

No. 1-15-2297

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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DICKENS 123, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 CH 10672
	)	
WHEATON BANK & TRUST COMPANY, and	)	
FAEGRE BAKER DANIELS, LLP,	)	Honorable
	)	Kathleen G. Kennedy,
Defendants-Appellees.	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Hoffman and Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirmed the dismissal of plaintiff's amended complaint and the denial of its motion to reconsider where plaintiff failed to state a cause of action for breach of fiduciary duty and fraud.

¶ 2 Plaintiff, Dickens 123, LLC, filed a seven-count, first amended complaint against defendants Wheaton Bank and Trust Company (Wheaton) and the law firm of Faegre Baker Daniels, LLP (Faegre).<sup>1</sup> As to Wheaton, plaintiff alleged breach of contract, common law fraud, and intentional interference with business expectancies, and also sought declaratory and injunctive relief and to quiet title. As to Faegre, plaintiff alleged breach of fiduciary duty and

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<sup>1</sup> WB Pad Holdings III, LLC intervened in the lawsuit, but was dismissed pursuant to a settlement agreement and is not a party to this appeal.

common law fraud. Plaintiff's claims against Wheaton were dismissed pursuant to a settlement agreement, and the trial court subsequently dismissed the claims against Faegre with prejudice for failure to state a cause of action. Plaintiff appeals the orders dismissing its breach of fiduciary duty and common law fraud claims against Faegre and denying its motion to reconsider. We affirm.

¶ 3 I. Allegations of Plaintiff's First Amended Complaint Against Faegre

¶ 4 A. Background Facts

¶ 5 Plaintiff was the owner of real estate at 2058 North Albany Avenue and 2102 North Albany Avenue in Chicago (collectively referred to as the Albany Properties). Wheaton, the successor in interest to Wheatland Bank, was the mortgagee on the Albany Properties. Wheaton filed foreclosure actions in the circuit court of Cook County to foreclose on the Albany Properties' mortgage.

¶ 6 On or about January 24, 2012, Wheaton obtained a partial summary judgment against plaintiff in the amount of \$2,032,007.38 in the foreclosure actions. On or about December 31, 2013, plaintiff and Wheaton entered into a written settlement agreement (which is attached as an exhibit to plaintiff's amended complaint). The settlement agreement settled Wheaton's foreclosure actions against plaintiff with regard to the Albany Properties, as well as with regard to other properties not relevant here. Faegre acted as Wheaton's counsel for purposes of the settlement agreement; plaintiff had its own independent counsel. The settlement agreement expressly provided that "The Parties and their attorneys have fully and equally participated in the preparation, negotiation, review and approval of this Agreement."

¶ 7 The settlement agreement provided in pertinent part that plaintiff would pay Wheaton \$19,595.70 on the 28th day of each month and the parties would attempt to sell the Albany

Properties. Plaintiff was authorized to bid on the properties; its opening bid was required to be \$1.9 million. Meanwhile, plaintiff also was required to execute quitclaim deeds in lieu of foreclosure for each of the Albany Properties along with any other documents that Wheaton required of it to effectuate the transfer of ownership of the Albany Properties to Wheaton, but Wheaton agreed not to immediately record the deeds. Instead, the deeds would be delivered to Faegre to be held "in trust," while plaintiff made the \$19,595.70 monthly payments to Wheaton and while the parties attempted to sell the Albany Properties. If the Albany Properties sold on or before April 15, 2014, Wheaton would destroy the deeds; if the Albany Properties were not sold by April 15, 2014, Wheaton was authorized to take ownership of the properties by recording the deeds.

¶ 8 Plaintiff executed the deeds to each of the Albany Properties. The deeds (which were attached as exhibits to the amended complaint) each state: "This Quit Claim Deed In Lieu of Foreclosure is an absolute conveyance of title in fact as well as form and is not intended as a mortgage, trust conveyance or security of any kind."

¶ 9 The deeds were delivered to Faegre, which continued to represent Wheaton. On February 21, 2014, plaintiff made Wheaton a \$1.9 million cash offer for the Albany Properties. Later that day, plaintiff submitted an updated offer to pay \$25,000 more than any other offer and to close within five business days from February 24, 2014. On March 5, 2014, Wheaton informed plaintiff of an offer from a third party, Hanover Hamilton Investments, LLC, to purchase the Albany Properties for \$2.6 million. On March 11, 2014, plaintiff sent Wheaton a letter stating its belief that the Hanover offer was not actually an offer but instead was an "offer to make an offer" and that, even if it was an actual offer, it would not close in the time frame required under the settlement agreement and therefore should be rejected. On March 31, 2014,

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Wheaton informed plaintiff it was accepting Hanover's offer. All of the communications between the parties regarding the competing offers for the Albany Properties were made between plaintiff's counsel and Wheaton's counsel, Faegre.

¶ 10 On or about May 2, 2014, plaintiff discovered that Faegre, on Wheaton's behalf, had recorded the deeds to the Albany Properties on April 30, 2014, even though Faegre and Wheaton knew that plaintiff: wanted to purchase the properties; objected to the deeds being recorded; and asserted that Wheaton was in default of the settlement agreement for agreeing to sell the Albany Properties to Hanover.

¶ 11 Along with the deeds, Wheaton and Faegre submitted to the recorder of deeds a "statement by grantor and grantee," affirming that the grantee of the conveyance, Wheaton, is legally able to hold title to real estate in Illinois. The grantor/grantee statement is a required document to effectuate the recording of the deed. The grantor/grantee statement has the name "Dickens 123 LLC, an Illinois limited liability company" typed above the grantor's signature line, underneath which is an illegible signature followed by the words "executed solely for purposes of recording" and a notary's seal and signature. The notary was from Faegre's office.

¶ 12 As the grantor/grantee statement was a required document to effectuate the recording of the deed and the transfer of ownership of the Albany Properties to Wheaton, plaintiff was obligated under the settlement agreement to sign the grantor/grantee statement and deliver it to Faegre upon execution of the agreement. Plaintiff alleged that it never signed the grantor/grantee statement, and that instead Faegre signed plaintiff's name and notarized the signature without Faegre's authority to do so.

¶ 13 At the time of the recording of the deeds, Wheaton caused a property management company, 33 Management, to take control of the Albany Properties. On or about June 30, 2014,

Wheaton transferred title to the Albany Properties to WB Pad Holdings III, LLC (a subsidiary of Wheaton).

¶ 14 B. Plaintiff's Breach of Fiduciary Duty Count Against Faegre

¶ 15 Plaintiff alleged that Faegre acted as a trustee while holding the deeds to the Albany Properties in trust, and, as such, that Faegre owed it fiduciary duties. Plaintiff alleged that Faegre breached its fiduciary duties to plaintiff by removing the deeds from trust, executing the grantor/grantee statement and recording the deeds over plaintiff's objections.

¶ 16 C. Plaintiff's Common Law Fraud Count Against Faegre

¶ 17 Plaintiff alleged Faegre committed fraud by removing the deeds from trust, executing the grantor/grantee statement, and recording the deeds over plaintiff's objections in violation of the industry standard requiring Faegre, as trustee, to "act impartially towards all parties."

¶ 18 II. The Dismissal Order

¶ 19 The circuit court dismissed plaintiff's breach of fiduciary duty and fraud claims against Faegre with prejudice pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)), and denied plaintiff's motion to reconsider. Plaintiff appeals.

¶ 20 III. Analysis of Plaintiff's Appeal

¶ 21 A. Whether the Circuit Court Erred  
in Dismissing Plaintiff's Breach of Fiduciary Duty Count

¶ 22 In ruling on a section 2-615 motion to dismiss, the circuit court accepts as true all well-pleaded facts in the complaint and all reasonable inferences therefrom. *Caulfield v. Packer Group, Inc.*, 2016 IL App (1st) 151558, ¶ 60. An exhibit attached to the complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to plaintiff, are sufficient to establish a

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cause of action upon which relief may be granted. *Caulfield*, 2016 IL App (1st) 151558. ¶ 60.

Our standard of review is *de novo*. *Id.*

¶ 23 First, plaintiff contends the circuit court erred by dismissing its breach of fiduciary duty count, which alleged that Faegre breached its fiduciary duties to plaintiff by removing the deeds from trust after the Albany Properties failed to sell by April 15, 2014, and by executing the grantor/grantee statement without plaintiff's authority and recording the deeds over plaintiff's objections.

¶ 24 To state a cause of action for breach of fiduciary duty, plaintiff must plead facts showing that Faegre owed plaintiff a fiduciary duty, that Faegre breached its fiduciary duty, and that the breach proximately caused plaintiff's injury. *Pippen v. Pederson and Houpt*, 2013 IL App (1st) 111371, ¶ 22.

¶ 25 Generally, the party asserting a fiduciary relationship and resulting duty must show he placed his trust and confidence in another who thereby gained dominance over him. *Midwest Decks, Inc. v. Butler & Baretz Acquisitions, Inc.*, 272 Ill. App. 3d 370, 380 (1995); *Benson v. Stafford*, 407 Ill. App. 3d 902, 913 (2010). The alleged fiduciary must agree to exercise its judgment on behalf of the servient party in order to gain the dominance necessary for the existence of a fiduciary relationship. *Midwest Decks*, 272 Ill. App. 3d at 380. A fiduciary duty may exist as a matter of law from the type of relationship between the parties, such as an attorney-client relationship (*Pippen*, 2013 IL App (1st) 111371, ¶ 22), or a trustee-beneficiary relationship. *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1006 (2010). In determining whether plaintiff adequately pleaded that Faegre owed it a fiduciary duty, we consider all well-pleaded facts in the amended complaint and attached exhibits, but disregard any legal and factual

conclusions not supported by specific factual allegations. *Davidson v. Gurewitz*, 2015 IL App (2d) 150171, ¶ 9.

¶ 26 1. Whether a Fiduciary Relationship Existed Between Plaintiff and Faegre Based on an Attorney-Client Relationship or Faegre's Dominance and Influence Over Plaintiff

¶ 27 As discussed earlier in this order, the amended complaint alleged that Wheaton, the mortgagee of the Albany Properties, filed foreclosure actions to foreclose on the Albany Properties and obtained a partial summary judgment against plaintiff in the amount of \$2,032,007.38. Plaintiff and Wheaton subsequently entered into a written settlement agreement, which was attached to the amended complaint. Correspondence between the parties' attorneys regarding the settlement agreement was also attached to the amended complaint.

¶ 28 The amended complaint, the attached written settlement agreement, and the attached written correspondence between the parties' attorneys indicate that plaintiff and Wheaton were dealing with each other at arm's length, with each party having its own separate counsel to represent and protect its interests in the settlement agreement. The law firm of Crane, Heyman, Simon, Welch, & Clar represented plaintiff; Faegre represented Wheaton. There are no allegations anywhere in the amended complaint, nor any statements in the attached settlement agreement and correspondence indicating that Faegre agreed to exercise its judgment on behalf of plaintiff instead of on behalf of its client, Wheaton, when executing the grantor/grantee statement and recording the deed transferring the Albany Property to Wheaton, or at any other time before or after the transfer of the property. Accordingly, in the absence of any allegations of an attorney-client relationship between Faegre and plaintiff, or any exercise of judgment by Faegre on plaintiff's behalf leading to a position of dominance, plaintiff failed to adequately plead the existence of a fiduciary relationship between them. See *Benson*, 407 Ill. App. 3d at





of the settlement agreement to "be held in trust until [Wheaton] receives the payments contemplated herein." If the Albany Properties sold by April 15, 2014, Wheaton would destroy the deeds; if the properties failed to sell by April 15, 2014, Wheaton was authorized to record the deeds to effectuate the transfer of ownership of the Albany Properties to Wheaton.

¶ 32 Plaintiff failed to plead that it made the payments that would have required Faegre, under the terms of the settlement agreement, to hold the deeds and any other required documents "in trust" past April 15, 2014 and, as such, plaintiff failed to plead facts showing the existence of a trustee-beneficiary relationship between itself and Faegre on April 30, 2014, the date on which the deeds were recorded. In the absence of a trustee-beneficiary relationship between Faegre and plaintiff, Faegre's fiduciary obligations ran only to its client, Wheaton, pursuant to their attorney-client relationship.

¶ 33 As the well-pleaded facts and attached settlement agreement failed to adequately assert the existence of a fiduciary relationship between Faegre and plaintiff and a concomitant fiduciary duty owed plaintiff by Faegre, we affirm the circuit court's dismissal of plaintiff's breach of fiduciary duty count for failure to state a cause of action.

¶ 34 B. Whether the Circuit Court Erred in Dismissing Plaintiff's Fraud Count

¶ 35 Next, plaintiff contends the circuit court erred in dismissing its common law fraud count for failure to state a cause of action. To state a cause of action for common law fraud, plaintiff must plead facts showing: (1) a false statement of material fact by defendant; (2) knowledge or belief by defendant that the statement was false; (3) an intention to induce plaintiff to act; (4) plaintiff's reasonable reliance on the truth of the statement; and (5) damage to plaintiff resulting from this reliance. *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 71.

¶ 36 Plaintiff contends it adequately pleaded that Faegre engaged in common law fraud by falsely representing to plaintiff that it would hold the deeds to the Albany Properties in trust according to the "industry standard" which, plaintiff alleged, required Faegre, as trustee, to act impartially toward all parties. Plaintiff contends that instead of acting impartially, Faegre improperly favored Wheaton by executing the grantor/grantee statement and recording the deeds over plaintiff's objections.

¶ 37 Initially, we note that the settlement agreement attached to the amended complaint expressly provided that "the agreements, terms, and conditions contained in this Agreement and any documents required to be executed in connection herewith, represent the entire agreement between the Parties." Further, the settlement agreement provided that the parties "have not relied upon any representation, covenant, agreement or undertaking other than those which are *expressly* set forth in this Agreement and the exhibits attached to the same." (Emphasis added.) The settlement agreement made no express representation that Faegre would abide by the "industry standard" for trustees and, thus, any such representation is not part of the settlement agreement and cannot support plaintiff's fraud claim. To the extent the attached settlement agreement contradicts the allegations in the amended complaint regarding plaintiff's reliance on Faegre's representation regarding the industry standard, the settlement agreement controls. See *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18 (where an exhibit contradicts the allegations in a complaint, the exhibit controls).

¶ 38 Further, as discussed earlier in this order, plaintiff failed to adequately allege the existence of a trustee-beneficiary relationship between itself and Faegre, and, thus, plaintiff's allegations of fraud arising out of Faegre's alleged breach of the "industry standard" for trustees necessarily fails as Faegre was not subject to that standard.

¶ 39 Also, even if plaintiff *had* adequately alleged the existence of a trustee-beneficiary relationship, and even if the settlement agreement *had* represented that Faegre was subject to the industry standard requiring impartiality, review of the amended complaint and attached settlement agreement shows that Faegre did not improperly favor Wheaton over plaintiff when it executed the grantor/grantee statement and recorded the deed over plaintiff's objections; rather, Faegre was following the dictates of the settlement agreement, which authorized the recording of the deed because the Albany Property had failed to sell by April 15, 2014.

¶ 40 Accordingly, we affirm the circuit court's dismissal of plaintiff's common law fraud claim for failure to state a cause of action.

¶ 41 Plaintiff also contends it adequately pleaded that Faegre engaged in "constructive fraud" which, it claims, falls under the "umbrella" of common law fraud. Constructive fraud includes any act, statement, or omission that is construable as a fraud because of its detrimental effect on the public interest and public or private confidence. *Prodromos v. Everen Securities, Inc.*, 341 Ill. App. 3d 718, 726 (2003). Constructive fraud arises only if there is a confidential or fiduciary relationship between the parties. *Id.* As discussed earlier in this order, plaintiff has failed to plead such a confidential or fiduciary relationship between itself and Faegre, and accordingly its claim for constructive fraud fails to state a cause of action.

¶ 42 Plaintiff argues that the circuit court erred by dismissing its amended complaint with prejudice, and that it should have been allowed to replead its counts against Faegre in a second amended complaint. Plaintiff forfeited review of this issue by failing to seek to file a second amended complaint. *Harlin v. Sears Roebuck and Co.*, 369 Ill. App. 3d 27, 37 (2006).

¶ 43 Finally, plaintiff contends the circuit court erred by denying its motion to reconsider based on the misapplication of existing law. Our review is *de novo*. *In re Marriage of Figliulo*,

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2015 IL App (1st) 140290, ¶ 10. For all the reasons stated earlier in this order, the circuit court committed no misapplication of existing law when dismissing plaintiff's claims. Accordingly, we affirm the denial of plaintiff's motion to reconsider.

¶ 44 For the foregoing reasons, we affirm the circuit court.

¶ 45 Affirmed.

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