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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THOMAS CLEARY, PATRICK CLEARY, and KATHLEEN A. KOZYRA,)	Appeal from the Circuit Court of McHenry County.
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 14-CH-938
)	
MICHAEL PAOLELLI,)	Honorable
)	Michael J. Chmiel,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed plaintiffs' complaint seeking a constructive trust and an accounting, where defendant owed no fiduciary duty to plaintiffs. Affirmed.

¶ 2 Plaintiffs, Thomas Cleary, Patrick Cleary, and Kathleen A. Koyra, sued defendant, Michael Paoellelli, seeking a constructive trust or an accounting and alleging that certain changes to Michael Distasi's (the parties' uncle's) estate plan resulted from defendant's undue influence over Distasi. Defendant moved to dismiss (735 ILCS 5/2-619(a)(9) (West 2014)) plaintiffs' second amended complaint, arguing that there was no fiduciary relationship between the parties

to sustain a claim for a constructive trust or an accounting. The trial court granted defendant's motion and dismissed plaintiffs' complaint with prejudice. Plaintiffs appeal, arguing that they need only show that defendant owed Distasi a fiduciary duty. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Plaintiffs filed their initial complaint on September 4, 2014. On November 3, 2014, defendant moved to dismiss the complaint for failure to state a cause of action. 735 ILCS 5/2-615 (West 2014). He argued that plaintiffs failed to allege a basis for the undue influence assertion, specifically, whether the undue influence pertained to a fiduciary relationship, fraud, or both.

¶ 5 On March 23, 2015, by agreed order, plaintiffs filed an amended complaint in lieu of an answer to defendant's motion to dismiss. On April 22, 2015, defendant again moved to dismiss plaintiffs' complaint for failure to state a cause of action, arguing that the complaint was unclear as to the claims it sought to assert and the requests for relief. 735 ILCS 5/2-615 (2014).

¶ 6 On June 16, 2015, plaintiffs filed a second amended complaint, which is the subject of this appeal.

¶ 7

A. Complaint

¶ 8 Plaintiffs alleged that Distasi lived for a considerable time in Florida with his wife, Irene. Irene passed away on or about 2002. About 2004, Distasi, age 88, sold his Florida house and approached his niece, Kozyra, about becoming her boarder in her family's Elmwood Park home. Distasi and Kozyra orally agreed that: Distasi would live in Kozyra's home; he would be more comfortable in a separate 1,300-square-foot addition (costing about \$150,000 to construct and for which the Kozyras took out a home equity loan);¹ Distasi would pay the Kozyras \$1,100 per

¹ Plaintiffs further alleged that the addition consisted of a master bedroom suite with a

month from his Allianz annuity as consideration; and Kozyra would perform homemaking tasks for Distasi (*e.g.*, laundry, cleaning, meals, and transportation). Distasi moved in to the Kozyra home in 2004.

¶ 9 Distasi executed a will on January 11, 2005. It provided that his property would pour over to the Michael Distasi Trust (Trust), also executed on January 11, 2005. Distasi named defendant as the will's executor (followed by Kozyra and then Thomas Cleary, if defendant was unable or unwilling to serve in that capacity). Distasi was the initial trustee of the Trust, and he named defendant as the successor trustee.² The Trust provided that, upon Distasi's death, Patrick and Thomas Cleary would each receive a distribution of 10% of Distasi's estate, Kozyra would receive 30%, and defendant would receive 30%.³ Distasi's attorney notarized the Trust.

¶ 10 Plaintiffs' complaint alleged that, after Distasi moved in with the Kozyras in 2004, defendant arranged to have Distasi visit defendant at defendant's Crystal Lake home, including extended and overnight visits. Plaintiffs alleged that, during this period, defendant "imposed his opinions, advice, control, and undue influence upon" Distasi and that defendant and his family attended to Distasi's needs (*i.e.*, purchasing food and medications, doing his cleaning and laundry, transporting him to appointments and social engagements, and managing his financial matters) "to the extent that [Distasi] was not acting under his own free will and volition."

¶ 11 Distasi executed a first amendment to the Trust on January 26, 2007. In Article 3.2, the document noted that the Trust held title to an Allianz annuity that provided a monthly

master bath for Distasi's exclusive use, plus two bedrooms for Kozyra's children to use.

² The Trust further provided that, if the trustee was unable to act, then Kozyra (followed by Thomas Cleary if Kozyra was unable to act) would become trustee.

³ Two non-party beneficiaries would receive the remaining 20%.

distribution of \$6,300 until maturity in 2015. The Trust made the following pre-maturity gifts from the annuity: \$912 per month to Kozyra and her husband (a decrease from the \$1,100-per-month payment toward the home equity loan) and the balance to be distributed 35% to defendant, 35% to Kozyra, 15% to Patrick Cleary, and 15% to Thomas Cleary. The Trust also provided that the remainder of the Trust was to be distributed as follows: 35% to defendant, 35% to Kozyra, 15% to Patrick Cleary, and 15% to Thomas Cleary. Distasi's attorney notarized the document. Distasi lived principally with Kozyra at this time, but neither Kozyra nor any of the other plaintiffs were present at the meetings between Distasi and his attorney.

¶ 12 Plaintiffs alleged that, when Distasi visited defendant, defendant “suggested, persuaded, cajoled—and unduly influenced and induced Distasi to meet with [defendant’s attorney]” in his Crystal Lake office to make changes to Distasi’s will and Trust “which effectuated changes to the beneficiaries and recipients of [Distasi’s] estate.” Defendant scheduled the appointments for Distasi, drove Distasi to the appointments, attended the meetings between Distasi and defendant’s attorney, “and played a significant and integral role in their colloquy.” According to plaintiffs, defendant “instigated and persuaded” Distasi to make the changes, which were a reflection of defendant’s “intentions and design—and were *not* a result of the voluntary and free-willed decisions of” Distasi. (Emphasis in original.)

¶ 13 Later that year, on July 31, 2007, Distasi executed a Second Amendment to the Trust. The amendment, which was prepared by defendant’s attorney, terminated the \$912 monthly payment to Kozyra and awarded that payment to defendant. Defendant’s attorney notarized the amendment.

¶ 14 Plaintiffs further alleged that, on or about April 1, 2008, the parties and Distasi met at Kozyra’s home to discuss Distasi’s intentions concerning the disposition of his estate. During

the meeting, the parties drafted a document (exhibit E, which plaintiffs refer to as the reaffirmation confirmation agreement, or reaffirmation agreement) that stated that Distasi's heirs were Kozyra and defendant (who were co-executors and would be each awarded 35% of his estate), and Thomas and Patrick Cleary (who would each take 15%). The parties signed the document on April 18, 2008, and Distasi re-signed it before a notary (Barbara Tuttle) on April 22, 2008.⁴

¶ 15 On or about March 2008, Distasi, age 92, was diagnosed with early-onset dementia/Alzheimer's disease and his physician prescribed Namenda to ameliorate the symptoms, including brief and occasional memory lapses.

¶ 16 Plaintiffs' complaint further alleged that, on or about 2008 and 2009, Distasi's visits to defendant's home increased in frequency and duration, with some stays exceeding one month.

¶ 17 On July 29, 2008, about one year after he executed a second amendment to his Trust, Distasi executed a new (and final) will that appointed defendant as executor (to be followed by his wife, Susan Paoelli, if he was unwilling or unable to act). The will provided that, "If any person takes any action to prevent the admission to probate of my Will, that person shall take nothing hereunder." The document also directed that the estate's property would pour over to

⁴ The document is a printout of an e-mail and is signed by Distasi (twice) and the parties. It states that Distasi's 2005 will and 2007 amendment "are still in effect and are the only documents to be recognized" and that "[a]ny new documents should be discussed by my heirs who are named in my existing trust and will and should be approved by all, including [Distasi's attorney] with their signatures." It also states, "The signatures listed below do hereby agree to these requests and that no other trusts, wills or documents or changes of any kind will be recognized, and I hope that this resolves any potential problems."

the Trust upon Distasi's death. Also on that date, Distasi executed a Third Amendment (prepared and notarized by defendant's attorney) to the Trust, appointing defendant as successor trustee after Distasi ceased to act as trustee. The amendment provided that, upon Distasi's death, his estate would be distributed to defendant and, if he did not survive Distasi, then to defendant's wife, Susan. In Article 3.5, entitled "Disinheritance," the amendment provided:

“(a) DONALD KOZYRA, KATHLEEN A. KOZYRA, JAMES A. KOZYRA, KELLY A. KOZYRA, PATRICK CLEARY, PATRICIA A. CLEARY, RICHARD M. CLEARY, TIMOTHY M. CLEARY, THOMAS R. CLEARY, ROSEMARY CLEARY, VALERIE CLEARY and CHRISTOPHER CLEARY shall receive nothing hereunder.

(b) If any person takes any action to prevent the admission to probate of my Will or to contest the validity of this trust, that person shall take nothing hereunder.”

(Emphasis omitted.)

¶ 18 Plaintiffs further alleged that, on or about September 30, 2009, Distasi left the Kozyra home, advising Kozyra that he was going to visit defendant. Kozyra understood that Distasi did not intend to abandon his residency at the Kozyra home.

¶ 19 Plaintiffs also alleged that, on or about October 20, 2009, about \$7,300 was withdrawn from Distasi's Banco Popular checking account “by or for the benefit of” defendant “as a result of his exercise of undue influence” over Distasi. Kozyra had been a signer and beneficiary on the account. (There is no documentation of this transfer attached to plaintiffs' complaint.)

¶ 20 Plaintiffs further alleged that, on or about 2010, Distasi's retirement funds were transferred from his longstanding account at Raymond James to an Edward Jones office in Crystal Lake, where both defendant and his attorney had utilized financial services. This transfer, they alleged, was made by reason of defendant imposing undue influence over Distasi to

initiate the transfer. This change, they further alleged, would not have been contemplated by Distasi, but for his being unduly influenced by defendant. Similarly, plaintiffs alleged that Distasi changed the beneficiary of his term life insurance policy (documentation of which was not attached to the complaint), under which Kozyra and defendant were originally equal beneficiaries, such that defendant was sole beneficiary. They alleged that Distasi would not have contemplated this change but for defendant's undue influence. Also, plaintiffs alleged that certain Parkway Bank accounts (documentation of which was not attached to the complaint) that were formerly owned by Distasi were transferred to defendant and that the transfer resulted from defendant's undue influence over Distasi and would not have been otherwise made.

¶ 21 Distasi passed away on September 27, 2012, at age 96. The death benefit under the life insurance policy was awarded to defendant.

¶ 22 Plaintiffs argued that, as a result of defendant's wrongful acts and the dominant/subservient relationship that evolved between defendant and Distasi, a presumption arose that the substantial changes in Distasi's will and Trust, Allianz account, Parkway Bank accounts, Banco Popular checking account, life insurance policy beneficiary designation, room addition to defendant's home, and the transfer of the Edward Jones account were the result of undue influence of defendant over Distasi.

¶ 23 Plaintiffs requested imposition of a constructive trust or lien upon the estate's funds received or held by defendant until the trial court could obtain an accurate accounting, and they sought attorney fees, costs, and compensatory and punitive damages.

¶ 24 B. Defendant's Motion to Dismiss and Trial Court's Ruling

¶ 25 On July 23, 2015, defendant moved to dismiss plaintiffs' second amended complaint (735 ILCS 5/2-619(a)(9) (West 2014)), arguing that there was no fiduciary relationship between

plaintiffs and defendant giving rise to a cause of action for a constructive trust or accounting and that defendant's relationship with Distasi did not give rise to a duty by him to plaintiffs. Defendant asserted that the mere fact that a blood or family relationship existed did not create a fiduciary relationship.

¶ 26 At the hearing on the motion, plaintiffs argued that they were not alleging a fiduciary duty between themselves and defendant, but one between defendant and Distasi. This relationship, according to plaintiffs, was one of undue influence, which they asserted they adequately pleaded.

¶ 27 On December 8, 2015, the trial court granted defendant's motion and dismissed the case with prejudice. In its order, the court found that "notwithstanding three opportunities to state a cause of action, the Plaintiffs failed to do so. In particular, the Plaintiffs fail to allege any duty owed by the Defendant to the Plaintiffs." Plaintiffs appeal.

¶ 28

II. ANALYSIS

¶ 29 Plaintiffs maintain that the trial court erred in dismissing their complaint. They argue that their undue-influence claim should not have been dismissed because their theory was that defendant had a fiduciary duty to *Distasi* (not *plaintiffs*, as defendant contends) that was breached and that resulted in harm to plaintiffs. For the following reasons, we reject plaintiffs' argument.

¶ 30 A motion to dismiss under section 2-619(a) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2014)) admits the legal sufficiency of the plaintiff's complaint, but asserts that the claim asserted against the defendant is barred by some affirmative matter that avoids the legal effect of or defeats the claim. *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 15. When ruling on the section 2-619(a)(9) motion, the trial court

construes the pleadings in the light most favorable to the nonmoving party and should only grant the motion if the plaintiff can prove no set of facts that would support a cause of action. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31. Section 2-619(a)(9)'s purpose is to provide litigants with a method of disposing of issues of law and easily proved issues of fact—relating to the affirmative matter—early in the litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). If a cause of action is dismissed pursuant to a section 2-619(a)(9) motion, the question on appeal is whether there is a genuine issue of material fact and whether defendant is entitled to judgment as a matter of law. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 494 (1994). Section 2-619 motions present a question of law, and our review is *de novo*. *Doe v. Diocese of Dallas*, 234 Ill. 2d 393, 396 (2009).

¶ 31 Plaintiffs sought imposition of a constructive trust based on defendant's alleged breach of his alleged fiduciary duty to Distasi.⁵ “A constructive trust is an equitable remedy imposed against one who, by some form of wrongdoing such as actual or constructive fraud, breach of a fiduciary duty, duress, coercion, or mistake, has been unjustly enriched.” *Schultz v. Schultz*, 297 Ill. App. 3d 102, 106-07 (1998). “[W]here by reason of friendship, agency, business association and experience, a high degree of trust is reposed, a confidential relationship may be said to exist;

⁵ In their complaint, plaintiffs also sought an accounting, which they do not address in their brief. However, we note that, as pleaded here, a breach of fiduciary duty must also be shown. See, e.g., *People ex rel. Hartigan v. Candy Club*, 149 Ill. App. 3d 498, 500-01 (1986) (“To sustain an action for an accounting in equity the complaint must allege the absence of an 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”) (Emphasis added.)

and the mere existence of such a connection prohibits the one trusted from seeking or obtaining any selfish benefit for himself [or herself] during the course of the relationship and affords a basis for fastening a constructive trust upon the property.” *Steinmetz v. Kern*, 375 Ill. 616, 620 (1941).

“To establish a constructive trust based on the existence of a confidential or fiduciary relationship, the party seeking the constructive trust must prove such a relationship by clear and convincing evidence. *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 46 (1994). The following factors must be taken into consideration: (1) the degree of kinship; (2) the disparity in age, health, mental condition, education, and business experience *between the parties*; and (3) the extent to which the allegedly servient party entrusted the handling of [his or] her business and financial affairs to the ‘dominant’ party and placed trust and confidence in him [or her]. *Ransom v. A.B. Dick Co.*, 289 Ill. App. 3d 663, 673 (1997).” (Emphasis added.) *Kaiser v. Fleming*, 315 Ill. App. 3d 921, 926 (2000).

¶ 32 “To sustain a finding that a fiduciary relation exists[,] special confidence and trust on one side and domination and influence on the other must be proved.” *Maley v. Burns*, 6 Ill. 2d 11, 17 (1955). The undue influence “must be directly connected with the execution of the instrument, operate at the time it was made, and be directed toward procuring the will of a particular party or parties.” *In re Estate of DiMatteo*, 2013 IL App (1st) 122948, ¶ 62. A familial relationship, including where the parent is the grantor and the child is the grantee is not sufficient to raise a presumption of undue influence or operate to establish a fiduciary relationship as a matter of law. *Stone v. Stone*, 407 Ill. 66, 78 (1950). “[O]ld age, eccentricities, and even partial impairment of the mental faculties is not necessarily sufficient to set aside [a] deed; and if the grantor has sufficient mental capacity to comprehend the nature of the transaction in making the deed and its

effect and meaning, it will not be set aside.” *McCrillis v. Utterback*, 397 Ill. 550, 554 (1947); see also *Campbell v. Freeman*, 296 Ill. 536, 539 (1921).

¶ 33 Where a confidential relationship exists, there is a presumption that the challenged transaction resulted from undue influence, thus, shifting the burden to the other party to establish the fairness of the transaction. *In re Estate of Kaminski*, 200 Ill. App. 3d 309, 313 (1990). Here, we conclude that no confidential relationship existed between plaintiffs and defendant.

¶ 34 Plaintiffs’ complaint was properly dismissed because the pleadings reflected that they could not show there was a fiduciary relationship between themselves and *defendant*, which was necessary to sustain a claim for a constructive trust. Contrary to plaintiffs’ contention, to show undue influence, plaintiffs had to establish that defendant owed *them*, not Distasi, a fiduciary duty. The case law upon which plaintiffs rely consists primarily of probate court actions brought by decedents’ estates to set aside testamentary documents and, thus, are not relevant here because Distasi’s estate is not a party to this action in equity. See, e.g., *In re Estate of Hoover*, 155 Ill. 2d 402 (1993) (will and codicils contest); *Tidholm v. Tidholm*, 397 Ill. 363 (1947) (will contest); *In re Estate of DiMatteo*, 2013 IL App (1st) 122948 (will contest); *In re Estate of Baumgarten*, 2012 IL App (1st) 112155 (will and revocable trust contest); *In re Nelson’s Estate*, 132 Ill. App. 2d 544 (1971) (citation proceeding by executor to recover alleged assets of the decedent’ estate). Indeed, plaintiffs’ citation to a pattern jury instruction for the proposition that they need to establish a fiduciary duty to Distasi, not to plaintiffs, is mistaken because the instruction applies to will contests, not equitable actions seeking a constructive trust and where the decedent’s estate is not a party. See Illinois Pattern Jury Instructions, Civil, No. 200.03 (July 2016) (for use in will contests where there are assertions of undue influence based entirely on un rebutted presumption arising from fiduciary relationship).

¶ 35 Several other cases upon which plaintiffs rely are distinguishable for other reasons. See *Kosakowski v. Bagdon*, 369 Ill. 252 (1938) (contract issue, specifically, a daughter's action to set aside a deed her deceased mother gave to her second husband during their engagement); *Kaiser v. Fleming*, 315 Ill. App. 3d 921 (2000) (the plaintiff alleged breach of fiduciary duty by defendant to plaintiff, not a decedent); *Schultz v. Schultz*, 297 Ill. App. 3d 102 (1998) (the plaintiff alleged that the decedent breached a fiduciary duty he owed to the plaintiff when he changed the beneficiary on his insurance policy); see also *Mann v. Kemper Financial Cos., Inc.*, 247 Ill. App. 3d 966, 980 (1992) (plaintiff investors sought an accounting in equity, alleging defendant investment adviser breached its fiduciary duty to plaintiffs and defrauded them via certain misrepresentations in prospectuses).

¶ 36 A review of the factors cited above that tend to show a fiduciary relationship (*e.g.*, kinship, disparity concerning certain characteristics, and entrustment) reflects that they are not present here to establish such a relationship between the parties. Although the parties are cousins and the first factor is satisfied, plaintiffs' complaint does not contain any allegations concerning the second factor—that there was a disparity as to certain characteristics (*e.g.*, disparity in age, mental condition, business experience, etc.) between the parties. Nor did plaintiffs allege that they placed any trust in defendant. Thus, no fiduciary relationship could be shown to exist between plaintiffs and defendant.

¶ 37 In the absence of any relevant authority supporting plaintiffs' argument or any well-pleaded facts showing a fiduciary relationship between the parties, plaintiffs have failed to show that they are entitled to seek a constructive trust (or an accounting) based upon defendant's alleged breach of a fiduciary duty to Distasi—someone who is not a party to this case. Furthermore, as defendant notes, many of the cases plaintiffs cite involve a party seeking to

invalidate a testamentary document, whereas, here, plaintiffs did not file an action to invalidate Distasi's will or Trust. However, plaintiffs' arguments are tied to the testamentary documents and their validity. We tend to agree with defendant's characterization that plaintiffs are essentially trying to sidestep the probate court, where they could have contested Distasi's will. Alternatively, as defendant notes, plaintiffs could have brought an action for tortious interference with economic expectancy to inherit.⁶ See *Ellis*, 236 Ill. 2d at 51-52 (2010) (noting that a will contest is distinct from the interference-with-economic-expectancy tort; issue in a will contest is whether the writing produced is the will of the testator and the action is against the will itself, not the beneficiaries, whereas a tort claim for intentional interference with inheritance is a personal action directed against an individual tortfeasor and the remedy is a judgment against the individual defendant).

¶ 38 In summary, no fiduciary relationship could be shown to exist between plaintiffs and defendant and the trial court properly dismissed plaintiffs' complaint, with prejudice. See *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405 (2008) (complaint should be dismissed pursuant to section 2-619(a)(9) with prejudice only where the plaintiff can prove no set of facts that will entitle him or her to recover).

¶ 39

III. CONCLUSION

¶ 40 For the reasons stated, the judgment of the circuit court of McHenry County is affirmed.

¶ 41 Affirmed.

⁶ The tort's elements are: (1) the existence of an expectancy; (2) the defendant's intentional interference with the expectancy; (3) conduct that is tortious in itself, such as fraud, duress, or undue influence; (4) a reasonable certainty that the expectancy would have been realized but for the interference; and (5) damages. *In re Estate of Ellis*, 236 Ill. 2d 45, 52 (2009).