedent. Although plaintiff suggests that MB owed a duty to the decedent's estate, the estate is not the named plaintiff in this case. Plaintiff brought this lawsuit in her individual capacity and not as the administrator or representative of the decedent's estate. Thus, the issue is whether MB owed plaintiff a duty of care and, as she was not a customer of the bank, we

[2]Even though *Thompson* is a federal case and decisions of the federal court are not binding on this court (*Cameron v. Bogusz*, 305 Ill. App. 3d 267, 273 (1999)), a federal court's interpretation of Illinois law is persuasive unless it runs contrary to previously decided state cases which if correctly reasoned will not be overturned. *In re Consolidated Objections to Tax Levies of School District No. 205*, 306 Ill. App. 3d 1104, 1113 (1999).

conclude that MB did not owe a duty to plaintiff. Without a duty, plaintiff cannot set forth a cause of action for negligence against MB. See *Kirk v. Michael Reese Hospital and Medical Center*, 117 Ill. 2d 507, 528 (1987) (finding that the plaintiff's negligence count against the defendant failed to state a cause of action and was properly dismissed where it lacked "the first essential element in a negligence claim: a recognized duty of care owed by the defendant to the particular plaintiff").

¶ 31 For all of these reasons, we find that there are no set of facts that could be proven that would entitle plaintiff to recover from MB under a theory of negligence. Accordingly, count III of plaintiff's complaint, which asserted the negligence count against MB, was properly dismissed.

¶ 32 Plaintiff next contends that the circuit court erred by granting summary judgment in favor of Caifano on count II of the complaint, which asserted a claim of legal malpractice. Plaintiff asserts that there is an issue of fact as to whether there was an attorney-client relationship between she and Caifano. Alternatively, plaintiff claims that even if she did not have an attorney-client relationship with Caifano, she can still recover for malpractice because she was the intended third-party beneficiary an attorney-client relationship between Caifano and the decedent. Finally, in her complaint, plaintiff also asserted that Caifano owed her a duty as a "prospective client" under Rule 1.18 of the Rules of Professional Conduct.

¶ 33 Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2004); *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). In determining whether the moving party is entitled to summary judgment, the pleadings and evidentiary

material in the record must be construed strictly against the movant. *Happel v. Wal-Mart Stores, Inc.*, 199 Ill. 2d 179, 186 (2002). The circuit court's decision to grant or deny a motion for summary judgment is reviewed *de novo*. *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 470-71 (2001).

¶ 34 Moreover, if the party moving for summary judgment provides sworn facts through an affidavit which, if uncontradicted, would entitle the party to judgment as a matter of law, the opposing party cannot rely upon its pleadings to raise a genuine issue of material fact. *Carruthers v. B.C. Christopher & Co.*, 57 Ill. 2d 376, 380 (1974). The corollary to this rule is that where an affidavit in support of a motion for summary judgment sets forth facts that are uncontradicted by counter-affidavits or other evidentiary materials, they must be taken as true notwithstanding the existence of contrary allegations in the opposing party's pleadings. *Steiner Electric Co. v. NuLine Technologies, Inc.*, 364 Ill. App. 3d 876, 882 (2006); *Carruthers*, 57 Ill. 2d at 380.

¶ 35 Count II of plaintiff's complaint alleged legal malpractice against Caifano. To prevail in an action for legal malpractice, plaintiff must prove the following elements: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) damages. *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169,174 (2004).

¶ 36 "The attorney-client relationship is a voluntary, contractual relationship, only created by a retainer, an offer to retain or a fee paid. *People v. Simms*, 192 Ill. 2d 348, 382 (2000). The

contract of retainer may be made like any other contract: it may be express or implied, written or oral. *Zych v. Jones*, 84 Ill. App. 3d 647, 651 (1980). It cannot be created by the attorney alone or by the attorney and a third party without authority to act. *Simms*, 192 Ill. 2d at 382. "The attorney-client relationship is consensual and arises only when both the attorney and the client have consented to its formation." *Torres v. Divis*, 144 Ill. App. 3d 958, 963 (1986). The client must manifest her authorization that the attorney act on her behalf, and the attorney must indicate his acceptance of the power to act on the client's account. *Torres*, 144 Ill. App. 3d at 963.

¶ 37 We find that summary judgment was properly entered on plaintiff's claim of legal malpractice against Caifano because there was no attorney-client relationship between plaintiff and Caifano. In her complaint, plaintiff did not allege that she asked Caifano to represent her when they spoke about the costs of probating the estate, that he agreed to do so or that she and Caifano agreed on a fee for his services. Instead, plaintiff alleged that the first time she and Caifano spoke on the telephone, they discussed fees and Caifano quoted her a price of over $3,000. According to the complaint, Caifano made this estimate after necessarily hearing facts about the issues involved in probating the estate. Plaintiff also alleged that when she next contacted Caifano, he told her he could not speak to her because he was now representing Steven for purposes of probating the estate.

¶ 38 However, Caifano responded to the complaint by filing a motion for summary judgment and an affidavit in support of that motion. In that affidavit, Caifano states that when he initially spoke to plaintiff, she inquired only about the costs of probating the estate. Caifano used his "professional legal experiences" to estimate the cost and plaintiff responded that Caifano's

estimate was too high and that she wanted to speak to other attorneys. According to Caifano, "the telephone conversation ended without plaintiff retaining [him] to represent her or the estate." Steven called Caifano a couple days later and said he wanted to hire Caifano. The following day, Caifano received documents from Romeo regarding the decedent's estate. Plaintiff later contacted Caifano again to discuss the costs of probating the estate and Caifano told plaintiff that she could not hire him because he had agreed to represent Steven.

¶ 39 Plaintiff filed a verified response to the summary judgment motion. She reiterated that Caifano quoted her an estimate the first time they spoke and that the next time she and Caifano spoke he told plaintiff that he could not represent her because he had been retained by Steven.

¶ 40 Plaintiff's verified response does not deny or contradict any of the relevant statements in Caifano's affidavit. Most importantly, plaintiff's response does not deny or contradict Caifano's statements that he and plaintiff discussed only the cost of probating the estate when they spoke, that plaintiff told Caifano that his estimate was too high and that she wanted to speak to other attorneys and that their conversation ended without plaintiff retaining Caifano to represent her or the estate. Because these statements in Caifano's affidavit were not contradicted by plaintiff's verified response, they are deemed admitted and must be taken as true. See *Carruthers*, 57 Ill. 2d at 381; *Steiner*, 364 Ill. App. 3d at 882.

¶ 41 As a result, we find as a matter of law that the facts contained in the trial record establish that there was no attorney-client relationship between Caifano and plaintiff. When Caifano and plaintiff spoke, there was no consensual agreement on representation. Plaintiff did not offer to retain Caifano or pay his retainer and she and Caifano did not agree on what his fee would be.

Plaintiff also did not authorize Caifano to act on her behalf and Caifano did not indicate an acceptance of the power to act on plaintiff's behalf. Instead, plaintiff and Caifano discussed only the costs of probating the estate and plaintiff told Caifano that his estimate was too high and that she wanted to speak to other attorneys. As Caifano stated in his affidavit, his conversation with plaintiff ended without plaintiff retaining [Caifano] to represent her or the estate." These facts, which we take as true, establish that there is no genuine issue of material fact as to the existence of an attorney-client relationship between Caifano and plaintiff and that Caifano is entitled to judgment as a matter of law.

¶ 42 Plaintiff raises the alternative argument that even if Caifano was not acting on her behalf, he was acting at the direction of Romeo, an agent for the decedent. Plaintiff then claims that as the wife of the decedent who would receive a part of his estate, she was the third-party beneficiary of Romeo and the decedent's agreement to hire an attorney to help prepare the trust for the decedent's actions. As such, any action that Caifano took in furtherance of the estate would be to plaintiff's benefit or detriment and Caifano therefore owed plaintiff a duty of administer the estate so as no to cause her harm. We disagree.

¶ 43 When Romeo first contacted Caifano on October 26, 2006, he told Caifano that the decedent wished to speak to an attorney regarding estate planning and that Romeo would send Caifano the decedent's financial information. Romeo, however, did not do so. Romeo contacted Caifano again on February 19, 2007, and told Caifano that the decedent had passed away, that plaintiff might contact Caifano to discuss probating the decedent's estate and that he would send Caifano the decedent's financial information. However, the decedent had already passed away

before this second conversation occurred. Under agency principles, "the death of the principal terminates the authority of the agent, even if the agent has no notice of the principal's death." *Washington v. Caseyville Health Care Association*, 284 Ill. App. 3d 97, 101 (1996). Therefore, Romeo's authority to act as the decedent's agent terminated when the decedent passed away on February 19, 2007, and he had no authority thereafter to act as the decedent's agent and to solicit Caifano's assistance in handling the decedent's estate. The relevant actions taken by Caifano, including having received the decedent's financial information and helping Steven prepare the small estate affidavit, took place after the decedent passed away and therefore after Romeo's authority to act as the decedent's agent ended. Accordingly, the actions taken by Caifano that allegedly damaged plaintiff could not have been done "as the direction of Romeo, an agent for [the decedent]."

¶ 44 In her complaint, plaintiff also alleged that Caifano owed her a duty of care as prospective client under Rule 1.18 of the Rules of Professional Conduct. That rule, entitled "Duties to Prospective Client," provides:

> "(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests

materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and that lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom." Ill. R. P. C. 1.18(d) (eff. Jan.1, 2010))

¶ 45 Plaintiff claims that she provided Caifano with information about the decedent's estate and that Caifano therefore owed her a duty to avoid representing Steven because his interests in the estate were adverse to plaintiff's interests.

¶ 46 Rule 1.18 was adopted in July of 2009 and did not become effective until January 1, 2010, approximately 3 years after Caifano is alleged to have spoken to plaintiff and breached his duty of care to her by representing Steven. Plaintiff makes no claim that the rule applies

retroactively and therefore any such claim is waived. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Accordingly, Rule 1.18 did not apply to impose upon Caifano a duty to plaintiff as a "prospective client" or preclude him from representing Steven. We also note that we accept as true the statements in Caifano's affidavit indicating that he and plaintiff only discussed the costs of probating the estate and that he did not receive any financial information regarding the decedent's account until after the decedent passed away. These admitted facts establish that Caifano did not receive any "significantly harmful" information from plaintiff regarding the decedent's estate such that Rule 1.18 would have precluded him from representing Steven.

¶ 47 Although plaintiff does not claim that Rule 1.18 applies retroactively, she does claim that the rule simply codified a standard that existed in the common law prior to the rule's enactment and therefore Caifano still owed plaintiff the same duty to plaintiff as a "prospective client." This point is waived because plaintiff cites no authority for her claim that the rule simply "memorialized existing practice and case law" and she cites no decisions issued prior to the rule's enactment setting forth the duties contained in Rule 1.18. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).; *Express Valet Inc.,* 373 Ill. App. 3d at 847 (2007) (a point raised but unsupported by reasoned argument or citation to relevant authority fails to satisfy the requirements of Supreme Court Rule 341(h)(7) and is therefore waived).

¶ 48 For all of these reasons, we find that there are no issues of material fact as to whether there was an attorney-client relationship between Caifano and plaintiff and whether Caifano owed plaintiff a duty of care. Accordingly, we affirm the entry of summary judgment on count II of plaintiff's complaint.

¶ 49 Plaintiff's final contention is that she set forth a valid claim for breach of contract against Romeo.[3] She claims that Romeo and the decedent orally agreed that Romeo would hire an attorney on the decedent's behalf to prepare a trust for the decedent's assets and that she was damaged by Romeo's failure to do so because plaintiff would have been the beneficiary of that trust.

¶ 50 A valid contract must have an offer, acceptance, and consideration. *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 979 (1997). To state a cause of action for breach of contract, a plaintiff must allege the existence of a contract, substantial performance by the plaintiff, defendant's breach of the contract, and damages. *Roberts v. Adkins*, 397 Ill. App. 3d 858, 866–67 (2010). The terms of the contract must be clear. *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 485 (1997). The terms must also be sufficiently definite that the court can determine whether the contract has been kept or broken. *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 29 (1991).

¶ 51 We find that Romeo's alleged promise to retain an attorney for the decedent was not a binding oral contract because it lacked consideration. Any act or promise which benefits one party or disadvantages the other party is sufficient consideration. *Johnson v. Johnson*, 244 Ill. App. 3d 518, 527–28 (1993). However, the allegations in plaintiff's complaint establish that Romeo did not receive any consideration in exchange for his promise to retain an attorney to

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[3]Romeo has not filed an appellate brief in this case. However, we may consider this portion of the circuit court's order under the standards set forth in *First Capitol Mort. Corp. v. Talandis Const. Corp.*, 63 Ill. 2d 128 (1976), because the record is simple and the issue can be decided without the aid of an appellee's brief.

create a trust for the decedent's assets. Instead, the complaint and other pleadings show that Romeo essentially agreed to help the decedent as a favor. There is no allegation in the complaint that Romeo anticipated being paid by the decedent in exchange for retaining an attorney on his behalf. Moreover, to the extent that plaintiff argues that Romeo's past business dealings with the decedent constituted consideration, past consideration is not valid consideration that will create a binding contract. See *Johnson*, 244 Ill. App. 3d at 528 ("if the alleged consideration for a promise has been conferred prior to the promise upon which alleged agreement is based, there is no valid contract"). Because there was no consideration for Romeo's promise to retain an attorney on the decedent's behalf, no binding contract was created between Romeo and the decedent. We also note that plaintiff makes no assertion that even if a contract was not created between Romeo and the decedent, Romeo voluntarily assumed a duty to hire an attorney to create the trust for the decedent. In fact, plaintiff explicitly states that "plaintiff does not allege that Romeo's actions were a gratuitous or voluntary undertaking." For these reasons, we affirm the dismissal of count I of plaintiff's complaint.

¶ 52 For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

¶ 53 Affirmed.