2018 IL App (2d) 170759-U
No. 2-17-0759
Order filed August 1, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OMNI-STAR EXPO LTD., NICHOLAS GIANNINI, and MICHAEL KONEWKO,	)	Appeal from the Circuit Court of Du Page County.
Plaintiffs-Appellants,	)	
v.	)	No. 14-CH-694
TED CHROBAK, CHERYL CHROBAK, PAUL CHROBAK, OLGA SAKOWICZ, MARIA CHROBAK, NICK ZADEREJ, TAMARA ZADEREJ, MICHAEL ZAREMBA,	)	
Defendants	)	
(Ted Chrobak, Cheryl Chrobak and Paul Chrobak, Defendants-Appellees).	)	Honorable Bonnie M. Wheaton, Judge, Presiding.

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

ORDER

¶ 1 *Held*: Plaintiffs' statement of fact is stricken in part as argumentative. The trial court properly denied plaintiffs' motion for summary judgment and properly granted defendants' motions for summary judgment. Plaintiffs' contention on appeal regarding the trial court's judgment on their motion for leave to amend is forfeited because the argument presented was patently insufficient.

¶ 2 Plaintiffs, Omni-Star Expo, Ltd., Nicholas Giannini, and Michael Konewko, appeal the judgments of the circuit court of Du Page County denying plaintiffs' motion for summary judgment, granting the motions for summary judgment of defendants, Cheryl Chrobak, and Paul Chrobak, and denying plaintiffs leave to amend their complaint. This case involves plaintiffs' attempt to maintain their actions against defendants Cheryl and Paul Chrobak after the death of Ted Chrobak. Plaintiffs had originally filed a three-count complaint against defendants for an accounting (count 1), embezzlement (count 2), and requesting preliminary injunctive relief (count 3) after it came to light that there may have been financial irregularities while Ted Chrobak was the president of Omni-Star. After Ted Chrobak's death, Cheryl and Paul Chrobak argued that there were no bases to support the accounting and embezzlement counts against them, and the trial court agreed. Cheryl and Paul Chrobak thereafter moved to clarify the trial court's order, arguing that the count for injunctive relief was only a remedy and not a cause of action, and the trial court again agreed, dismissing the injunctive count. Plaintiffs appeal, arguing first that the trial court erred by denying plaintiffs' motion for summary judgment because it was adequately supported by uncontradicted factual material; arguing next that the trial court incorrectly resolved defendants' motions for summary judgment because defendants did not present any admissible factual material that demonstrated their entitlement to judgment in their favor, and finally arguing that their motion for leave to amend should have been granted. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Omni-Star was founded to present trade show exhibitions for various corporations with its main client dealing in medical and medical-related products. The individual plaintiffs were majority stockholders. From 2001 to his 2014 removal, Ted Chrobak was the president of Omni-

Star. From 2001 to 2016, Giannini was a member of Omni-Star's board of directors; in September 2011, Konewko was elected to the board of directors. Paul Chrobak, Ted's son, was employed by Omni-Star. Cheryl Chrobak, Ted's wife, was not employed by Omni-Star and held no position associated with it.

¶ 5 Ted Chrobak, in his capacity as president, handled the day-to-day business affairs of Omni-Star. Plaintiffs allege that Chrobak's duties included negotiating engagements to prepare for expositions and trade shows, hiring personnel, collecting money and paying bills. He also used personal credit cards for company business and paid them off, and he made payments to himself and the employees. Plaintiffs allege that, from 2001 to 2008, Omni-Star broke even; but from 2008 onward, Omni-Star hit its stride, increasing its gross income from $150,000 per year to $1 million each year thereafter. Plaintiffs further allege that, over time, Ted Chrobak seemingly viewed Omni-Star as a wallet full of ready cash, which he used to enrich himself and his family at the expense of the company.

¶ 6 According to plaintiffs, before 2008, when Omni-Star was in break-even mode, Ted Chrobak would inform Giannini at the company board meetings that, because the company was just breaking even, there was no money available for dividends. As president, Chrobak kept the company books and was responsible for handling the company's income taxes.

¶ 7 According to plaintiffs, by June 2013, Giannini had enough and demanded both the return of his initial investment of $20,000 and the opportunity to review all of the corporate records. According to plaintiffs, Ted Chrobak tendered a payment to Giannini and then physically removed him from the company's premises. Giannini turned to Konewko, the other corporate shareholder, and who also was an attorney. Konewko was elected a member of the board of directors, according to plaintiffs, "[i]n response to Ted Chrobak's hostile actions."

¶ 8 According to plaintiffs, at the next board meeting and the first involving Ted Chrobak, Giannini, and Konewko, Chrobak admitted that he filed tax returns for Omni-Star in 2001 but failed to file any tax returns for the company since then. Plaintiffs assert that the board immediately hired an accountant to complete an audit and to file the missing tax returns. The accountant prepared the necessary documents and Chrobak signed and filed them as president of Omni-Star. According to plaintiffs, in compiling the documents, "it was found" that Chrobak had paid his wife, Cheryl Chrobak, substantial sums of money designated as interest on loans, but the payments were purportedly excessive. Additionally, plaintiffs assert that several cars were improperly purchased for Ted, Cheryl, and Paul Chrobak with company funds. Finally, plaintiffs assert that "large payments," designated as loans, birthday gifts, or wedding presents, were improperly made from company funds to Chrobak family members. Finally, plaintiffs assert that none of the financial irregularities identified were reported to or approved by Omni-Star's board of directors.

¶ 9 Plaintiffs assert that, based on the accountant's findings, Ted Chrobak was terminated as president of Omni-Star. In December 2014, Michael Kline was hired as president of the company. Kline obtained the available company records for the years 2006 to 2014. Kline oversaw the examination and audit of the records, which included the corporate books, banking records, credit card records, company ledgers and checks, and vendor records. Plaintiffs assert that Kline's investigation determined that Ted Chrobak improperly used company funds to pay for remodeling materials used in Cheryl Chrobak's house, to purchase jewelry for Cheryl, and to reimburse himself and Paul Chrobak for out-of-pocket expenses "far beyond the money actually spent." Plaintiffs assert that Kline determined that Ted Chrobak had siphoned off over $650,000 over an unspecified period of time to fund his and his family's lifestyle, all to the detriment of

Omni-Star. In contrast, Kline completed an affidavit in which he averred only that Ted Chrobak improperly used company funds to purchase three cars and spent over $131,000 in purported loan interest, all totaling about $285,000.

¶ 10 On April 11, 2014, plaintiffs filed a three-count complaint against defendants and several other members of Ted Chrobak's immediate and extended family alleging a claim for an accounting (count 1), a claim for embezzlement (count 2), and a request for an injunction to preclude defendants from disposing of the property purchased with or otherwise related to corporate funds (count 3). On April 15, 2014, plaintiffs filed a petition for a temporary restraining order. On the same date, the trial court entered a temporary restraining order restraining defendants from selling identified property and all property obtained by the use of any funds from Omni-Star. The trial court also set the matter for hearing on April 25, 2014.

¶ 11 On April 25, 2014, the trial court held the hearing. First, the death of Olga Sakowicz was spread of record. The temporary restraining order was vacated with regard to the other family members. Finally, the temporary restraining order was converted to an injunction, but the terms remained in place as modified against defendants: the injunction was modified to apply only to business accounts and monies; it remained in force as originally constituted against the property named in the petition for temporary restraining order.

¶ 12 Over the next two years, the case progressed. Defendants appeared unenthusiastic in responding to plaintiffs' discovery requests, to the point that, on November 17, 2015, plaintiffs filed a motion to compel, which, on December 1, 2015, the trial court granted. At the next hearing, defendants' counsel was given leave to file a motion to withdraw. On February 9, 2016, defendants' counsel filed the promised motion to withdraw. On February 10, 2016, plaintiffs filed a motion for sanctions based on Ted and Paul Chrobak's failures to submit to depositions

and to produce requested documents. On February 16, 2016, the trial court granted defendants' counsel's motion to withdraw and continued the motion for sanctions. On March 29, 2016, having patched up the attorney-client relationship, the same counsel was given leave to appear, and on April 5, 2016, the same counsel once again appeared on behalf of defendants. On April 28, 2016, the trial court scheduled deadlines for document review and the depositions of Ted and Paul Chrobak.

¶ 13 On June 20, 2016, with counsel for the all of the remaining parties present, plaintiffs' counsel stated to the trial court, "one of [defendants' counsel's] clients passed away." The trial court also entered an order stating, "[t]he death of Defendant Ted M. Chrobak is hereby spread of record." Plaintiffs assert, without citation to the record, that "Defendants' counsel never gave to Plaintiffs' counsel a copy of [the June 20, 2016,] Order and no formal Notice of Death was recorded or sent." Plaintiffs further assert, continuing their failure to cite to the record, that "Plaintiffs were never informed of Cheryl Chrobak or Paul Chrobak opening an Estate on behalf of Ted Chrobak, and OmniStar [*sic*] never received an Order or notice spreading Ted Chrobak's death of record to Plaintiffs." Plaintiffs admit, however, "[t]he Defendant [*sic*], *with Plaintiff* [*sic*] *present*, merely discussed Ted Chrobak's death in Court." (Emphasis added.) Plaintiffs conclude this portion of their factual recitation by arguing, still without citation to the record, that "Defendants' Counsel never sent a copy of the [June 20] Order to Plaintiffs counsel [*sic*] and Defendants['] counsel [*sic*] never complied with the Circuit Court Rules as to Notice," citing Illinois Supreme Court Rule 104(b) (eff. Jan 4, 2013).

¶ 14 On November 7, 2016, plaintiffs filed a motion for summary judgment. Following briefing and argument, on January 19, 2017, the trial court denied plaintiffs' motion. The trial court held:

> "I think that there are numerous questions of fact here. I think that the basis for the compilation is certainly not established by the [Kline] affidavit.
>
> I think that this is a case that is certainly complicated by the fact that the main defendant is deceased. And I think [defendants' counsel] is correct, there are just so many issues about the—the plaintiffs a bit need to prove-up this case [*sic*].
>
> It's—it's certainly something that cannot be decided on a motion for summary judgment. I think that their personal knowledge is one thing, whether—you know, well, I'm not going to try your case for you.
>
> But I think there are just too many factual issues that would preclude me from granting a summary judgment."

The trial court also scheduled the matter for a jury trial, from May 8-10, 2017.

¶ 15 On March 6, 2017, plaintiffs filed a motion to appoint a special representative for the deceased defendant, Ted Chrobak. After the discovery cut-off, on March 21, 2017, defendants filed separate and individual motions for summary judgment. The briefing on the motion to appoint a special representative and on defendants' motions for summary judgment occurred in tandem. On April 25, 2017, the trial court heard the pending motions.

¶ 16 Regarding plaintiffs' motion to appoint a special representative, the trial court denied the motion. The trial court held that there were formal errors with the submission of the motion that would have required its denial, but more importantly to the trial court's mind, the motion was untimely. Regarding defendants' separate motions for summary judgment, the trial court denied them, holding that they were also untimely filed, being filed too close to the trial date.[1] Plaintiffs

[1] According to the parties, the local rule required motions for summary judgment to be

also requested that the trial be postponed due to the unexpected unavailability of Kline as a witness due to overseas travel commitments. The trial court denied the motion to continue, holding that Kline would be allowed to testify remotely.

¶ 17 On April 28, 2017, plaintiffs again filed a motion to continue the trial. Plaintiffs explained that the remote technology would not work for Kline during his travels. On May 2, 2017, the trial court granted the motion to continue "to the next agreeable available date" for a bench trial. The "next agreeable available date" was July 24-26, 2017.

¶ 18 On May 12, 2017, defendants again filed separate motions for summary judgment, making the same arguments as in their earlier, untimely motions. Now, however, the motions were outside of the 60-day limit required by the local rules. Plaintiffs, in their factual recitation, appear to argue the point somewhat, stating that, "[b]y granting this Motion to continue the Trial [*sic*], the Trial Circuit Court [*sic*] allowed Defendants' time to re-file [*sic*] the exact same Motions for Summary Judgment on behalf of Defendants which were previously stricken." Plaintiffs' statement implies that the trial court reset the trial date with the purpose of allowing sufficient time for defendants to timely file motions for summary judgment; yet the statement seems to completely disregard the fact that the continuance was obtained *at plaintiffs' behest for plaintiffs' convenience.*

¶ 19 Following the parties' briefing on the motions, on July 6, 2017, the trial court heard argument on the motions. In brief, defendants argued that there was no basis for an accounting

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filed more than 60 days before trial; defendants unsuccessfully argued that they filed the motions after the discovery cut-off and only 55 days before trial. By our count, defendants' motions were filed 48 days before trial.

against either Cheryl or Paul Chrobak because there was no fiduciary relationship with plaintiffs. Defendants also argued that embezzlement is not a civil action, thus, count 2 did not present a cognizable cause of action on which relief could be granted. The trial court agreed and granted summary judgment in favor of Cheryl and Paul Chrobak on counts 1 and 2 of plaintiffs' complaint, and ordering that "[t]rial will be limited to only the issue of who has rights to the cars, which are subject the current injunctive order." The trial court stated:

> "I don't believe that enough has been established to justify an accounting against Paul Chrobak because he has said in his affidavit that he was never an employee, a director, an officer, et cetera. And nothing that the plaintiff has produced establishes that there was any fiduciary duty that would create the need for an accounting.
>
> There is no—there is no civil action for embezzlement. So I will enter a summary judgment on those two issues, but it seems like the remaining issue, rather than an injunction, is a declaratory judgment as to who has the right to these vehicles."

¶ 20 On July 24, 2017, defendants filed a motion to clarify the July 6, 2017, ruling. (Plaintiffs again argue that this motion violated the local rules.) On July 25, 2017, the scheduled date for the beginning of trial, the trial court heard the motion to clarify as well as plaintiffs' motion for leave to amend the pleadings (plaintiffs' motion for leave to amend the pleadings was, for reasons unexplained in the record or by the parties, filed on July 26, 2017). The thrust of defendants' motion to clarify was that, because counts 1 and 2 of the complaint had been dismissed, and because count 3 was for an injunction, which was a remedy, not a stand-alone cause of action, and which relief had been granted at the beginning of the case, there was no basis for the case to continue. Plaintiffs' motion sought to plead a declaratory judgment action in lieu of count 3, seeking to determine who properly possessed the rights to the property subject to

the injunction. The trial court reviewed the language of count 3 in the complaint and concluded that, rather than a permanent injunction, count 3 requested a preliminary injunction to prevent defendants from liquidating or transferring the identified property before an adjudication could be had on counts 1 and 2. Based on its review and reasoning, the trial court concluded that, when judgment was entered on counts 1 and 2, judgment should also have been entered on count 3 dissolving the preliminary injunction. The trial court accordingly clarified the July 6 order, entering judgment on count 3 in favor of defendants. The trial court also denied plaintiffs' motion for leave to amend.

¶ 21 On August 7, 2017, plaintiffs filed a motion to reconsider, requesting that the trial court vacate the July 25 order and reset the matter for trial on plaintiffs' amended complaint. On August 24, 2017, the trial court denied the motion to reconsider. The trial court reasoned:

> "the only thing that we could have gone to trial on [(on July 25)] was Count 3. And as [defendants' counsel] very cogently pointed out, there was nothing that the Court could decide in Count 3 because the accounting action had been dismissed. There was nothing left to go to trial on. And it was—your Count 3 was seeking temporary relief, which could not be granted. So there was nothing to go to trial on and I think that was the proper ruling then. There was nothing left and nothing had been argued as to Count 3.
>
> I'm going to deny [plaintiffs'] motion [to reconsider]. I think the—[defendants' counsel] was correct in pointing out that there was only temporary relief sought in Count 3 and it was moot because the accounting action had already been dismissed, so there was nothing left to try.
>
> The motion is denied."

¶ 22 Plaintiffs timely appeal.[2]

¶ 23 II. ANALYSIS

¶ 24 On appeal, plaintiffs identify six issues, but actually argue only three: the trial court erred in denying plaintiffs' motion for summary judgment, the trial court erred in granting defendants' motions for summary judgment, and the trial court abused its discretion in denying plaintiff leave to amend their complaint. Issues identified but not argued are waived. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). Accordingly, we address the three issues actually argued by plaintiffs in turn.

¶ 25 A. Plaintiffs' Motion for Summary Judgement

¶ 26 Plaintiffs argue that the trial court erred in denying their motion for summary judgment. Summary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2016). In considering a motion for summary judgment, the court must construe the record strictly against the moving party and liberally in favor of the nonmoving party. *PNC Bank, National Ass'n v. Wilson*, 2017

[2] We note that plaintiffs include a section in their factual recitation described as "facts presented in request for summary judgment." Rather than factual material, however, plaintiffs provide argument as to why the trial court should have granted plaintiffs' motion for summary judgment and rejected defendants' motions for summary judgment and specifically, the shortcomings of Paul Chrobak's affidavit in support of his motion for summary judgment. This is wholly inappropriate. Ill. S. Ct. R. 347(h)(6) (eff. Nov. 1, 2017). Accordingly, we strike the offending material and will not consider it.

IL App (2d) 151189, ¶ 16. Summary judgment is a drastic means of disposing of a case and should only be granted if the moving party's right to judgment is clear and free from doubt. *Id.* We review *de novo* the trial court's judgment on a motion for summary judgment. *Id.* ¶ 17.

¶ 27 Where the well-alleged facts in the moving party's affidavits are not contradicted by a counteraffidavit from the nonmoving party, those facts must be accepted as true despite the averments in the nonmoving party's pleadings that are contrary and purport to establish a genuine issue of material fact. *T.E.C. & Associates, Inc. v. Albert-Culver Co.*, 131 Ill. App. 3d 1085, 1090 (1985). However, even in the complete absence of counteraffidavits, whether because they have been stricken or their averments are not well-alleged, the moving party should not be awarded summary judgment unless the affidavits in support of the motion for summary judgment establishes the moving party's right to judgment as a matter of law. *Id.* Thus, we examine the judgment even if the nonmoving party has not filed a cognizable counteraffidavit and, if it is apparent the moving party's affidavit does not support the entry of judgment as a matter of law, then summary judgment is inappropriate. *Id.*

¶ 28 Plaintiffs argue primarily that defendants' affidavits did not contradict the averments set forth in their affidavit. Plaintiffs then analyze the effect of defendants' lack of controverting evidence, concluding that, because their averments were not contradicted, they are taken as true and that, therefore, they must be entitled to summary judgment in their favor. As we have discussed above, however, even if defendants completely failed to respond to plaintiffs' motion for summary judgment, plaintiffs, as the moving party, would still have to establish their right to summary judgment as a matter of law. *Id.* Accordingly, we must determine whether Kline's affidavits establish plaintiffs' right to summary judgment as a matter of law. To do this, we

shall, for the purposes of argument, assume that defendants' affidavits do not controvert any material in Kline's affidavits.

¶ 29 Plaintiffs alleged actions for an accounting and for embezzlement against defendants. To succeed in a claim for an accounting in equity, the plaintiff must allege and prove the absence of an adequate remedy at law and one of: (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. *Centrue Bank v. Voga*, 2017 IL App (2d) 160690, ¶ 63. Plaintiffs alleged that Cheryl Chrobak was Ted Chrobak's wife, and that Paul Chrobak was Ted Chrobak's son and an employee of Omni-Star. Cheryl Chrobak averred that she had no connection with Omni-Star, either as an employee or director. Kline's affidavits do not contradict Cheryl Chrobak's averment and they do not aver that she had a fiduciary relationship with Omni-Star or any of the plaintiffs. Kline's affidavits also do not establish that Cheryl Chrobak knew about Ted Chrobak's conduct or participated in any fraud, and there are no allegations or averments that she took any action to defraud plaintiffs. Kline's affidavits do not establish that there existed between plaintiffs and Cheryl Chrobak mutual accounts of a complex nature. Finally, plaintiffs stated, in their reply in support of their motion for summary judgment, that there was no need for discovery. Thus, plaintiffs failed to demonstrate any one of the necessary elements that would entitle them to an accounting against Cheryl Chrobak. As a result, plaintiffs have failed to demonstrate that they were entitled to judgment on their action for an accounting as a matter of law, and the trial court properly denied plaintiffs' motion for summary judgment against Cheryl Chrobak regarding the action for an accounting.

¶ 30 Turning to Paul Chrobak, plaintiffs alleged that he was an employee of Omni-Star, but did not allege, and Kline did not aver, that Paul Chrobak was in a managerial, executive, or other

role that would have resulted in a the creation of a fiduciary duty between him and plaintiffs. Additionally, Paul Chrobak averred that he did not hold any role at Omni-Star that would have imposed a fiduciary duty, and Kline did not make any contrary averments. Thus, plaintiffs failed to demonstrate the existence of a fiduciary duty between them and Paul Chrobak. Likewise, the same infirmities identified with respect to Cheryl Chrobak also apply to Paul Chrobak: there is no evidence that Paul Chrobak was aware of Ted Chrobak's wrongdoing or that he participated in it, there is no evidence that Paul Chrobak took any fraudulent actions regarding plaintiffs; and there is no evidence of mutual accounts of a complex nature. Thus, plaintiffs also failed to demonstrate any one of the necessary elements that would entitle them to an accounting against Paul Chrobak. Therefore, plaintiffs failed to demonstrate that they were entitled to judgment on their action for an accounting as a matter of law, and the trial court properly denied plaintiffs' motion for summary judgment against Paul Chrobak regarding the action for an accounting.

¶ 31 We also note that the trial court denied plaintiffs' motion for summary judgment on the grounds there were factual issues precluding summary judgment and that plaintiffs had not otherwise established that they were clearly entitled to summary judgment as a matter of law. We agree. The Kline affidavits do not identify whom he oversaw in performing the audit and include as exhibits a summary of irregularities with no foundation as to how the summary was compiled, along with one page from January 2006 of a presumptive corporate ledger, again, with no explanation of its significance. As the trial court aptly observed, "plaintiffs a bit need to prove-up this case [*sic*]." As such, Kline's affidavit was insufficient to establish that plaintiffs were entitled to summary judgment as a matter of law on the action for an accounting.

¶ 32 Plaintiffs, in their brief on appeal, solely denigrated defendants' response to their motion for summary judgment, and did not examine whether they had adequately demonstrated their

entitlement to summary judgment. In their reply brief on appeal, plaintiffs change tack, for the first time arguing that this court should construe their complaint as necessary to allow them to proceed, for example, by considering that plaintiffs were really alleging an action in assumpsit rather than for an accounting. This argument fails for at least two reasons: first, because a plaintiff's complaint crystallizes the issues in controversy and the plaintiff is free to frame those issues as he or she wishes. *800 South Wells Commercial LLC v. Cadden*, 2018 IL App (1st) 162882, ¶ 43. Plaintiffs did not argue to the trial court or frame their complaint as an action in assumpsit. Second, because, until their reply brief on appeal, plaintiff had never requested that their action be construed as an action in assumpsit, and we cannot now, at this late stage, countenance their request. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) ("[p]oints not argued are waived and shall not be raised in the reply brief"). Accordingly, we hold that the trial court properly denied plaintiffs summary judgment with regard to their action for an accounting against defendants.

¶ 33 We now turn to plaintiffs' action for embezzlement. Embezzlement is a type of theft. *E.g.*, *People v. Campbell*, 28 Ill. App. 3d 480, 483 (1975) (the defendant was charged with theft by embezzlement). For the offense of embezzlement, the original taking is lawful; the gravamen of embezzlement "is the subsequent felonious conversion of the property with intent to convert it to the [alleged embezzler's] own use." *People v. Strong*, 363 Ill. 602, 604-05 (1936). Thus, to maintain a claim for embezzlement, the plaintiff must allege the conversion of the property as well as the defendant's intent to convert the property.

¶ 34 Defendants argue, and the trial court accepted, that embezzlement is not a recognized cause of action, but is instead, a crime. Our research has uncovered no case with that specific holding. Defendants cite *Ker v. People*, 110 Ill. 627, 645 (1884), for this proposition. However,

Ker noted only that "[e]mbezzlement is a crime defined by statute," with the elements defined by the legislature. *Id.* While that may have been true in 1884, the Criminal Code of 2012 does not include an offense of "embezzlement." See, *e.g.*, *Campbell*, 28 Ill. App. 3d at 483 (the defendant was charged with theft by embezzlement). Additionally, we have uncovered no case prohibiting an action in tort to recover for alleged embezzlement; likewise, defendants do not cite any case of any vintage for that specific proposition. Thus, "embezzlement" is a shorthand description of conduct with a specific meaning; but we can discern no prohibition against seeking, in a civil action, to recover the property that was the subject of conduct alleged to be "embezzlement."

¶ 35 This naturally leads us to inquire about what conduct is meant by the term, "embezzlement." Plaintiffs do not specifically address the elements of embezzlement; defendants properly suggest that embezzlement requires the intent to embezzle, some sort of special relationship with the victim, such as a fiduciary duty or a confidential relationship, and the conversion of the property to the embezzler's own use. *People v. Curoe*, 97 Ill. App. 3d 258, 273 (1981) (embezzlement consists of the alleged embezzler's conversion of another's funds in his possession in a fiduciary capacity, and the crime is complete when there is a fraudulent conversion without the owner's consent). Chief among the elements of embezzlement, then, is a fiduciary duty. *Id.*

¶ 36 Here, plaintiffs did not establish the existence of a fiduciary duty between themselves and Cheryl and Paul Chrobak. Kline's affidavits do not establish that Cheryl Chrobak was either an employee or director of Omni-Star or otherwise possessed any relationship with any of the plaintiffs sufficient to impose upon her fiduciary duties. Likewise, Kline's affidavits do not establish that Paul Chrobak was in a managerial position or otherwise a fiduciary to any of the plaintiffs; additionally, Paul Chrobak's affidavit affirmatively stated that he was only an

employee of Omni-Star and did not have any fiduciary responsibilities with respect to Omni-Star or the other plaintiffs. Thus, plaintiffs have failed to establish that either of the remaining defendants were fiduciaries, so the allegations and proof of embezzlement are insufficient. Accordingly, the trial court properly denied plaintiffs' motion for summary judgment with respect to embezzlement.

¶ 37 Moreover, the count for embezzlement suffers from an even more basic deficiency: plaintiffs' allegations are directed solely against Ted Chrobak, the deceased defendant. There are no allegations of embezzlement directed against either Cheryl or Paul Chrobak. Additionally, plaintiffs do not allege with any specificity that Cheryl and Paul Chrobak participated in an embezzlement scheme with Ted Chrobak. Finally, Kline's affidavits do not supply any specific averments concerning any purported conspiracy between defendants and Ted Chrobak, and they do not aver that defendants Cheryl or Paul Chrobak themselves embezzled any property (indeed, they cannot, as they failed to establish that these defendants were fiduciaries; instead, Kline averred facts suggesting only that Ted Chrobak was a fiduciary). For this more basic reason, the trial court correctly denied plaintiffs' motion for summary judgment with respect to embezzlement. Accordingly, for the foregoing reasons, we affirm the trial court's judgment on plaintiffs' motion for summary judgment.

¶ 38 B. Defendants' Motions for Summary Judgment

¶ 39 Plaintiffs argue that the trial court improperly granted summary judgment in favor of defendants on defendants' motions for summary judgment. As an initial matter, they argue generally that defendants' motions for summary judgment were effectively untimely as they were repeats of the earlier motions stricken because they were filed too close to the trial date. There are at least two insurmountable flaws in plaintiffs' contention. First, plaintiffs themselves

moved to continue the trial date. The trial court granted plaintiffs' request and scheduled the trial for "the next agreeable available date." That date, presumably agreeable to plaintiffs, defendants, and the trial court, happened to be beyond the time period of the local rule prohibiting motions for summary judgment from being heard too close to trial. Further, plaintiffs caused the issue of which they now complain. It is fundamental that a party cannot complain about purported error that the party itself injected into the case. *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 29. Here, plaintiffs requested a continuance and induced the trial court to grant them the continuance. They cannot now be heard to complain that the trial court erred in so doing.

¶ 40 Second, and perhaps even more concerning, plaintiffs cavalierly and with no evidence accuse the trial court of corruptly acting to favor defendants in granting the continuance that plaintiffs sought. Plaintiffs accuse the trial court of "manipulating the Local Court Rules," engaging in "a blatant abuse of the Code of Court Procedure to solely benefit the Defendants [*sic*] position over Plaintiffs [*sic*]," and claim that "[i]t is quite apparent the Circuit Court intentionally abused its discretion to give Defendants the advantage to ultimately allow a dismissal of this suit to the detriment of the Plaintiffs." These accusations are both deeply offensive and deeply corrosive, especially where plaintiffs appear to be wholly unaware that they themselves sought the continuance that allowed defendants the opportunity to file timely motions for summary judgment. Plaintiffs' counsels on appeal, James P. Mullally and Douglas Drenk, are strongly admonished not to promiscuously toss off repeated and grave accusations of misconduct without also including actual support for such claims. Ill. R. Prof'l Conduct (2010) Rs. 8.2, 8.4 (eff. Jan. 1, 2010). They have been reported to the Attorney Registration and Disciplinary Commission for appropriate action in relation to their conduct.

¶ 41 Turning to the merits of plaintiffs' arguments, they contend that each defendant's motion for summary judgment, effectively arguing that plaintiffs had not stated a claim against her or him thereby entitling each defendant to judgment, should fail in light of plaintiffs' previous motion for summary judgment. We have considered plaintiffs' motion for summary judgment above. For the reasons given above, we agree with defendants that plaintiffs failed to adequately demonstrate a viable claim for an accounting against either Cheryl or Paul Chrobak, as well as a viable claim for embezzlement against either Cheryl or Paul Chrobak. Thus, it is not that defendants disproved plaintiffs' claims; rather, plaintiffs failed to produce sufficient evidence (and allegations) to show that they were entitled to maintain their claims against defendants. Accordingly, we hold that the trial court properly granted defendants' motions for summary judgment and affirm its judgment.

¶ 42 C. Motion for Leave to Amend Complaint

¶ 43 Plaintiffs argue that the trial court abused its discretion in denying their motion to amend the complaint. Section 2-616 of the Code of Civil Procedure (Code) (735 ILCS 5/2-616 (West 2016)) allows for amendments to a complaint to be allowed on just and reasonable terms, as well as after a judgment to conform the pleadings to the proofs. Section 2-1005(g) of the Code also allows for amendment following entry of summary judgment on just and reasonable terms. 735 ILCS 5/2-1005(g). We review the trial court's judgment on a motion for leave to amend the complaint for an abuse of discretion. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273-74 (1992).

¶ 44 In considering a motion for leave to amend, the court must consider four factors: (1) whether the proposed amendment would cure the defective pleading, (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment, (3) whether the

proposed amendment is timely, and (4) whether previous opportunities to amend the pleading could be identified. *Id.* at 273. Additionally, the court should keep in mind that amendments should be allowed to further the ends of justice. *Id.* at 272-73.

¶ 45 Plaintiffs argue only that "all four of the *Loyola* factors favor allowing the amendment." Plaintiffs do not analyze the circumstances involved in light of the four *Loyola* factors. Accordingly, because their argument is insufficient, we hold it to be forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017); *Velocity Investments , LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2010) (the appellate court is entitled to have the issues clearly defined with pertinent authority presented and coherent arguments developed; it is not a repository for a party to foist upon it the burden of argument and research).

¶ 46 Even if plaintiffs had not forfeited their argument, we would not find an abuse of the trial court's discretion. The matter had been filed in 2014 and was finally coming on for trial in July 2017. There were ample opportunities for plaintiffs to amend, and, in fact, the matter was scheduled for trial on the very day that plaintiffs presented their motion for leave to amend. We agree with the trial court that the motion was not timely. Finally, defendants are entirely correct that count 3, seeking a temporary injunction, presented a remedy, not a cause of action. *Kopnick v. JL Woode Management Co., LLC*, 2017 IL App (1st) 152054, ¶ 34. The amendment sought to present an entirely new cause of action after the causes of action supporting count 3's remedy were knocked out by summary judgment; moreover, as the temporary injunction had been in effect since almost the case's inception, plaintiffs had certainly received the temporary injunctive relief they sought. Accordingly, the *Loyola* factors did not favor plaintiffs.

¶ 47 III. CONCLUSION

¶ 48 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 49 Affirmed.