

2017 IL App (2d) 160947-U
No. 2-16-0947
Order filed October 24, 2017
Modified Upon Denial of Rehearing December 7, 2017

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
SECOND DISTRICT

<i>In re</i> THE ESTATES OF CHARLES RESTAINO, deceased, and JEANETTE RESTAINO, deceased)	Appeal from the Circuit Court of Du Page County.
)	
)	No. 15-P-1008
)	
(Frank Restaino, Petitioner-Appellant, v. Northern Trust Company, Estate of Jeanette Restaino, Maryann Magno and Jean Grieco, Respondents-Appellees).)	Honorable Robert G. Gibson Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed appellant's amended petition when, after stripping the pleading of unsupported conclusions and inferences, he failed to state a cause of action for any of the claims he made in the seven-count amended petition. Also, the trial court did not abuse its discretion in dismissing the amended petition with prejudice when it advised appellant and his counsel of the substantial defects in his original petition and those defects were not cured in the amended petition.

¶ 2 Plaintiff Frank Restaino (Frank) brought a seven-count petition in which he asserted various contract, tort and equitable theories seeking to redress amendments to a trust agreement

that his late step-mother, Jeanette Restaino (Jeanette), made that removed him, and later his children, as beneficiaries. Defendants are: (1) the beneficiaries of Jeanette’s trust, her daughters, Maryann Magno and Jean Grieco (Mary Ann and Jean); and (2) the trustee of both trusts, The Northern Trust Company (Northern Trust). The trial court dismissed Frank’s original petition pursuant to section 619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)) and it dismissed the amended petition pursuant to section 615 of the Code (735 ILCS 5/2-615 (West 2016)) on the ground that the claims were substantially insufficient at law and failed to allege facts that brought the claims within any of the seven causes of action asserted. The amended petition was dismissed with prejudice. On appeal, Frank contends that the trial court erred in: (1) dismissing his petition when it contained enough facts to entitle him to a trial on the merits; and (2) dismissing his petition with prejudice. For the following reasons, we affirm.

¶ 3

I. BACKGROUND

¶ 4 The record reflects that Jeanette married Charles Restaino (Charles) in Illinois on August 26, 1960. Charles had two adult children at that time, Frank and his sister, Patricia Restaino (Patricia). Jeanette also had two adult children at that time, Mary Ann and Jean. On September 15, 1972, Charles established the “Charles Restaino Insurance Trust” in Illinois. On July 2, 1979, Jeanette established the “Jeanette Restaino Trust,” also in Illinois.

¶ 5 In 1993, Charles and Jeanette moved to Florida permanently. On February 26, 1998, Charles and Jeanette updated their estate planning and amended their individual trusts and executed reciprocal documents for the benefit of each other and their combined four children. Each trust provided for the principal and interest to support the surviving spouse and that the remainder would be divided equally among each set of children. Charles and Northern Trust

were named co-trustees of Charles' trust, and Jeanette and Northern Trust were named co-trustees of Jeanette's trust.

¶ 6 Both trusts contained a section entitled "Situs of Trust." That section provided:

"This Declaration of Trust has been accepted by the Trustee in the State of Florida, and it shall be construed and regulated and all rights under it shall be governed by the laws of that State."

¶ 7 Article V of both trusts was entitled "Rights and Powers Reserved by Settlor." That article provided, in pertinent part:

"The Settlor shall have and possess, and hereby reserves, the following rights and powers, to be exercised at any time and from time to time by a writing or writings signed and acknowledged by Settlor and to be effective when delivered to the then acting Trustee hereunder:

A. To revoke this Declaration of Trust and any trust established hereunder in whole or in part, whereupon the Trust Estate or the part thereof affected thereby shall be distributed as the Settlor shall direct in writing, after making payment or provision of all expenses connected with the administration of this Trust.

C. To alter, modify or amend this Declaration of Trust in any and every particular; provided, however, that the duties and responsibilities of any Trustee hereunder shall not be changed without the written consent of such Trustee."

¶ 8 In addition, Article XVI of both trusts was entitled "Construction of Agreement" and contained the following paragraph:

"2. The right to amend or revoke the foregoing Restatement in whole or in part is

hereby reserved.”

¶ 9 Article XII of Charles’ trust was entitled “Powers of Trustees.” That section provided that the trustee may exercise specific powers at any time in its unrestricted judgment and discretion without resort to any person or court for further authority. One of those powers was entitled “Distribution in Cash or in Kind.” Specifically, that section gave the trustee the following power:

“To make payment or distribution (required or authorized under this Declaration) either wholly or partly in kind at market value at date of distribution and to cause any share to be composed of cash, property or undivided fractional interest in property different in kind from any other share without regard to differences in tax bases on any such property and the Trustee’s decision with respect thereto shall be final and binding on all beneficiaries.”

¶ 10 In May 2000 Jeanette and Charles moved into an assisted living facility in Florida. In January 2001 Charles died. On June 19, 2002, Jeanette amended her trust, leaving intact the division of the assets as half to her daughters and the other half to Frank and Patricia, per stirpes. Jeanette also noted that if any beneficiary should die before she did, and if that beneficiary did not have any living descendants, then the deceased beneficiary’s principal would be distributed to that beneficiary’s then living sibling, or if that sibling was deceased, then to the siblings’ living descendants.

¶ 11 On April 4, 2003, Jeanette amended her trust again. This time, she provided that half of the principal would still go to Maryann and Jean. However, the other half would be divided equally between Patricia, but only if she had not remarried, and Frank’s four children. Also, in the event that Patricia did remarry, then her trust share would be distributed equally to Frank’s

living children, or all of it to the survivor of them.

¶ 12 On December 20, 2005, Jeanette amended her trust again. The trust was entitled “Third Amendment” and it materially altered the prior trusts. In that amendment Jeanette disinherited Charles’ children from the trust and only left the principal to Maryann and Jean and their children. In March 2006 Jeanette moved back to Illinois.

¶ 13 On September 23, 2014, Jeanette died. In early 2015, Frank’s children found out that Jeanette had died through online research. Frank telephoned Northern Trust to confirm that Jeanette had died, and asked how the trust funds would be distributed. In response, Northern Trust sent Frank a letter on February 25, 2015, confirming that Jeanette had died and that the remainder of Charles’ Trust was now distributable to the children as beneficiaries. In that letter Northern Trust also said, “[p]rior to distributing your share of the Trust to you, we must consider whether to liquidate all or a portion of the assets. We will need the mutual agreement of all 3 beneficiaries in either case, so please let us know your preference in that regard as soon as possible.” Later in the letter Northern Trust wrote, “[i]f the beneficiaries do not agree, all the assets will be liquidated and distributed as cash.” At that time, the approximate value of Charles’ trust was \$540,000.

¶ 14 Frank then telephoned Donna Moody, the administrator at Northern Trust, and asked what had happened to the funds from Jeanette’s trust and why had its distribution not been mentioned in the letter as well. In response, Moody informed Frank that he was no longer a beneficiary of Jeanette’s trust. On March 30, 2015, Northern Trust sent Frank another letter advising him that Maryann and Jean wanted to have their shares in cash and that the assets of Charles’ trust would therefore be liquidated. The same day the letter was sent Northern Trust liquidated the assets of Charles’ trust.

¶ 15 On July 10, 2015, Northern Trust sent Frank another letter, this time informing him that if he did not agree to sign an “Approval of Accounts and Release Agreement” by July 31, 2015, it would retain outside counsel to release and discharge Northern Trust at the expense of Charles’ trust. On July 13, 2015, Frank, through counsel, sent a letter to Northern Trust requesting copies of the trusts, correspondences, accountings and distribution documents. Northern Trust wrote Frank back and again told him that he was not a beneficiary of Jeanette’s trust and therefore Northern Trust would not provide the requested documents. In the letter Northern Trust also said that if Frank did not agree to approve and release it from its responsibilities under Charles’ trust it would retain counsel to seek judicial approval of a release, at the expense of Franks’ share of Charles’ trust.

¶ 16 On October 14, 2015, Northern Trust sent a follow up letter to Maryann, Jean and Frank, stating that since Frank had not signed the “Approval of Accounts and Distribution, Release and Refunding Agreement,” it would hire outside counsel to have the court release and discharge it at the cost of the trust.

¶ 17 Frank then filed a “Petition for Modification of Trust and Verified Complaint for Damages” on October 23, 2015. Frank attached Charles’ trust, along with the correspondence between him and Northern Trust, to the petition. Frank’s petition contained seven counts. One allegation in the petition claimed that if Jeanette did not intend to be bound by the reciprocal terms of the estate plan, then she fraudulently induced Charles Restaino into signing his restated trust in 1998. Following that allegation Frank claimed that Jeanette was in good health in 1998 when she restated her trust agreement.

¶ 18 Northern Trust filed a motion to dismiss all seven counts of the original petition, joined by Maryann and Jean. Attached to the motion were copies of Jeanette’s original trust and the

three amendments to it.

¶ 19 On April 20, 2016, after extensive briefing and oral argument, the trial court dismissed Frank's original petition without prejudice pursuant to sections 2-619.1 of the Code. 735 ILCS 5/2-619.1 (West 2016). The court stressed the severe conceptual and practical problems with Frank's claims and admonished him, through counsel, to consider the cost of proceeding. Specifically, the court said:

“I am going to give you 28 days, if you choose to try to amend this, but I think there [are] several problems here. *** And certainly you and your client are going to have to determine whether your client is going to seek to spend a lot of money on this situation.

There are such things are irrevocable trusts, there are such things at [sic] joint and mutual wills that would put a limitation on it, but for whatever reason, the parties didn't enter into those when they had their counsel draft and when they executed these, the trust and then later on restatements.”

¶ 20 On May 18, 2017, Frank filed an amended petition. The amended petition repeated, sometimes verbatim, the same seven claims contained in the original petition. In count I, breach of fiduciary duty against Northern Trust, Frank alleged that Northern Trust breached its fiduciary in several ways: (1) by failing to be impartial; (2) by taking the direction of Maryann and Jean to the detriment of him, including liquidating Charles' trust account; (3) by engaging in *ex parte* communications and collusion with Maryann and Jean to his detriment; (4) by inflicting duress upon him to approve and release it from its trustee responsibilities or be subject to attorney fees and court costs; (5) by failing to petition the trial court for instruction on the third amendment to

Jeanette's trust when there were conflicting claims to her trust; (6) by failing to timely send out notice to Frank that Jeanette had died until more than five months after her death, and only after he had telephoned Northern Trust to inquire about Jeanette's death following an internet search; (7) by prematurely liquidating Charles' trust without due notice, even when it knew that there were conflicting claims to the trust; and (8) by failing to prudently invest the proceeds of Charles' trust when it liquidated the trust.

¶ 21 Count II involved a breach of contract claim against Jeanette's estate. In it, Frank alleged that from the time Charles and Jeanette were married they agreed to treat both sets of their children equally. This agreement was verbal as well as evidenced by the terms of their reciprocal restatements of trusts executed on February 26, 1998. Charles and Jeanette had "mutual" estate plans as the trust contained reciprocal provisions in separately executed documents.

¶ 22 Count III was a fraud claim against Jeanette. In it, Frank alleged that alternatively, if Jeanette did not intend to be bound by the reciprocal terms of the estate plan, then she fraudulently induced Charles into signing his restated trust in 1998. He claimed that because Charles had been diagnosed with Parkinson's disease, it was reasonable to assume that Charles would die first. Jeanette knew this, and used it to her and her children's advantage. Charles would not have agreed to sign the reciprocal estate planning documents if he had known that Jeanette would change her documents after he died, to leave her own children three times as much as his own children could receive. If Jeanette had told Charles that she intended to leave all of her trust assets to Maryann and Jean, Charles would have left all of his trust assets to Frank and Patricia. But for the fraudulent misrepresentation and inducement of Jeanette, Charles' children would have been the beneficiaries of the assets of his trust, or half of the assets of both

trusts if the reciprocal estate plans were followed.

¶ 23 Count IV was a “Lack of Capacity Contest Claim” against Jeanette’s estate, in the alternative. In it, Frank alleged that if Jeanette had intended to be bound by the terms of the reciprocal estate plan, but forgot that because of her advanced age, disability, dementia and “other general and mental incapacity,” she could not have validly executed any amendments to her trust. He claimed that during the years in which Jeanette made amendments to her trust she was unable to live alone, unable to manage her own affairs, finances or care, and she needed around the clock care at a live-in facility. Finally, he alleged that at the time she executed the amendments to her trust Jeanette lacked the capacity required to validly execute them. Specifically, in the background section of the amended petition (the facts of which were incorporated into every count in the petition) Frank alleged:

“Through the mid to late 1990’s, Charles’ and Jeanette’s physical and mental health declined substantially, not only because they were in their eighties in age, but also because Charles suffered from Parkinson’s disease and Jeanette suffered from coronary artery disease and exhibited early symptoms of her later-severe dementia.”

¶ 24 Frank also provided two examples of Jeanette’s dementia in the background section of the amended petition. The first example was a reference to a family vacation in the latter half of the 1990s when Frank and his children visited Charles and Jeanette in Florida. Jeanette allegedly made Frank and his two sons (but not his daughters) shower in the pool locker room instead of in one of the home’s many bathrooms. The second example of Jeanette’s alleged dementia was about a random encounter that Frank had with Maryann, Jean and Jeanette in 2004. According to Frank, Jeanette “was not communicative, seemed confused and generally appeared as if ‘she wasn’t all there.’”

¶ 25 Count V was another alternative claim, labeled “Undue Influence Contest Claim” against Jeanette’s estate and Maryann and Jean. In it, Frank claimed that he was told not to contact Jeanette after Charles died. Maryann and Jean took specific actions that controlled Jeanette and alienated her from Frank and his family. By design, Maryann and Jean showed Jeanette the only kindness and affection she received and managed her care so that they were the only family she saw. Examples of Maryann and Jean’s control were provided in the background section of the amended petition. Frank alleged that in April 2013, he went to visit Jeanette for her birthday and the next day Jean called Frank and told him that he was not allowed to visit Jeanette, and that if he wanted to visit her in the future he needed to ask Jean’s permission first. When he ran into Maryann a few weeks later and expressed his concern that Jean was limiting his ability to visit Jeanette, Maryann had no response “and was not concerned about this alienation action.” In April 2014, Frank called Jean and requested permission to visit Jeanette with his daughter and granddaughter. Jean told Frank that they could not visit because “she was so out of it that ‘she would not even recognize [his daughter] or know who she was at all.’”

¶ 26 Frank alleged that the control that Maryann and Jean exerted over Jeanette negatively impacted him and his family. Further, their actions unduly influenced Jeanette to alter the reciprocal estate plan and to amend her trust to take away the half of her trust earmarked for Charles’ descendants and to instead give that half of the trust to Maryann and Jean’s own children. But for this undue influence Maryann and Jean would not be the beneficiaries of three times as much as Charles’ descendants and Charles’ descendants would be beneficiaries of half of the assets of Jeanette’s trust.

¶ 27 Count VI was entitled “Tortious Interference with Economic Expectancy to Inherit Claim against Maryann Magno and Jean Grieco (Alternative Count) and alternatively against (Estate

of) Jeanette Restaino (Alternative Count).” In it, Frank alleged that he had an expectancy to inherit half of Jeanette’s trust as it was allocated for him and Patricia, his deceased sister, in the reciprocal estate plans of Charles and Jeanette as well as in prior letters he had received from Northern Trust. Frank claimed that Jeanette, Maryann and Jean intentionally interfered by inducing changes to the reciprocal estate plan and inducing amendments to Jeanette’s trust to remove Charles’ descendants and making Jeanette’s descendants the only beneficiaries. Frank was negatively impacted by this tortious conduct of undue influence and fraud.

¶ 28 Count VII was another alternative count, this time a request to modify Charles’ trust. In it, Frank said that if the trial court found the third amendment to Jeanette’s trust to be valid, then he requested that a “reciprocal judicial modification of the Charles Restaino Trust to remove Jeanette’s children, Maryann Magno and Jean Grieco, in favor of Frank Restaino and Patricia Restaino, should be ordered as well.” Frank alleged that Charles would not have agreed to a distribution scheme that resulted in his own children receiving only a third of what his stepchildren would receive by way of their family inheritance. Charles and his children had great relationships and there would be no reason for Charles to disinherit or disadvantage his children. It was Charles and Jeanette’s intention to treat each of their two sets of children equally with regard to the distributions when they both agreed their mutual trusts’ distribution schemes and the intention of both testators would be best served by treating each of their two sets of children the same at this time. Such a modification should be done in the interest of fundamental fairness.

¶ 29 On June 15, 2016, Maryann and Jean filed a motion to dismiss pursuant to section 619.1 of the Code (735 ILCS 5/2-619 (West 2016)). Northern Trust subsequently filed its motion to dismiss pursuant to section 615 of the Code (735 ILCS 5/2-615 (West 2016)). On October 11,

2016, the trial court dismissed the amended petition pursuant to section 2-615 of the Code, but this time with prejudice. 735 ILCS 5/2-615 (West 2016). Specifically, the court held:

“The summary is, the motions are going to be granted on a 2-615 basis. As to Count I, the breach of fiduciary duty, there [are] conceptual problems as well as pleading problems as there were with the original complaint, which was dismissed. Plaintiff’s response points out and extols the 157 paragraphs of length, but the content is the issue, not the number of paragraphs. The Plaintiff fails to allege facts constituting a breach of fiduciary duty. The trustee liquidated the assets in Charles’ trust in accordance with the trust terms. Plaintiff’s position is simply wrong. The Northern Trust can rightly administer and defend the trust.

As to Count 2, the brief [*sic*] of contract of the Estate of Jeanette Restaino, the continued assertion that Charles Restaino and Jeanette Restaino entered into a mutual, irrevocable, reciprocal estate plan is belied by the documents the parties executed, as well as Florida and Illinois statutes and case law. This problem can’t be rectified by an amended pleading. The parties reserve the right in their estate plan to amend or even revoke their estate planning documents. There is no basis, it can’t be rectified through an amended pleading, so the motion to dismiss is granted with prejudice.

Count 3 against the estate of Jeanette Restaino, this count presupposes an agreement to form an irrevocable, reciprocal estate plan. The premise is flawed, and consequently this count falls [*sic*] as well. Motion to dismiss is granted with prejudice.

Lack of capacity, count 4, a settler’s [*sic*] mental incapacity at the time of the trust execution, amendment or revocation will invalidate the trust documents executed.

Here, there is insufficient or no facts alleged which support a lack of testamentary capacity at the time, particularly of the Third Amendment. The court notes the Plaintiff is attempting to thread a needle here by referring approvingly to the restatement of the trust, and even the first two amendments to the trust, but then attempting to invalidate the Third Amendment. And although there is discussion at various points about invalidating other amendments as well, instead of alleging facts, Plaintiff offers up its impressions which did not pass muster to sustain the cause of action. The motion is granted, and count 4 is dismissed with prejudice.

As to undue influence, count 5, it fails to allege a specific recital of the manner in which the free will of the testator was impaired at the time the instrument was executed and that the document's execution was procured by such undue influence; consequently, count 5 is dismissed with prejudice.

Count 6, tortious interference with economic expectancy to inherit, the interference must involve conduct which is tortious in and of itself, such as fraud, duress or undue influence. There is [*sic*] no facts that have been substantively pled that would sustain this burden, so count 6 is dismissed with prejudice as well.

Count 7, this count contains no basis to permit or justify this court to modify Mrs. Restaino's [*sic*] estate plan, consequently count 7 is dismissed with prejudice."

¶ 30

II. ANALYSIS

¶ 31 On appeal, Frank first makes two general arguments: (1) in his amended petition he met the minimum pleading requirements in Illinois; and (2) he should have been granted leave to further amend his petition if necessary. Since a determination of these issues can only be found

by reviewing the allegations in all seven counts, we will reserve a ruling on these points until we have thoroughly reviewed the amended petition.

¶ 32 We initially note that this court applies a *de novo* standard of review to a trial court's order granting a motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)); *Ferris, Thompson & Zwig, Ltd. v. Esposito*, 2017 IL 121297, ¶ 5. "On review of a dismissal for failure to state a claim, the court concerns itself only with the allegations of the complaint and whether they adequately state the necessary elements for the cause of action alleged." *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 17. We will review a trial court's decision to dismiss a cause of action with prejudice under an abuse of discretion standard. *Fabian v. BGC Holdings, LP*, 2014 IL App (1st) 141576, ¶ 22.

¶ 33 Before addressing the merits of these arguments we must address Northern Trust's contention that Frank erroneously relies on Illinois law with regard to the construction, validity and administration of Jeanette and Charles' trusts. Instead, Northern Trust contends that Florida law governs the construction, validity and administration of the trusts here.

¶ 34 While Illinois law governs pleading standards and other procedural matters in this case (*Denton v. Universal Am-Can, Ltd.*, 2015 IL App (1st) 132905, ¶ 16), it is clear from the wording of both trusts that Florida law governs the construction, validity and administration of the trusts. Specifically, both trusts contained the exact same wording:

"F. Situs of Trust. This Declaration of Trust has been accepted by the Trustee in the State of Florida, and it shall be construed and regulated and all rights under it shall be governed by the laws of that State."

¶ 35 In Illinois, a trust instrument "is construed in accordance with the rules of construction of the state designated for this purpose in an instrument." *Brown v. Ryan*, 338 Ill. App. 3d 864,

870-71 (2013) (quoting Restatement (Second) of Conflict of Laws § 268(1) (1979)).

¶ 36 We agree with Northern Trust that Florida law controls the construction, validity and administration of Charles and Jeanette's trust. Therefore, to the extent that Frank has cited to Illinois law for these purposes, such law will be ignored in favor of Florida law.

¶ 37 We now turn to the counts alleged in Frank's petition to determine whether the trial court committed error in granting the motions to dismiss, and whether it erred in granting those motions with prejudice.

¶ 38 A. Count I – Northern Trust's Breach of Fiduciary Duty

¶ 39 Frank first alleges that the trial court erred in dismissing his claim that Northern Trust breached its fiduciary duty to him. Specifically, he alleges five ways that Northern Trust breached this duty: (1) it failed to notify him of Jeannette's death; (2) it misled him regarding liquidating the trust account; (3) it failed to maintain the status quo and file an interpleader action; (4) it failed to remain impartial; and (5) it failed to prudently invest the trust funds by holding them in cash for two years.

¶ 40 To establish a claim for breach of fiduciary duty, a plaintiff must prove: (1) the existence of a duty, (2) breach of that duty, and (3) damages flowing from the breach. *Cassedy v. Allland Investments Corp.*, 128 So. 3d 976, 978 (Fl. App. Ct. 2014).

¶ 41 We have carefully reviewed the allegations in Frank's amended petition and find that the trial court properly determined that he did not establish a breach of a fiduciary duty on Northern Trust's part. Specifically, the facts Frank alleged in this count do not state a claim for breach of fiduciary duty because those facts either: (1) implicate no recognized fiduciary duty; or (2) fail to identify any damages that resulted from the alleged breach. We will address each of his claims of breach separately.

¶ 42 1. Failure to Notify Frank of Jeanette's Death

¶ 43 Frank first claims Northern Trust breached a fiduciary duty to him by failing to notify him of Jeanette's death. He contends that since he was a beneficiary under Charles' trust he was entitled to be notified of Jeanette's death, since Jeanette's death meant that he became an automatic successor beneficiary in Charles' trust. To support this claim Frank cites to section 736.0813(1)(b) of the Florida Trust Code, wherein a trustee's duty to inform and account to the beneficiaries includes, but is not limited to, the following:

“(a) Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice to the qualified beneficiaries of the trust's existence, the identity of the settlor or settlors, the right to request a copy of the trust instrument, the right to accountings under this section ***[.]” Fla. Stat. § 736.0813(1)(b) (2016).

¶ 44 We are not persuaded. Here, even if we were to find that Northern Trust breached its duty to notify Frank of Jeanette's death because he was a beneficiary in Charles' trust, Frank still did not allege any facts showing that he suffered any damages from this alleged breach. Frank himself alleges that he was alerted to Jeanette's death by his children, and then he filed a timely suit against Jeanette and Charles' estates. Accordingly, this claim fails.

¶ 45 2. Premature Liquidation of Charles' Trust

¶ 46 Next, Frank claims that Northern Trust breached a fiduciary duty to him when it misled him regarding liquidating the assets in Charles' trust account. He claims that Northern Trust stated to him in writing that it would wait to liquidate Charles' trust until all three beneficiaries agreed, but then it proceeded to liquidate the account anyway, without Frank's agreement or

giving him advanced notice of it. Specifically, Frank contends that in a letter dated February 25, 2015 to him, Northern Trust wrote, “Prior to distributing your share of the Trust to you, we must consider whether to liquidate all or a portion of the assets. *We will need the mutual agreement of all 3 beneficiaries in either case*, so please let us know ***[.]” (Emphasis in original). (A copy of the letter was attached to the amended petition as exhibit B.) Despite what Northern Trust wrote in the letter to him, however, Frank claims that Northern Trust did not wait for the mutual agreement of all three beneficiaries. Instead, it liquidated the trust account without any warning and then put a letter in the mail to Frank informing him of the liquidation. Frank did not have a chance to review the options with his tax advisor or with legal counsel, and he was deprived of the opportunity for a court to enter a temporary restraining order or other type of court order to maintain the status quo pending a judicial determination of the underlying issues.

¶ 47 In response, Northern Trust argues that Frank’s claim cannot be reconciled with: (1) the plain language in Charles’ trust; or (2) with the full text of Northern Trust’s correspondence, which Frank misstates in his amended petition and in his brief on appeal.

¶ 48 We agree with Northern Trust that Charles empowered it to make the final distribution after Jeanette’s death “in cash or in kind” to the surviving remainder beneficiaries under his trust. The plain language of Charles’ grant refutes Frank’s allegations that Northern Trust breached its fiduciary duties by liquidating the trust assets to make a cash distribution without first obtaining Frank’s consent or seeking judicial instructions. Here, Northern Trust owed Frank no duty to obtain his consent or seek judicial intervention before liquidating the remaining assets in Charles’ trust. In fact, the terms of the trust provided that Northern Trust was given the authority to make the distribution in cash or in kind “in its unrestricted judgment and discretion without resort to any person or court for further authority.” Further, the trustee’s decision was to be

“final and binding on all beneficiaries.”

¶ 49 We also agree with Northern Trust that Frank misstates the full text of Northern Trust’s correspondence, both in his amended petition and in his brief on appeal. Frank argues that Northern Trust misled him by stating in writing that it “would wait to liquidate the [trust] until all three beneficiaries [had] agreed,” but then proceeded to liquidate the assets without Frank’s consent.

¶ 50 Contrary to Frank’s contention, in the letter from Northern Trust that Frank refers to, Northern Trust never stated that it would wait to liquidate the assets until all three beneficiaries agreed. Instead, in the letter it stated:

“Prior to distributing your share of the Trust to you, we must consider whether to liquidate all or a portion of the assets. We will need the mutual agreement of all 3 beneficiaries in either case, so please let us know your preference in that regard as soon as possible *** *If the beneficiaries do not agree, all the assets will be liquidated and distributed in cash.*” (Emphasis added.)

¶ 51 The letter from Northern Trust, dated February 25, 2015, is attached to Frank’s amended petition. However, the italicized sentence above is not referred to in Frank’s pleading or in his brief. “Where an exhibit contradicts the allegations in a complaint, the exhibit controls.” *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. Here, Frank’s silence was taken as a disagreement with his step sisters concerning the liquidation of the assets of Charles’ trust, and the trustees, in their discretionary powers, properly liquidated the assets. For these reasons, Frank’s claim that Northern Trust breached its fiduciary duty to him by liquidating the trust assets without first getting his consent or court approval fails as a matter of law.

¶ 52 3. Failure to Maintain the Status Quo/File an Interpleader Action

¶ 53 Next, Frank argues that Northern Trust breached its fiduciary duty to him when it failed to maintain the status quo and file an interpleader action when there were conflicting claims to the trust funds. He claims that since Northern Trust was aware of a beneficiary dispute from Frank's telephone calls to it, Northern Trust should have kept the funds invested as they were and filed an interpleader action in court regarding the proper distribution of the trust funds. As support for these claims Frank cites to *Northern Trust v. Heuer*, 202 Ill. App. 3d 1066 (1990).

¶ 54 This claim has no merit. First, as we have noted, Florida law, not Illinois law, controls the administration of the trusts here. Second, even if we were to consider Illinois law, the obvious distinction between the instant case and *Heuer* is that in *Heuer*, the trustee brought an action for construction of the trust when a clause in the trust was subject to different interpretations that would affect the assets to be distributed to the two beneficiaries *named in the trust*. *Heuer*, 202 Ill. App. 3d at 1069. Here, of course, there is no dispute as to the beneficiaries in Charles' trust and how much they would each receive. As to Jeanette's trust, Frank was not a named beneficiary in the second or third amendments of the trust. Since the terms of Charles's trust were clear and Frank was not a beneficiary to Jeanette's trust, Northern Trust owed Frank no duty to file an action interpreting the terms of either trust.

¶ 55 4. Failure to Remain Impartial

¶ 56 Next, Frank claims that Northern Trust breached its fiduciary duty to him when it failed to remain impartial in the proceedings below. Specifically, he claims that Northern Trust communicated with Maryann and Jean but not him and that it had taken direction solely from them. Also, Northern Trust argued below in favor of Maryann and Jean and against him, in violation of the holding in *Heuer*, 202 Ill. App. 3d at 1070 ("Unless the terms of the trust document provide otherwise, a trustee's fiduciary duty to each beneficiary precludes it from

favoring one party over another.”) Frank claims that *Heuer* is directly on point and when there are conflicting claims of beneficiaries to the same funds, the trustee is not allowed to take a position or argue in favor of one beneficiary and against another. He also contends that Northern Trust was only named as a defendant in the first count of his amended petition; however, it has filed and argued against the other six counts in his amended petition as well, even though those counts are not directed at Northern Trust. This is direct proof, Frank claims, that Northern Trust breached its duty of impartiality to him.

¶ 57 Under Florida law, a trustee has a duty to “act impartially in administering the trust property, giving due regard to the beneficiaries’ respective interests.” Fla. Stat. § 736.0813(1)(b) (2016).

¶ 58 Here, we find that Northern Trust did not breach its duty of impartiality to Frank. The letter from Northern Trust to Frank on February 25, 2015, is proof that such a breach did not occur. That letter evidences that Northern Trust *did communicate* with Frank. The content of the letter also shows, contrary to Frank’s allegations, that when Frank, Maryann and Jean did not unanimously agree to receive in-kind distributions, Northern Trust took direction from none of the beneficiaries and liquidated all of the assets, just as it had informed Frank that it would do so in its February 25, 2015, letter to him. The sentence in that letter that Frank ignores specifically read that if “the beneficiaries [did] not agree, all the assets [would] be liquidated and distributed in cash.” When the beneficiaries did not agree, Northern proceeded as it promised it would and liquidated the assets. Charles expressly authorized Northern Trust to do so in article XII of his trust when he instructed the trustee to act “in its unrestricted judgment and discretion without resort to any person.” We are also not persuaded that *Heuer* is on point here, even if Illinois law was controlling, which it is not. As we have noted, Frank was not a beneficiary under Jeanette’s

final amended trust. Therefore, there were not “conflicting claims of beneficiaries to the same funds.”

¶ 59 Finally, the fact that Northern Trust is only named in count I of the amended petition but has filed a brief addressing the other six counts in the petition as well is not “direct proof,” as Frank alleges, that it breached its duty of impartiality to Frank. We agree with Maryann and Jean that significant parts of Frank’s claim against Northern Trust arise, not from the specific terms of Charles’ trust, but from claims related to the purported agreement between Charles and Jeannette (count II) and the allegedly fraudulent actions by Jeannette related to that agreement (count III). Frank also alleged that Northern Trust breached its fiduciary duty in relation to Jeannette’s trust as it pertains to the other claims, including Jeannette’s capacity (count IV) and by allegedly colluding with and assisting Maryann and Jean to induce Jeannette to amend her trust in 2005 (count V). Finally, the claim of tortious interference with economic expectancy to inherit in count VI arises out of and relies upon the prior counts III and IV. Also, the allegations in support of all the claims are intermingled with Frank’s “Background Information”, which is re-alleged and incorporated by reference into each and every count of the petition. Therefore, the fact that Northern Trust chose to address the merits of all Frank’s claims is not proof that it breached its duty of impartiality to Frank.

¶ 60 5. Failure to Prudently Invest the Trust Funds

¶ 61 Finally, Frank argues that because of Northern Trust’s premature liquidation of the account before a judicial determination could be made, the assets of Charles’ trust are no longer invested and no longer earning income but have been sitting in Northern Trust’s books for over two years. He claims that trustees are not allowed to keep assets sitting entirely as cash. As support for these claims Frank cites to Illinois’ Prudent Investor Rule, found in Act 5 of the Trust

and Trustees Act. 760 ILCS 5/5 (West 2016). Section (a)(5) of that Act provides, “The trustee has a duty to pursue an investment strategy that considers both the reasonable production of income and safety of capital, consistent with the trustee’s duty of impartiality and the purposes of the trust.” 760 ILCS 5/5(a)(5) (West 2016).

¶ 62 Again, Florida law controls with regard to the trustee’s duties. Florida’s Prudent Investor Rule provides, in part:

“(1) A fiduciary has a duty to invest and manage investment assets as follows:

(a) The fiduciary has a duty to invest and manage investment assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust. This standard requires the exercise of reasonable care and caution and is to be applied to investments not in isolation, but in the context of the investment portfolio as a whole and as a part of an overall investment strategy that should incorporate risk and return objectives reasonably suitable to the trust, guardianship, or probate estate. If the fiduciary has special skills, or is a named fiduciary on the basis of representations of special skills or expertise, the fiduciary is under a duty to use those skills.” Fla. Stat. § 518.11(1)(a) (2016).

¶ 63 First, as we have held, Northern Trust did not prematurely liquidate the assets in Charles’ trust. Second, Frank cites no authority for his claim that trustees are not allowed to keep assets sitting as cash. Florida’s Prudent Investor Rule requires the trustee to manage assets “with care and caution,” considering specific facts and circumstances, including “the purposes, terms, distribution requirements, and other circumstances of the trust,” along with the “risk and return objectives reasonably suitable to the trust.” Fla. Stat. § 518.11(1)(a) (2016). Here, Northern Trust decided to hold the liquidated assets from Charles’ trust after Frank declined to return its

proposed form of release, and then Frank filed this action against Northern Trust and the beneficiaries of Jeanette's trust. Northern Trust had to consider the pendency of this litigation with its uncertain duration, associated administrative expenses, and, most important, with a reformation claim in count VII that seeks to modify the distribution scheme set forth in Charles' trust. Therefore, we find that Northern Trust prudently managed the assets in Charles' trust. Accordingly, the trial court properly dismissed count I of the amended petition.

¶ 64 B. Count II – Breach of Contract Claim Against Jeanette's Estate

¶ 65 Next, Frank argues that the trial court erred in dismissing count II of his amended petition. Count II involved a breach of contract claim against Jeanette's estate. In it, Frank alleged that from the time Charles and Jeanette were married, they agreed to treat both sets of their children equally. This agreement was verbal as well as evidenced by the terms of their reciprocal restatements of trusts executed on February 26, 1998. Charles and Jeanette had "mutual" estate plans as the trust contained reciprocal provisions in separately executed documents. According to Frank, Jeanette breached this contract when she amended her trust and disinherited him and his children. Frank argues that this count was improperly dismissed because: (1) the fact that Charles and Jeanette's trusts were mutual or revocable was irrelevant to the existence of a prior contract; (2) all of the elements of a contract were properly pled; (3) contracts to make a bequest disposing of property are enforceable, particularly if one side has fully performed; (4) courts of equity will enforce an oral contract for a bequest, even if another law requires a writing; and (5) intended beneficiaries of an oral contract for a bequest may enforce it.

¶ 66 First, Frank argues that the "mutual," "reciprocal" and even "revocable" nature of the trust agreements are non-issues here because it does not matter if these documents are trust

agreements. He claims that the underlying issue is *not* whether Jeanette's trust was mutual, reciprocal or revocable or whether Jeanette could ever amend or modify her revocable trust. Instead, he contends, the issue is whether or not Jeanette could have properly amended her trust to disinherit Charles' children *in breach of her prior contract with Charles to make distributions to both sets of children equally*.

¶ 67 We must initially note that within this issue, as well as in several other issues on appeal, Frank argues that Maryann and Jean's counsel misled the trial court on issues of law, and for that reason alone this court should reverse the trial court's order granting the motions to dismiss. It is well-settled, however, that the standard on appeal from the grant of a motion to dismiss is *de novo*. *Ferris, Thompson & Zwig, Ltd. v. Esposito*, 2017 IL 121297, ¶ 5. Accordingly, the parties' arguments below, whether accurate or not, are not pertinent on appeal. Instead, we are reviewing the allegations in the amended petition to determine if Frank pled a cause of action in the amended petition's seven counts such that the pleading could survive a motion to dismiss.

¶ 68 "The elements of a breach of contract action are: (1) a valid contract; (2) a material breach; and (3) damages." *Abbott Laboratories., Inc. v. General Electric Capital*, 765 So.2d 737, 740 (Fla. App. Ct. 2000)

¶ 69 Here, Frank has failed to allege specific facts to establish the contract claim in count II. He claims that the contract was verbal and confirmed through Charles and Jeanette's actions and made known to their family and friends. He also claims that the oral contract was also evidenced by the terms of their reciprocal restatements of trust executed together on February 26, 1998.

¶ 70 First, the allegations of an oral agreement are vague and lack specificity. It is well-settled that Illinois is a fact-pleading jurisdiction, and after stripping the pleading of unsupported conclusions and inferences, a plaintiff must allege sufficient facts to state a cause of action. *In re*

Estate of Baumgarten, 2012 IL App (1st) 112155, ¶ 11. Frank does not allege *how* the oral contract was confirmed through Charles and Jeanette’s actions, or *when* did Charles and Jeanette make this oral contract known to their friends and family.

¶ 71 Second, Charles and Jeanette’s trusts do not “constitute the writings” that satisfy the statutory requirement under the Code. A plain reading of the terms of Charles and Jeanette’s trusts show no agreement to devise anything to Frank, or to make a devise to him irrevocable. On the contrary, the terms of both trusts make it clear that each reserved his or her right to modify or amend the respective trusts.

¶ 72 For these reasons, Frank failed to state a cause of action as a matter of law for a breach of contract against Jeanette’s estate in count II of the amended petition. Therefore, we need not address his other allegations as to why this count should not have been dismissed.

C. Count III – Fraud Against the Estate of Jeanette Restaino

¶ 73 Next, Frank argues that the trial court erred in dismissing count III of the amended petition, in which he argued in the alternative that Jeanette made material misrepresentations to Charles in order to induce him into taking or refraining from certain actions, and Charles relied upon those misrepresentations to his detriment. He claims that all of the elements for fraudulent misrepresentation have been properly pled without any need to dissect the trust agreements. Frank contends that in that count he pled these specific factual allegations : “(1) [that] Jeanette told Charles that if he modified his trust to provide for both his set of children and her set of children equally, that she would likewise modify her trust so that it would provide for both sets of children equally too; (2) Charles relied on that representation by Jeanette such that he revised his trust so that instead of only providing for his children alone, it would provide equally for both his set of children and her set of children; and (3) he died with that reliance to his detriment,

because Jeanette then turned around and re-modified her trust to remove Charles' children (as she had planned to do all along), once Charles could no longer write her children out of his trust.”

¶ 74 It is self-evident that the facts and circumstances constituting an alleged fraud must be pled with specificity and particularity. *Daugharty v. Daugharty*, 456 So. 2d 1271, 1274 (1984).

¶ 75 We agree with Northern Trust that Frank overstates the actual allegations in his amended petition. A review of that pleading demonstrates that Frank *did not* allege that Jeanette told Charles that if he modified his trust to provide for both his children and her children equally that she would likewise modify her trust so that it would provide for both sets of children equally as well. Instead, in the pleading Frank only alleges that Jeanette did not tell Charles when they restated their separate trust agreements in 1998 that she “would change her documents after he died,” as she ultimately did in 2003. Frank also does not allege in the amended petition that Jeanette harbored any such intention in 1998 and therefore that she knowingly or intentionally concealed the allegedly material information. In addition, the allegations in this count are completely conclusory and lack sufficient specificity to state a cause of action for fraud. For these reasons, the trial court properly dismissed count III of the amended petition

D. Count IV – Lack of Capacity

¶ 76 Frank also argues that Count IV, a lack of capacity claim against Jeanette's estate, was improperly dismissed. He contends that he clearly pled that Jeanette suffered from dementia at the time she executed the amendments to her trust, and that because of her dementia-related symptoms (confusion, paranoia and memory loss) she lacked the requisite capacity to legally execute the trust amendments. He also claims that Northern Trust, Maryann and Jean have conceded that Jeanette had dementia because they have not argued that Jeanette *did not* have

dementia. Finally, he contends that in count IV he also gave examples of Jeanette's dementia over time and its progression as well as its negative impact on her capacity.

¶ 77 In Florida, it is well settled that testamentary capacity, or “sound mind,” is the “ability of the testator to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will as executed.” *American Red Cross v. Estate of Haynsworth*, 708 So. 2d 602, 605 (Fla. Dist. Ct. App. 1998) (quoting *Newman v. Smith*, 77 Fla. 633, 649 (1918)). The capacity required to amend a revocable trust is the same capacity as that required to make a will. Fla. Stat. § 736.0601 (2016).

¶ 78 Here, Frank's contentions exaggerate the allegations in count IV of the amended petition. In support of his claim that Jeanette suffered from dementia at the time she executed the amendments to her trust, and that because of her dementia-related symptoms she lacked the requisite capacity to legally execute the trust amendments, Frank cites to ¶ 14 of the amended petition. However, in that paragraph Frank only alleged the following:

“Through the mid to late 1990's, Charles' and Jeanette's physical and mental health declined substantially, not only because they were in their eighties in age, but also because Charles suffered from Parkinson's disease and Jeanette suffered from coronary artery disease and exhibited early symptoms of her later-severe dementia.”

¶ 79 That paragraph, however, differs substantially from Frank's allegation in his initial verified petition where he alleged that Jeanette “was in good health” in 1998 when she restated her trust agreement. In fact, in his initial petition Frank made no allegation that Jeanette suffered from dementia. “Unless they are the product of mistake or inadvertence, a party's admissions contained in an original verified pleading are judicial admissions that bind the pleader

throughout the litigation, even after the filing of an amended pleading that supersedes the original.” *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24. In his reply brief, Frank alleges that the comment about Jeanette’s “good health” in the original petition was in the context of the original complaint discussing the parties’ actions *before* the 1998 amendment. However, the allegation immediately before the one in question claimed “Alternatively, if Jeanette Restaino did not intend to be bound by the reciprocal terms of the estate plan, then she fraudulently induced Charles Restaino into signing his restated trust *in 1998*.” (Emphasis added.) It is clear, then, that Frank has made a judicial admission that Jeanette was in “good health” in 1998.

¶ 80 Frank is also incorrect that Northern Trust and Maryann and Jean conceded that Jeanette suffered from dementia because they did not deny this fact. Northern Trust, Maryann and Jean all moved to dismiss the amended petition pursuant to section 615 of the Code, which requires that the moving party only address the facts as alleged. See 735 ILCS 5/2-615 (West 2016). Northern Trust, Maryann and Jean did not need to deny that Jeanette suffered from dementia. Instead, they only needed to make a persuasive argument that the allegations in Frank’s complaint did not state a cause of action as a matter of law.

¶ 81 Finally, we are not persuaded that the examples that Frank provided of Jeanette’s alleged dementia were sufficient to state a cause of action for lack of capacity. One example of Jeanette’s alleged dementia was based upon an incident that occurred on a family vacation in the latter half of the 1990s. Frank and his children visited Charles and Jeanette in Florida and Jeanette made Frank and his two sons (but not his daughters) shower in the pool locker room instead of in one of the many penthouse bathrooms. Frank’s contention that Jeanette’s actions were a result of dementia based upon this event is completely conclusory. Jeanette could have had many reasons for making Frank and his sons shower in the pool locker room and we need

not speculate on them.

¶ 82 The other example Frank provided of Jeanette’s alleged dementia is likewise insufficient to state a cause of action for lack of capacity. In that example Frank alleged that that in a chance encounter with Maryann, Jean and Jeanette in 2004, Jeanette “was not communicative, seemed confused and generally appeared as if ‘she wasn’t all there.’” These self-serving, vague facts are wholly insufficient to state a cause of action for lack of testamentary capacity. For all these reasons, the trial court properly dismissed count IV of the amended petition.

¶ 83 E. Count V – Undue Influence

¶ 84 Frank next argues that the trial court erred in dismissing count V, in which he alleged in the alternative that Maryann and Jean exerted undue influence on Jeanette when she executed her trust amendments.

¶ 85 In Florida, undue influence that is sufficient to invalidate a testamentary instrument must amount to over-persuasion, duress, force, coercion or fraudulent contrivances to such a level that there is a destruction of free agency and the testator’s willpower. *Levin v. Levin*, 60 So. 3d 1116, 1118 (Fla. Dist. Ct. App. 2011).

¶ 86 As we have repeatedly held, Illinois is a fact-pleading jurisdiction and after stripping the pleading of unsupported conclusions and inferences, a plaintiff must allege sufficient facts to state a cause of action. *Baumgarten*, 2012 IL App (1st) 112155, ¶ 11.

¶ 87 Here, count V does not contain sufficient facts to state a cause of action for undue influence. The facts in the amended petition provide as follows:

“In this case, Frank Restaino was told not to contact Jeanette Restaino after Charles Restaino died.

As detailed in great length above, Jean Grieco and Maryann Magno took

specific actions that controlled Jeanette Restaino and alienated her from Frank Restaino and his family.

By design, Jean Grieco and Maryann Magno showed her the only kindness and affection she received, and managed her care, so that they were the only family she saw.

They exerted control over Jeanette Restaino, which control negatively impacted Frank Restaino and his family.

Jean Grieco's and Maryann Magno's actions unduely [*sic*] influenced Jeanette Restaino to alter the reciprocal estate plan and to amend her trust to take away the half of her trust that was set for Charles' descendents, specifically Frank Restaino and his children, and to instead provide that half of the trust to Jean's and Mary Ann's [*sic*] own children.

But for the undue influence of Maryann Magno and Jean Grieco, Maryann Magno and Jean Grieco and their children would not be beneficiaries of three times as much as Charles' descendents, consisting of Frank Restaino and his children, and Charles' descendents would be a [*sic*] beneficiary [*sic*] of half of the assets of the Jeanette Restaino Trust.”

¶ 88 Again, to state a cause of action for undue influence, Frank had to allege facts that amounted to over-persuasion, duress, force, coercion or fraudulent contrivances to such a level that there was a destruction of free agency and Jeanette’s willpower. See *Levin*, 60 So. 3d at 1118. However, in reviewing his allegations, along with those contained in the background section of the amended pleading, Frank did not allege that Maryann or Jean had any input into the preparation of Jeanette’s 2002 or 2003 trust amendments. Further, the amended petition

makes only the conclusory allegation that Jeanette executed the 2005 amendment “at the direction of her daughters.” Count V contains no allegations about *how* Maryann and Jean’s alleged conduct caused Jeanette’s will to be overcome so that she was induced to execute the trust amendments or *when* such alleged conduct occurred. Accordingly, count V did not state a cause of action for undue influence and it was properly dismissed.

¶ 89 F. Count VI – Tortious Interference with Economic Expectancy to Inherit

¶ 90 Frank claims that the trial court improperly dismissed his alternative tort claim that Jeanette, as well as Maryann and Jean, intentionally interfered with his expected inheritance under Jeanette’s trust. He argues that there were many substantively pled facts pertaining to fraud by Jeanette and undue influence by Maryann and Jean in counts III and V. Also, the specific conduct that was alleged and incorporated by reference into count VI (including the misrepresentation by Jeanette and the control, isolation and alienation by Maryann and Jean), are independent bases to sustain count VI on its own.

¶ 91 The elements of the tort of intentional interference are: “(1) the existence of an expectancy; (2) intentional interference with the expectancy through tortious conduct; (3) causation; and (4) damages. *Whalen v. Prosser*, 719 So. 2d 2, 5 (Fla. Dist. Ct. App. 1998).

¶ 92 The allegations in count VI provided:

“In this case, Frank Restaino had an expectancy to inherit half of the Jeanette Restaino Trust as allocated for him and his deceased sister, in accordance with the reciprocal estate plans of his father, Charles Restaino, and his stepmother, Jeanette Restaino, and the prior letters received by him from Northern Trust.

Jeanette Restaino, Maryann Magno and Jean Grieco intentionally

interfered by inducing changes to the reciprocal estate plan and inducing amendments to Jeanette's trust to remove Charles' descendants as a one-half beneficiary, making Jeanette's descendants the only beneficiaries.

The above-described tortious conduct of undue influence and fraud negatively impacted Frank Restaino.

But for the above-described undue influence and fraud, Frank Restaino and his children would have been a beneficiary of the full Charles Restaino Trust, or half of each of the Charles Restaino Trust and the Jeanette Restaino Trust, if the agreed mutual and reciprocal estate plan agreement had been followed.

It is reasonably certain that Frank Restaino would have realized being a full beneficiary of the Charles Restaino Trust, or half of each of the Charles Restaino Trust and the Jeanette Restaino Trust as equal beneficiary, but for the above actions, as the only surviving child of his father and natural object of his bounty.

As a result, Frank Restaino is only a beneficiary of half of what he otherwise would have been a beneficiary of, under the reciprocal estate plan, and has sustained damages accordingly.”

¶ 93 Here, Frank fails to state a claim for intentional interference with economic expectancy to inherit for the same reasons the other counts in his amended petition fail: the facts are all conclusory in nature. With no elaboration, Frank incorporates his vague and conclusory allegations of undue influence in count V into count VI, alleging only that Jeanette and her daughters “intentionally interfered” with his expected inheritance by “inducing changes” to the reciprocal estate plan. But *how* did they intentionally interfere? *How* did they induce changes to

the reciprocal estate plan? Count VI fails to lay out the specific facts to state a claim for this tort. In addition, we fail to see how Frank had an expectancy to inherit when the terms of both Charles' and Jeanette's trusts made it very clear that both trusts were revocable. For these reasons, the trial court properly dismissed count VI of the amended petition.

¶ 94 G. Count VII - Judicial Modification of Charles' Trust

¶ 95 Frank now claims that the trial court erred in dismissing count VII of his amended petition, which requested that the trial court amend Charles' trust by removing Maryann and Jean as beneficiaries. He seeks this reformation as an equitable remedy in response to Jeanette's disinheritance of him in her trust. Specifically, he alleges: (1) the trial court's reference to Jeanette's trust instead of Charles' trust in its ruling dismissing this count was clear error and should allow for a reversal and remandment as a matter of law; and (2) he properly pled a claim for judicial modification based upon a latent ambiguity in Charles' trust.

¶ 96 Florida law provides that a court may modify the terms of a trust only under certain limited circumstances, for example, when: "(1) the purposes of the trust have been fulfilled or have become illegal, impossible, wasteful or impracticable to fulfill; (2) because of circumstances not anticipated by the settlor, compliance with the terms of the trust would defeat or substantially impair the accomplishment of a material purpose of the trust; or (3) a material purpose of the trust no longer exists." Fla. Stat. § 736.04113(1)(a),(b)(c) (2016).

¶ 97 A court may look beyond the face of a trust if there is an ambiguity as to the person to whom it is applicable. See *In re Estate of Corbin*, 645 So. 2d 39, 42 (Fla. Dist. App. Ct. 1994). If there is a latent ambiguity as to the identity of a legatee or devisee, or a mere inaccuracy in the designation or description contained in the will, extrinsic evidence is admissible to explain the ambiguity or inaccuracy and identify the person designated. *Id.*

¶ 98 We initially address Frank’s claim that count VII should be remanded and reinstated as a matter of clear error because, in ruling on this count, the trial court said, “this count contains no basis to permit or justify this court to modify *Mrs. Restaino’s* estate plan, consequently count VII is dismissed with prejudice.” (Emphasis added.)

¶ 99 Again, it is well settled, both in Illinois and Florida, that the standard of review on a motion to dismiss is *de novo*. *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11; *Heritage Property and Casualty Insurance Co. v. Romanach*, 224 So. 3d 262, 265 (Fla. Dist. Ct. App 2017). Nevertheless, Frank has repeatedly littered his brief with claims that the dismissal of a particular count in his amended petition should be reversed based upon an alleged error of the trial court or that of the other parties. Our role in this case is to review the counts in the amended petition and determine whether the allegations in each of those counts set forth a cause of action for a particular claim in order to survive a motion to dismiss under section 615 of the Code (735 ILCS 5/2-615 (West 2016)). That is all. Therefore, we reject outright Frank’s claim that the trial court’s reference to Jeanette’s trust instead of Charles’ trust in its ruling entitles him to a reversal of the trial court’s order and a remandment for further proceedings.

¶ 100 Turing to the merits of this issue, we find that the trial court properly dismissed count VII of the amended petition. First, Frank fails to allege any circumstances provided for by Florida law that would allow for the reformation of Charles’ trust. Second, we are not persuaded by Frank’s claim that there is a latent ambiguity in the bequest that explicitly calls for the equal treatment of both sets of children. To the extent that Frank is trying to argue that Jeanette’s amendment presents a circumstance that was not anticipated by Charles, this argument fails under the clear terms of the trust agreement for the same reasons that his fraud claims fail. Jeanette’s and Charles’ respective unfettered rights to amend their trusts does not square with

Frank's contention that Charles did not anticipate that Jeanette would amend her trust. For these reasons, the trial court properly dismissed this claim because Frank did not allege valid grounds for the court to modify Charles' trust.

¶ 101 H. Dismissal With Prejudice

¶ 102 Finally, Frank claims in the alternative that even if his amended petition was lacking sufficient factual detail, the trial court abused its discretion when it dismissed the pleading with prejudice.

¶ 103 We review the trial court's decision to dismiss a pleading with prejudice for an abuse of discretion. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 28. An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adhered to by the trial court. *In re Marriage of Heroy*, 2017 IL 120205, ¶ 24.

¶ 104 Here, the trial court did not abuse its discretion when it dismissed the amended petition with prejudice. The record reflects that when the trial court dismissed Frank's first petition it admonished Frank's counsel about the severe problems with the claims in the petition and that counsel and Frank needed to determine whether Frank wanted to spend a lot of money on these claims. Nevertheless, Frank's amended petition contained the same seven claims that were previously dismissed by the court. Although he added some new allegations to the amended petition, as we have held, the amended pleading still fails to state claims upon which relief can be granted. The Code encourages trial courts to consider "substantial defects in prior pleadings" when ruling on a motion to dismiss and whether to allow a litigant to file another pleading or instead to terminate the litigation. 735 ILCS 5/2-615(c),(d) (West 2016). Here, the trial court properly determined that the amended petition could not be fixed in order to properly state

claims upon which relief could be granted. For these reasons, the trial court's decision to dismiss the amended petition with prejudice was not an abuse of discretion.

¶ 105

III. CONCLUSION

¶ 106 In sum, the trial court properly dismissed Frank's amended petition because after stripping the pleading of unsupported conclusions and inferences Frank failed to state a cause of actions for any of the seven counts in his amended petition. Also, the trial court did not abuse its discretion in dismissing the amended petition with prejudice. The trial court advised Frank and his counsel of the substantial defects in his original petition, and those defects were not cured in the amended petition.

¶ 107 Accordingly, the judgment of the circuit court of Du Page County is affirmed.

¶ 108 Affirmed.