2019 IL App (1st) 180595-U

SIXTH DIVISION
January 25, 2019

No. 1-18-0595

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF RHODA SHAPIRO, Deceased	)	Appeal from the Circuit Court of Cook County.
(ALAN FRYMAN and HOLLY FRYMAN, as co-executors of the Estate of Rhoda Shapiro,	)	
Plaintiffs-Appellants,	)	Nos. 16 P 3515 & 16 CH 10677 (cons.)
v.	)	
RICHARD JOSEPH LADON,	)	
Defendant-Appellee).	)	Honorable Daniel B. Malone, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Claims in amended complaint were not barred by affirmative matter under section 2-619(a)(9); amended complaint sufficiently stated claims for an accounting, breach of fiduciary duty, and breach of contract; plaintiffs' other claims were properly dismissed under section 2-615; affirmed in part, reversed in part, and remanded for further proceedings.

¶ 2 Plaintiffs, Alan Fryman and Holly Fryman, appeal the dismissal of their amended verified complaint under sections 2-619(a)(9) and 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619(a)(9) (West 2016)). On appeal, plaintiffs contend that the circuit court improperly dismissed their amended complaint under section 2-619(a)(9) of the Code and that the amended complaint's claims should have survived dismissal under section 2-615. We conclude that dismissal under section 2-619(a)(9) was improper and that plaintiffs sufficiently stated claims for an accounting, breach of fiduciary duty, and breach of contract. Plaintiffs' other claims were properly dismissed under section 2-615. Thus, we affirm in part, reverse in part, and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 The record, including plaintiffs' amended verified complaint, reveals the following. Plaintiffs (Alan and Holly), are the son and daughter of Rhoda Shapiro (Rhoda), who died, testate, on May 14, 2016. Rhoda's will was admitted to probate by order of the circuit court of Cook County, and plaintiffs were appointed co-executors of Rhoda's estate. Of note, Rhoda's will is not directly at issue here. Plaintiffs' claims stem from a trust that was executed by Rhoda's late husband, Sheldon Shapiro, in 1990, and named Rhoda a beneficiary. Sheldon had owned and operated Arrow Chevrolet, a south suburban car dealership. Sheldon died on March 18, 1990. In part, his trust provided:

> "If my wife survives me, the trustee as of my death shall distribute to her from the principal of the trust estate, including any property added thereto by my will, a pecuniary amount equal to 1/3rd of an amount equal to:
>
> The value of my gross estate as defined under Internal Revenue Code ¶ 2031, less the aggregate amount of deductions under Internal Revenue

> Code ¶ 2053 and ¶ 2054 and less the amount of the Federal estate tax not reduced by the credit for state death taxes under Internal Revenue Service Code ¶ 2011;
>
> less the aggregate amount of marital deductions, if any, allowed for interests in property passing or which have passed to my wife otherwise than by the terms of this article, all as finally determined for Federal estate tax purposes. In case my wife survives me, but is not living on the 180th day after my death, she shall be deemed not to have survived me.
>
> The trustee in his sole discretion shall select and distribute the cash, securities and other property which shall constitute the distribution, employing for the purpose values current at the time of distribution. No asset or proceeds of any asset shall be selected for my wife as to which a marital deduction is not allowable. The selection shall not be subject to question by any beneficiary, and no adjustment shall be made to compensate for a disproportionate allocation of unrealized gain for Federal income tax purposes. This distribution shall carry with it a proportionate part of the income of the trust estate from the date of my death to the date of distribution." (Emphasis in original.)

The balance of the trust estate was to be distributed to Sheldon's children from his first marriage, Jules Shapiro and Deborah Weinstein. The trust named defendant (Ladon), Cary Frank, and Sidney Marks as successor trustees. Sheldon was survived by Rhoda, Jules, and Deborah.

¶ 5 At the time of his death, Sheldon's estate included certain parcels of real estate located in Midlothian, Illinois, as well as certain promissory notes from Arrow Chevrolet and Arrow Chrysler payable to Sheldon's estate. Rhoda retained an attorney to represent her interests in the

estate. Ladon became an acting trustee, as well as attorney for Sheldon's estate for negotiating and carrying out the distribution that was due to Rhoda. Per plaintiffs' amended complaint, Ladon valued the gross estate at $9,780,635, and the net assets to be distributed, after certain deductions and estimate estate taxes, at $4,376,569. Ladon calculated Rhoda's one-third distribution as $1,184,831.

¶ 6 According to the amended complaint, the estate did not have sufficient liquid assets to pay Rhoda in cash, so on April 23, 1991, Ladon sent a letter to Rhoda's attorney that proposed paying Rhoda her distribution partially in cash and partially by an in-kind conveyance of the non-cash assets of the estate. That letter stated in part:

> "I have attached some computations indicating what would be distributed to Rhoda and some variations. They are all based on the values used for estate tax purposes. The figures are relatively accurate, but some minor changes are expected.
>
> We will also have to work out the mechanics. There would be some restrictions on Rhoda's ability to dispose of her interest and authorization would have to be given to the Trustees to collect the income and pay the notes.
>
> I hope that an agreeable solution can be quickly resolved."

Ladon's letter included possible allocations of income property and cash that would total $1,184,831.

¶ 7 On January 23, 1992, Ladon sent a letter to Rhoda that stated in part:

> "I will try to clarify the status of the monies due you from the trust.
>
> ***

> We agreed to transfer 1/3 of the real estate and notes, subject to certain loans to you and the balance due you to be paid in cash.
>
> The papers covering the real estate and notes have been signed will be recorded soon [*sic*]. There was a $400,000 payment to you as part of the balance due you estimated to be $416,752."

¶ 8 Per the amended complaint, Ladon prepared a document entitled "Escrow Agreement," which was dated December 31, 1991, and stated that it was entered into by Rhoda, the trust, and the then-acting trustees, who would act as the escrow agent. The escrow agreement further stated as follows. Rhoda and the trust were beneficiaries of Sheldon's estate and the estate's assets included, among other things, certain parcels of real property that were subject to triple net leases to Arrow Chevrolet and Arrow Chrysler, and certain notes from Arrow Chevrolet and Arrow Chrysler that were payable to the estate. Rhoda was entitled to receive a one-third interest and the trust was entitled to receive a two-thirds interest in and to those properties and notes. Rhoda and the trust authorized and directed the escrow agent to collect monthly rents due on the properties, pay all monthly mortgage payments, pay an outstanding note balance, and collect all monies due and payable under two other notes. "Not less frequently than monthly," the escrow agent was to disburse one-third of the net estate proceeds to Rhoda and two-thirds of the net estate proceeds to the trust, where "net proceeds" meant all sums received via rents and monies due less sums payable. The escrow agent was required to "maintain complete and accurate books and records of all monies received from, and paid on behalf of, the Estate Assets ***." Further, "[a] complete accounting of all transactions involving Estate Assets ***" was to be made available to Rhoda or the trust during all normal business hours. The escrow agreement was governed by Illinois law "applicable to contracts to be wholly performed in that state" and was

signed by Ladon, Sidney Marx, and Rhoda as representatives of the trust and Ladon and Sidney Marx as escrow agents.

¶ 9 The amended complaint further alleged that eventually, Ladon was the sole remaining trustee of the trust and sole remaining escrow agent under the escrow agreement. Further, from 1991 until Rhoda's death, Ladon, in his capacity as escrow agent, made monthly distributions to Rhoda of her one-third share of the net income of the properties. Each year, Ladon would prepare and send Rhoda a year-end reconciliation of the taxable income paid to her. Also, Ladon would attach an IRS Form 8275 Disclosure Statement to the trust's federal tax return, which explained why a K-1 was issued to Rhoda even though she was no longer a beneficiary of the trust. A copy of the Disclosure Statement from 2014 was attached to the complaint and included the following explanation:

> "1. The Trust and Rhoda Shapiro jointly own the real estate, that was subject to a mortgage. The trustee's [*sic*] pursuant to a written agreement acted as agent of Rhoda Shapiro in collecting income and disbursing expenses.
>
> 2. To simplify reporting of the various items and to simply [*sic*] record keeping, Rhoda Shapiro was given a K-1, treating her as a "beneficiary". The treatment appears to cause no substantive change in the return of Rhoda Shapiro or the Trust. It services [*sic*] the same purpose as issuance of nominee statement."

¶ 10 The trust marketed all of the properties for sale after 2008 or 2009, and in 2015, plaintiffs learned that certain properties had been sold, including one at 147th and Cicero that sold for $2.8 million. Alan, acting under power of attorney from Rhoda, called Ladon and asked when the proceeds of the sale would be distributed. Ladon replied that he needed to complete the final accounting and anticipated distributing the proceeds near the end of 2015. On November 16,

2015, Ladon wrote a letter to Rhoda that noted the sale price and explained that "[i]n computing the proceeds due you, Jules and Debbie," each person was allocated one-third of the sales price and one-third of the costs of the sale. The letter further stated that Rhoda "always received all of your 1/3 share of the income and expenses, when there was income." Also, Ladon deducted amounts for loans and advances to Rhoda "since inception of Trust" dating back to 1996 and made other deductions. The letter appended supporting schedules.

¶ 11 According to the amended complaint, Alan requested a breakdown of $396,404 in selling costs and advances to Rhoda and asked to review the detailed accounting records of the trust with the help of an accountant. Ladon did not respond or provide Alan with his requested details. Alan retained counsel to review and verify the accuracy of the trust's proposed distribution to Rhoda of her share of the sale proceeds. Alan's counsel also requested a meeting with Ladon to discuss the accounting, which was ultimately scheduled for December 30, 2015. At that meeting, Ladon provided a revised estimate of Rhoda's final distribution, which was $579,458. A settlement statement from Chicago Title and Trust Company for the sale of the 147th and Cicero property showed that the actual costs of the sale paid at closing were $116,720.95.

¶ 12 On January 7, 2016, Alan's counsel again requested an itemized breakdown of the aforementioned $396,404 in total selling costs and the year-end statements issued by the trust from 1996 through 2015, which corresponded to an estimate for deductions for loans and advances. Counsel also requested year-end statements issued by the trust from 1996 to 2015. In a letter dated January 27, 2016, Ladon included a photocopy of adding machine tape with hand notations purporting to be the breakdown of the total selling costs. According to the amended complaint, the letter disclosed that only $97,879.25 represented actual costs paid from proceeds at the sale of the property. The rest of the costs included a $126,750 consulting fee to Ladon, a

$113,774 consulting fee to Ladon's business associate, $43,000 in legal fees to Ladon, $10,000 in legal fees to Ladon's daughter, and a $5,000 bonus to Ladon's secretary. Ladon's letter also stated that records within the three-year statutory period would be available for inspection, even though per the amended complaint, Ladon's estimates had included deductions for loans and advances received by Rhoda since 1996, as well as Rhoda's share of sales of other properties that occurred outside the statutory period.

¶ 13 Alan's counsel again asked Ladon for year-end statements for 1996 to 2015 to verify the deductions from Rhoda's share. Alan's counsel also requested the billing statements for the $298,525 in consulting and legal fees. On February 1, 2016, Alan's counsel received a phone call from Ladon, who stated that he was preparing the final distribution and K-1's and was too busy to respond. When asked to send copies of his billing statements, Ladon stated that the fees he received were fair and did not need to justify them to Alan's counsel or "anyone else." Alan's counsel later renewed his request for a more detailed explanation for various fees and costs, billing statements, and year-end summaries for 1996 through 2015.

¶ 14 On February 8, 2015, Alan received a letter from Ladon with a check payable to Rhoda for $573,057.95. The letter included a document that set forth a breakdown of that amount, which was in a different format than previous estimates. The back of the check included a restrictive endorsement providing that the check was "IN FULL PAYMENT & RELEASE OF ANY & ALL CLAIMS AGAINST THE SHAPIRO TRUST." Ladon's letter also stated that "[t]he books and records are available for inspection, as required by law." Alan's counsel informed Ladon that the check would be returned, asked for copies of billing statements, and raised questions about how Ladon calculated the net proceeds from the sale of the properties.

¶ 15 Ladon retained counsel in his capacity as trustee of the trust. On April 12, 2016, Ladon's counsel sent a letter with a narrative explanation of the fees paid to Ladon. Ladon's counsel also agreed to produce the year-end summaries for 1996 to 2014 without waiving the statutory three-year limitation, and copies of those summaries were subsequently received. Ladon's counsel further stated that the books and records of the trust for 1996 through 2015 would be made available for review at his office. Rhoda's accountant subsequently inspected the documents, tabbing selected documents for production. After Alan's counsel asked when the documents would be copied and made available, Ladon's counsel replied that copying took longer than expected but the documents should be produced "this week."

¶ 16 The amended complaint continued that after Rhoda died on May 14, 2016, Ladon's counsel stated that Alan's power of attorney lapsed on death and the trust documents would be withheld until further notice. A probate estate was opened for Rhoda with letters of office issued to Alan and Holly, which were emailed to Ladon's counsel with a request for the records previously marked for production. Alan's counsel and Ladon's counsel engaged in further back-and-forth about when the documents would be available. On June 24, 2016, Ladon sent a letter stating that Ladon and his counsel had already charged nearly $50,000 against Rhoda's estate's share of the trust's proceeds for responding to the "constant demands" of Alan's counsel. Ladon's letter included six bulk billing statements covering the period from December 1, 2015, through May 31, 2016.

¶ 17 Alan's counsel again inquired when the trust documents would be made available. At one point, documents from 2013 to 2015 were delivered. The documents included billing statements prepared by Ladon that allegedly charged the trust estate for professional service over large periods of time without itemization. Among other billing entries, one of the statements dated

October 5, 2015, was for $15,000 and described the services as "RJL fees for 5 months, legal." The amended complaint alleged further exchanges about reviewing records, with Ladon's counsel ultimately stating that the accountant could look at the prior years' records, but could not make copies to review with counsel, or to mark and annotate for use in preparing his audit report.

¶ 18 On August 15, 2016, plaintiffs filed a verified complaint in the chancery division for an accounting and other relief. Plaintiffs' action was consolidated with the probate case on December 7, 2016. Ladon subsequently filed a motion to dismiss plaintiffs' verified complaint under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2016)), contending that the estate no longer had any interest in the trust because it was overpaid and that the escrow agreement was null and void. The circuit court granted Ladon's motion without prejudice on August 14, 2017.

¶ 19 On September 29, 2017, plaintiffs filed an amended verified complaint, asserting causes of action for: (1) a declaratory judgment for the court to declare the respective rights and obligations of the parties under the escrow agreement; (2) an accounting; (3) breach of fiduciary duty; (4) breach of contract; (5) promissory estoppel; (6) equitable estoppel; (7) common law fraud; and (8) removal of Ladon as the escrowee and for a preliminary injunction.

¶ 20 Ladon filed a motion to dismiss the amended complaint under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2016)). Ladon again asserted that plaintiffs did not have standing because the estate had no remaining interest in the trust and no basis for enforcing the escrow agreement. According to Ladon, Rhoda had been vastly overpaid because she had been entitled to receive a pecuniary amount equal to $1,184,831 under the trust, but ultimately received almost $5,000,000 from 1990 to 2015. Ladon also maintained that the escrow agreement was null and void and a schedule of distributions proved that Rhoda received her entire distribution in cash. Ladon further stated that the amended complaint did not allege that

the parties ever finalized the transfer of any property interest to Rhoda, and moreover, a review of the pertinent records indicated that the transfer never happened.

¶ 21 In response, plaintiffs clarified that their claims were under the escrow agreement and not the trust. According to plaintiffs, the escrow agreement was the mechanism used by the parties to carry out the express terms of the trust. Plaintiffs conceded that long ago, Rhoda received 100% of the $1,184,831 distribution due her under the trust. Plaintiffs maintained that the distribution was made partially in cash and partially by an in-kind transfer of an ownership interest in certain real estate and promissory notes owned by Sheldon's estate at the time of his death. Plaintiffs further stated that the escrow agreement was binding and did not expand Rhoda's interest in the trust.

¶ 22 Plaintiffs also filed a separate motion for a preliminary injunction. Plaintiffs sought to require Ladon to deposit with the court or a neutral third-party escrowee the sum of $573,057.95, which represented the amount that Ladon previously calculated and remitted as Rhoda's full and final distribution. Plaintiffs asserted that the deposit of the disputed funds into escrow, pending the full resolution of the action, was necessary to preserve the status quo and prevent further dissipation of the escrow funds account to the irreparable damage of the estate. The court set the matter for an evidentiary hearing on March 22, 201[8][1], if the motion to dismiss the amended complaint was denied.

¶ 23 After a hearing on March 6, 2018, the court dismissed plaintiffs' amended complaint in its entirety with prejudice under sections 2-619(a)(9) and 2-615 of the Code. In its oral ruling, the court found in part that plaintiffs did not have standing because the estate had no remaining interest in the trust. Further, the escrow agreement was null and void because it increased the size of Rhoda's distribution and enlarged the powers of the trustee. According to the court, Rhoda's

[1] We assume the hearing was set for this date based on when the order was entered.

estate's interest in the trust should have ended in June 1995, after Rhoda received a total amount above the $1.1 million she was allowed under the trust. Rhoda was owed nothing more and the trustees had no authority to pay Rhoda more. The court also struck the March 22, 2018, hearing date for plaintiffs' motion for a preliminary injunction.

¶ 24 Plaintiffs subsequently appealed.

¶ 25 II. ANALYSIS

¶ 26 On appeal, plaintiffs contend that their amended complaint should not have been dismissed under either section 2-619(a)(9) or section 2-615 of the Code.

¶ 27 A. Preliminary Issues

¶ 28 We first address plaintiffs' assertion that Ladon filed a hybrid motion to dismiss that did not comply with section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2016)). Plaintiffs argue that Ladon's motion commingled arguments under sections 2-615 and 2-619. Plaintiffs further assert that in its ruling, the circuit court referenced the same factual basis to support dismissal under both sections of the Code.

¶ 29 As background, a motion to dismiss under section 2-615 tests the legal sufficiency of the complaint based on defects apparent on its face. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 25. Meanwhile, a motion to dismiss under section 2-619(a)(9), which was the section cited by Ladon, acknowledges the cause of action, but presents an affirmative matter that avoids the legal effect of the claim. *Builders Bank v. Barry Finkel & Associates*, 339 Ill. App. 3d 1, 5 (2003). Section 2-619.1 of the Code provides that section 2-615 and 2-619 motions may be filed together as a single motion, but the combined motion must be divided into parts that are limited to and specify the single section of the Code under which relief

is sought. 735 ILCS 5/2-619.1 (West 2016); *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1029 (2006).

¶ 30 Here, plaintiffs have forfeited their objection to any deficiencies in the form of Ladon's motion to dismiss because they did not raise the matter below. See *Economy Fire & Casualty Co. v. GAB Business Services, Inc.*, 155 Ill. App. 3d 197, 202 (1987) (failure of a party to object at any time to the form or substance of a motion to dismiss bars that party from raising that issue for the first time on appeal as grounds for reversal). Thus, we will not consider plaintiffs' argument on this point.

¶ 31 Plaintiffs also challenge an aspect of Ladon's brief on appeal. Plaintiffs contend that Ladon's statement of facts violates Illinois Supreme Court Rule 341(h)(6) (eff. Nov. 1, 2017) because it is argumentative and inaccurate. While an appellee is not required to submit a statement of facts, if he chooses to do so, he must comply with Rule 341(h)(6). *Hurlbert v. Brewer*, 386 Ill. App. 3d 1096, 1100-01 (2008). That rule provides that a brief's statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." Ill. S. Ct. R. 341(h)(6) (eff. Nov. 1, 2017). We agree with plaintiffs that Ladon's statement of facts is argumentative at various points, but we will not strike it. Instead, we will disregard the offending portions and admonish counsel to avoid argument in the statement of facts in the future. See *Hamilton v. Conley*, 356 Ill. App. 3d 1048, 1052-53 (2005).

¶ 32 B. Dismissal under Section 2-619(a)(9)

¶ 33 Next, plaintiffs contend that their amended complaint was incorrectly dismissed under section 2-619(a)(9) because the escrow agreement is valid. Plaintiffs argue that paying Rhoda's distribution partially in cash and partially in-kind neither expanded Rhoda's interest in the trust

nor exceeded Ladon's powers under the trust. In response, Ladon maintains that the escrow agreement was illegal. Further, Ladon asserts that the trustee was free to change his mind about how Rhoda would be paid and the trustee ultimately chose to pay Rhoda entirely in cash. Moreover, no legally recognized transfer ever occurred.

¶ 34 In dismissing plaintiffs' amended complaint under section 2-619(a)(9) of the Code, the court found that plaintiffs' claims were "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2016)). "Affirmative matter is something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." (Internal quotation marks omitted.) *Golden v. Mullen*, 295 Ill. App. 3d 865, 869 (1997). The affirmative matter must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). Further, once a defendant satisfies this initial burden, the plaintiff must establish that the affirmative defense asserted is either "unfounded or requires the resolution of an essential element of material fact before it is proven." (Internal quotation marks omitted.) *Id.* In reviewing a dismissal under section 2-619, "we construe all pleadings and supporting documents in a light most favorable to the plaintiff, the nonmoving party." *Cortright v. Doyle*, 386 Ill. App. 3d 895, 899 (2008). An exhibit attached to a complaint becomes part of the pleading for the purpose of deciding a motion to dismiss. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. A motion to dismiss should be granted only if the plaintiff can prove no set of facts that would support a cause of action. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. We review a dismissal under section 2-619 of the Code *de novo*. *Gagnon*, 2012 IL App (1st) 120645, ¶ 18.

¶ 35 Whether the escrow agreement is valid depends on the language of the trust. "[A] trust itself constitutes the charter of the trustee's powers and duties." *Harris Trust & Savings Bank v. Wanner*, 326 Ill. App. 307, 315 (1944). "From it he derives the rule of his conduct, and it not only prescribes the extent and limit of his authority but also furnishes the measure of his obligations." *Chicago Title & Trust Co. v. Chief Wash Co.*, 368 Ill. 146, 153 (1938). The trustee has no right to perform any acts extraneous to his trust or beyond the authority granted in the trust. *Harris Trust & Savings Bank*, 326 Ill. App. at 315. Further, the purposes of judicial construction of a trust instrument are to ascertain the intent of the drafter and carry it out. *National City Bank of Michigan/Illinois v. Northern Illinois University*, 353 Ill. App. 3d 282, 287 (2004). We interpret a trust by using the same rules of construction that apply to contracts. *Stein v. Scott*, 252 Ill. App. 3d 611, 614 (1993). Thus, we first look to the plain and ordinary meaning of the language used to ascertain the drafter's intent. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007).

¶ 36 Before examining the trust, we briefly review the escrow agreement. As noted above, the escrow agreement gave Rhoda a one-third interest in certain parcels of real property and promissory notes that were part of Sheldon's estate. Ladon, a trustee, was appointed as the escrow agent to collect rents and monies due, and at least monthly, disburse one-third of the net proceeds to Rhoda. This arrangement was allowed by the plain language of Sheldon's trust. The trust provided that Rhoda was to receive "a pecuniary amount" equal to one-third of the value of the estate, subject to certain deductions. (Emphasis in original.) Multiple trust provisions indicate that the "pecuniary amount" did not have to be all in cash and could be arrived at via property. The trustee was to "select and distribute the cash, securities and other property which shall constitute the distribution." The trustee could "distribute income and principal in cash or in kind,

or partly in each." The trust also states that "[n]o asset or proceeds of any asset shall be selected for my wife as to which a marital deduction is not allowable." We note that Black's Law Dictionary (10th ed. 2014) defines "asset" as "[a]n item that is owned and has value" and "[a]ll the property of a person *** available for paying debts or for distribution." These provisions allow Rhoda to receive part of her distribution via property, as she did via the escrow agreement.

¶ 37 Moreover, other trust provisions relating to the trustee's powers authorize the trustee to manage property in the way that the escrow agreement provides. The trustee must "hold, manage, care for and protect the trust property." The trustee's powers include "[retaining] any property." The trustee could "contract to sell, convey, exchange, transfer and otherwise deal with the trust property." Further, the trustee could "perform other acts necessary or appropriate for the proper administration of the trust, execute and deliver necessary instruments and give full receipts and discharges." Based on the plain language of the trust, Ladon, as trustee, was allowed to convey an interest in the property to Rhoda, collect rent on the property, and distribute the proceeds. We acknowledge the principle that "beneficiaries cannot by their own agreement or by agreement with the Trustee cause an acceleration of distribution nor can they revise the will of the deceased to suit their own conveniences." *Sauvage v. Gallaway*, 335 Ill. App. 35, 41 (1948). However, that did not occur here. The plain language of the trust permits the arrangement set out in the escrow agreement.

¶ 38 Further, Ladon does not explain how the escrow agreement expanded Rhoda's interest in the trust. Ladon cites general principles about the powers of trustees, but fails to explain how the escrow agreement ran afoul of those principles. Ladon also muddies the waters by contending that the then-acting trustee essentially changed his mind, never transferred the property to Rhoda, and paid Rhoda entirely in cash. Yet, whether the transfer described in the escrow agreement

actually occurred would inform whether the escrow agreement was breached, and not whether the escrow agreement was valid when executed. See *McCleary v. Wells Fargo Securities, LLC*, 2015 IL App (1st) 141287, ¶ 19 (elements of breach of contract are the existence of a valid and enforceable contract, performance by the plaintiff, breach of subject contract by the defendant, and that the defendant's breach resulted in damages). Further, based on the current state of the record, whether the parties later abandoned the escrow agreement is not an "easily proved [issue] of fact" that can be decided on a section 2-619 motion. See *AFP Enterprises, Inc. v. Crescent Pork, Inc.*, 243 Ill. App. 3d 905, 912-13 (1993).

¶ 39 At this point, viewing the pleadings and supporting documents in the light most favorable to plaintiffs, it has not been shown that the escrow agreement is null and void. Thus, the circuit court improperly dismissed the amended complaint under section 2-619(a)(9) of the Code.

¶ 40 C. Dismissal under Section 2-615

¶ 41 Next, we turn to plaintiffs' challenge to the dismissal of all eight counts of their amended complaint under section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)). As stated above, a section 2-615 motion tests the legal sufficiency of a complaint. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. When ruling on the motion, "a court must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them [citation], but a court cannot accept as true mere conclusions unsupported by specific facts." *Id*. Further, "Illinois is a fact-pleading jurisdiction that requires a plaintiff to present a legally and factually sufficient complaint and a plaintiff must allege sufficient facts to state all the elements of the asserted cause of action." *Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶ 17. In determining whether a complaint states facts or conclusions, the complaint must be considered in its entirety and not in its disconnected parts. *Payne v. Mill Race Inn*, 152 Ill. App. 3d 269, 273 (1987). Further, "[e]xhibits

attached to a pleading constitute a part of the pleading for all purposes." *Id*. at 274. We review *de novo* a dismissal under section 2-615. *Patrick Engineering, Inc.*, 2012 IL 113148, ¶ 31. We also note that we may affirm on any ground for which there is a factual basis in the record, regardless of the trial court's reasoning. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 586 (2005).

¶ 42 1. Declaratory Judgment

¶ 43 We begin with plaintiffs' claim for a declaratory judgment, in which the court would declare the parties' rights and obligations under the escrow agreement. Plaintiffs assert that determining the validity of a contract and the rights of the parties under that contract is a proper use of declaratory judgment.

¶ 44 A declaratory judgment action allows the parties to a dispute to learn the consequences of their action before acting. *Beahringer v. Page*, 204 Ill. 2d 363, 373 (2003). Thus, a declaratory judgment action is proper when the potentially breaching act has not yet occurred. *Adkins Energy, LLC v. Delta-T Corp.*, 347 Ill. App. 3d 373, 379 (2004). As for specific elements, "[a] declaratory judgment action requires (1) a plaintiff with a tangible, legal interest; (2) a defendant with an opposing interest; and (3) an actual controversy between the parties concerning such interests." *Id*. at 376. "An actual controversy is a concrete dispute that admits of an immediate and definitive determination of the party's rights." (Internal quotation marks omitted.) *Illinois State Toll Highway Authority v. Amoco Oil Co.*, 336 Ill. App. 3d 300, 305 (2003).

¶ 45 In their amended complaint, plaintiffs tried to fulfill the three elements of a declaratory judgment action. Plaintiffs stated that they have a tangible legal interest in recovering on behalf of Rhoda's estate the sums that are due from Ladon under the escrow agreement. Plaintiffs further alleged that Ladon has an opposing interest because of the consulting fees and legal fees paid to Ladon from the proceeds of the sale, and plaintiffs seek to recoup those sums. Plaintiffs

asserted an actual controversy exists in that plaintiffs contend the escrow agreement is a valid and binding agreement, while Ladon maintains the escrow agreement is unenforceable and was not authorized under Sheldon's trust.

¶ 46 Nonetheless, plaintiffs' claim was properly dismissed because other allegations indicate that the controversy has progressed too far. The "potentially breaching act" (*Adkins Energy, LLC v. Delta-T Corp.*, 347 Ill. App. 3d 373, 379 (2004)) has already happened—Ladon refused to provide the necessary records for an accounting. In the amended complaint, plaintiffs alleged that on August 5, 2016, after much back-and-forth, Ladon's counsel stated that plaintiffs' accountant could view records from prior years, but could not make copies to review with counsel, or to make and annotate for use in preparing his audit report. Further, plaintiffs even characterized the final series of events leading to filing a complaint as "The Refusal to Produce the Documents Tabbed by the Accountant." Moreover, plaintiffs alleged that Ladon already disavowed the escrow agreement. Based on the parties' actions, a declaratory judgment action is not available. Compare *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 10 (declaratory judgment action improper where the defendants already terminated the purchase agreement at issue), with *Illinois State Toll Highway Authority*, 336 Ill. App. 3d at 303 (declaratory judgment with regard to remediation and cleanup obligations was proper where the plaintiff averred that the defendants had neither acknowledged a duty to assist in remediation nor compensated the plaintiff for sums expended so far). The circuit court properly dismissed plaintiffs' claim for a declaratory judgment under section 2-615.

¶ 47 2. Accounting

¶ 48 Next, plaintiffs contend that their amended complaint stated a claim for an accounting under the trust and the escrow agreement. Plaintiffs assert an accounting is permitted by both

documents. In contrast, Ladon contends that plaintiffs' claim is precluded by the language of the trust and that the escrow agreement is null and void.

¶ 49 The trust contains two provisions about an accounting. The first provision, which Ladon relies on, states, "No trustee wherever acting shall be required to give bond or surety or be appointed by or account for the administration of any trust to any court." Ladon maintains that this provision prevents plaintiffs from seeking an accounting. However, Ladon ignores the second provision, which states, "The trustee shall render an account of his receipts and disbursements at least annually to me if living, otherwise to each adult income beneficiary." In reconciling these two provisions, we again apply the same rules of construction that apply to other contracts. *Stein*, 252 Ill. App. 3d at 614. One such rule of construction is that in interpreting a contract, "it is presumed that all provisions were intended for a purpose, and conflicting provisions will be reconciled if possible so as to give effect to all of the contract's provisions." (Internal quotation marks omitted.) *Guterman Partners Energy, LLC v. Bridgeview Bank Group*, 2018 IL App (1st) 172196, ¶ 51. Further, a court will not interpret a contract in a way that would nullify or render provisions meaningless, or in a way that is contrary to the plain and obvious meaning of the language used. *Id.* The two provisions quoted above relate to different entities—a court and the adult income beneficiaries. Here, plaintiffs' claim falls under the second provision, which states the requirement that the trustee render an account to each adult income beneficiary. Plaintiffs are not asking that Ladon account to a court. Moreover, that the trust provides that the trustees do not have to account for the trust's administration to any court, "does not mean that they or the trust are not subject to supervision" by our state courts. See *Matter of Estate of Thomson*, 139 Ill. App. 3d 930, 935 (1986). Plaintiffs' claim for an accounting is not precluded by the language of the trust.

¶ 50 Plaintiffs may also seek an accounting under the escrow agreement. We previously rejected Ladon's contention that the escrow agreement is null and void. Further, the escrow agreement requires the escrow agent to "maintain complete and accurate books and records" of certain transactions. The escrow agreement also states, "A complete accounting of all transactions involving the Estate Assets *** shall be made available to Rhoda or the Trust during all normal business hours." Thus, the escrow agreement allows plaintiffs' claim for an accounting.

¶ 51 We conclude that plaintiffs stated a claim for an accounting under the trust and escrow agreement and reverse the circuit court's dismissal of that claim under section 2-615.

¶ 52 3. Breach of Fiduciary Duty

¶ 53 Next, plaintiffs contend that they stated a claim for breach of fiduciary duty under the escrow agreement. To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty, the breach of that duty, and damages proximately caused by the breach. *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 17. A fiduciary relationship exists where one party places trust and confidence in another, "who thereby gains a resulting influence and a superiority over the subservient party." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 58. Escrowees have been found to owe a fiduciary duty to the party making the deposit and the party for whose benefit it is made. *Moy v. Ng*, 371 Ill. App. 3d 957, 961 (2007).

¶ 54 Plaintiffs sufficiently stated a claim for breach of fiduciary duty. In their amended complaint, plaintiffs alleged that Ladon, as escrow agent under the escrow agreement, owed fiduciary duties to Rhoda, which included a duty of loyalty and a duty to maintain complete and accurate accounts. Plaintiffs listed multiple ways that Ladon breached his fiduciary duty: by

failing to timely account for proceeds, failing to maintain accurate and complete records, charging Rhoda fees that were greatly disproportionate to the services rendered, and refusing requests to review and inspect records, among other acts. Plaintiffs further asserted that substantial damages resulted from those breaches, including loss of income to the estate caused by Ladon's payment to himself and his affiliates of excessive fees, loss of use of the income that Ladon diverted to his own use, and by causing plaintiffs to unnecessarily incur expenses to obtain an accounting of the sums due to Rhoda's estate. Keeping in mind that our task is to "determine *** whether the well-pleaded factual allegations of the complaint adequately alleged" the elements of breach of fiduciary duty (*Khan*, 2012 IL 112219 ¶ 49), we find that plaintiffs stated a cause of action.

¶ 55 Ladon asserts that plaintiffs cannot state a claim because Rhoda received everything she was entitled to under the trust, but that is beside the point. Plaintiffs seek to recover under the escrow agreement, which created a separate payment arrangement for Rhoda. As an aside, whether Rhoda was fully paid under the escrow agreement is not a matter that can be resolved at this point. See *id*. ¶ 56 (when reviewing a section 2-615 dismissal, "to consider matters outside the pleadings would inappropriately resolve issues that are best resolved on remand with the benefit of a full evidentiary record"). Plaintiffs stated a claim for breach of fiduciary duty and we reverse the circuit court's dismissal of this claim under section 2-615.

¶ 56 4. Breach of Contract

¶ 57 Plaintiffs next contend that their amended complaint stated a claim for breach of contract under the escrow agreement. To state a cause of action for breach of contract, a plaintiff must plead: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) a breach of the contract by the defendant; and (4) that the defendant's breach resulted in damages.

McCleary, 2015 IL App (1st) 141287, ¶ 19. In this court, the parties focus their arguments on whether a contract was formed through the escrow agreement—that is, whether there was an offer, acceptance, and consideration. *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 979 (1997).

¶ 58 Considering the amended complaint and exhibits, plaintiffs sufficiently alleged the three elements required to form a contract. Correspondence in the record demonstrates an offer and acceptance. In a letter dated April 23, 1991, from Ladon to Rhoda's then-counsel, Ladon included possible allocations of property and cash that would total $1,184,831, which was the amount due Rhoda under the trust. On January 23, 1992, Ladon sent another letter to Rhoda stating, "We agreed to transfer 1/3 of the real estate and notes, subject to certain loans to you and the balance due you to be paid in cash." The escrow agreement, which was dated December 31, 1991, memorialized the arrangement and was signed by Rhoda and Ladon. Although Ladon claims he later changed his mind and paid Rhoda all in cash, the letters and escrow agreement indicate that Ladon and Rhoda at one point reached an agreement that Rhoda would receive her distribution via property and cash, as described in the escrow agreement.

¶ 59 Turning to consideration, plaintiffs assert that they alleged that the trust did not have the cash to pay Rhoda the amount she was due without selling off some of its assets, which would have been a detriment to the trust. Meanwhile, Ladon asserts that the trust already vested the trustee with the sole discretion to determine how to make distributions to Rhoda, and so her willingness to accept a distribution partially in-kind cannot be deemed consideration. Ladon also states that the trust did not require the trustee to make distributions by any specific time. Thus, her alleged willingness to accept her distributions between 1991 and 1995 also could not be deemed consideration to the trust or trustee.

¶ 60 Consideration is the "bargained-for exchange of promises or performances, and may consist of a promise, an act or a forbearance." (Internal quotation marks omitted.) *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, ¶ 23. Further, "any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract." (Internal quotation marks omitted.) *Id*. The values exchanged need not be equal, and generally, courts will not inquire into the adequacy of the consideration provided to support a contract. *Chandra v. Chandra*, 2016 IL App (1st) 143858, ¶ 16.

¶ 61 Here, plaintiffs adequately alleged that there was consideration for the escrow agreement. As noted by plaintiffs, the trust benefitted from the escrow agreement because it did not have to sell off assets to pay Rhoda. Further, the escrow agreement allowed Rhoda to receive monthly payments from the net income of certain properties. We only determine whether consideration existed (*id*.), and conclude that together with the exhibits, the amended complaint stated that it did. We cannot say that there is no set of facts under the pleadings that would entitle plaintiffs to relief. See *Payne*, 152 Ill. App. 3d at 275. We reverse the section 2-615 dismissal of plaintiffs' breach of contract claim.

¶ 62 5. Promissory Estoppel

¶ 63 Next, plaintiffs contend that their amended complaint stated an alternative claim for promissory estoppel. Per plaintiffs' amended complaint, Ladon promised to pay Rhoda's $1,184,831 distributive share partially in cash and partially by conveying a partial ownership interest in certain property. Plaintiffs stated that enforcement of this promise is necessary to avoid a substantial injustice.

¶ 64 A claim for promissory estoppel requires the following elements: (1) the defendant made an unambiguous promise to the plaintiff; (2) the plaintiff relied on that promise; (3) the

plaintiff's reliance was expected and foreseeable by the defendant; and (4) the plaintiff relied on the promise to her detriment. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51 (2009). Whether detrimental reliance occurred is determined by the specific facts of each case. *DiLorenzo v. Valve & Primer Corp.*, 347 Ill. App. 3d 194, 202 (2004).

¶ 65 Here, plaintiffs' amended complaint was properly dismissed under section 2-615 because plaintiffs did not sufficiently state how Rhoda relied on defendant's promise to her detriment. Plaintiffs alleged that Rhoda relied on Ladon's promise, allowing the trust to pay her less than her full distributive share in exchange for a promise that she would have a future and continuing interest in the net proceeds of the property. Other allegations in the amended complaint state that Rhoda indeed received the proceeds she was promised. The amended complaint stated, "From and after 1991 and continuing until the date of Rhoda's death, Ladon, in his capacity as Escrow Agent, made monthly distributions to Rhoda of her one-third share of the net income from the Income Property." Per plaintiffs' allegations, Rhoda was treated as having an interest in the net proceeds of the property and, over a number of years, received the payments she was promised. Plaintiffs have not otherwise stated how Rhoda "put [herself] in such a position that grave injustice would result if the promise is not kept." See *Hux v. Woodcock*, 130 Ill. App. 3d 721, 724 (1985). We affirm the circuit court's dismissal of plaintiffs' claim for promissory estoppel under section 2-615.

¶ 66 6. Equitable Estoppel

¶ 67 For the same reason, plaintiffs' amended complaint failed to state an alternative claim for equitable estoppel. Equitable estoppel is defined as "the effect of the person's conduct whereby the person is barred from asserting rights that might otherwise have existed against the other party who, in good faith, relied upon such conduct and has been thereby led to change his

or her position for the worse." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313 (2001). The party claiming estoppel must demonstrate that "(1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he *** made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act on the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to her *** detriment; and (6) the party claiming estoppel would be prejudiced by *** her reliance on the representations if the other person is permitted to deny the truth thereof." *Id*. at 313-14.

¶ 68 Plaintiffs' amended complaint is missing facts that show that Rhoda reasonably relied to her detriment on Ladon's representation that the property would be conveyed. Quite the opposite is revealed by the allegations, where plaintiffs stated that between 1991 and 2014, Rhoda received monthly distributions of her one-third share of the net income from the property at issue. Plaintiffs did not state how Rhoda "[changed] *** her position for the worse" as a result of Ladon's representations that the property would be conveyed. See *id*. at 313. As such, the circuit court properly dismissed plaintiffs' claim for equitable estoppel under section 2-615.

¶ 69 7. Common Law Fraud

¶ 70 Next, plaintiffs contend that their amended complaint stated an alternative claim for common law fraud. In their amended complaint, plaintiffs alleged that Ladon's representation in his January 23, 1992 that the documents "covering the real estate and notes have been signed [and] will be recorded soon," was false and known by Ladon to be false when made. According to plaintiffs, at the time of the representation, title to the property at issue was held in two land

trusts, but Ladon never lodged any assignment of beneficial interest with the trustees of the land trusts or otherwise took any action to perform his promise to transfer a one-third interest in the real estate to Rhoda. Plaintiffs also stated that Rhoda did not and could not discover that the conveyance documents had not been signed and recorded until Ladon disavowed the escrow agreement and revoked his promise to pay Rhoda her share of the proceeds of the sale of the real estate.

¶ 71 To state a claim for common law fraud, a plaintiff must demonstrate: (1) a false statement of material fact; (2) the defendant's knowledge that the statement was false; (3) the defendant's intent that the statement induce the plaintiff to act; (4) the plaintiff's reliance on the statement; and (5) the plaintiff's damages resulting from reliance on the statement. *Miller v. William Chevrolet/GEO, Inc.*, 326 Ill. App. 3d 642, 648 (2001). Illinois law generally does not allow actions for promissory fraud, "meaning that the alleged misrepresentations must be statements of present or preexisting facts, and not statements of future intent or conduct." *Ault v. C.C. Services, Inc.*, 232 Ill. App. 3d 269, 271 (1992). As an exception to this rule, promises are actionable if the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud. *Id*. at 272.

¶ 72 Here, the alleged misrepresentation is found in Ladon's letter dated January 23, 1992, in which he stated, "The papers covering the real estate and notes have been signed will be recorded soon [*sic*]." This is a statement of future conduct—Ladon will record the relevant documents at a later time. Moreover, this statement does not fit into the "scheme to defraud" exception noted in *Ault*. The amended complaint stated that Rhoda was paid monthly distributions from the income of the property for 24 years and then was remitted a share of the sale proceeds, although that amount is disputed. Still, the allegations state that for years, Ladon

treated Rhoda as entitled to a one-third interest in the property, only disavowing the escrow agreement after the litigation started. We fail to see how such conduct amounts to a scheme to defraud Rhoda. But see *Johnson v. George J. Ball, Inc.*, 248 Ill. App. 3d 859, 869 (1993) (allegations adequate to allege a scheme to defraud where the plaintiff alleged that the defendant made a false statement with the present intention of not complying with it). Thus, the circuit court properly dismissed plaintiffs' claim for common law fraud under section 2-615.

¶ 73 8. Injunctive Relief and Removal of the Escrowee

¶ 74 Next, plaintiffs contend that the circuit court improperly dismissed their claims for injunctive relief and to remove Ladon as escrowee under the escrow agreement. We first address plaintiffs' claim for injunctive relief. In their amended complaint, plaintiffs requested a temporary restraining order (TRO), "with notice to Defendant, enjoining and prohibiting the withdrawal, disbursement or other dissipation of the funds now held by Defendant which are subject to the Escrow Agreement." Plaintiffs also requested that the circuit court conduct an evidentiary hearing and enter a preliminary injunction "enjoining and prohibiting the withdrawal, disbursement or other dissipation of the funds now held by Defendant which are subject to the Escrow Agreement." Plaintiffs contend that an injunction is permissible even though the ultimate relief is the recovery of money. Plaintiffs further argue that Rhoda's interest in the funds is in need of protection where they are the sole remaining assets of the trust.

¶ 75 A TRO "is an emergency remedy issued to maintain the status quo until a hearing can be held on an application for a preliminary injunction." *Peoples Gas Light & Coke Co. v. City of Chicago*, 117 Ill. App. 3d 353, 355 (1983). Meanwhile, a preliminary injunction maintains the status quo until the case is disposed of on the merits. *Id.* A TRO is equivalent to a preliminary injunction "only when it is issued with notice and is of unlimited duration." *Stanton v. City of*

Chicago, 177 Ill. App. 3d 519, 523 (1988). Here, plaintiffs requested a TRO "with Notice to Defendant" and did not indicate an end date. Thus, we treat the request for a TRO as a request for a preliminary injunction.

¶ 76 With this in mind, we consider the issue as whether the circuit court abused its discretion by denying plaintiffs a preliminary injunction. See *Carriage Way Apartments v. Pojman*, 172 Ill. App. 3d 827, 835 (1988) (granting of a preliminary injunction rests within the trial court's discretion). A preliminary injunction is an extraordinary remedy and mandatory preliminary injunctions are disfavored by the courts. *Lumbermen's Mutual Casualty Co. v. Sykes*, 384 Ill. App. 3d 207, 230 (2008). To obtain injunctive relief, a party must show that (1) it has a certain and clearly ascertainable right that must be protected; (2) it will be irreparably harmed without that protection; (3) it has no adequate remedy at law; and (4) it is likely to be successful on the merits. *Id*. Irreparable harm occurs "only where the remedy at law is inadequate, meaning that monetary damages cannot adequately compensate the injury and the injury cannot be measured by pecuniary standards." (Internal quotation marks omitted.) *Hensley Construction, LLC v. Pulte Home Corp.*, 399 Ill. App. 3d 184, 190 (2010).

¶ 77 Plaintiffs argue that while money is at the root of this case, they also seek a declaration of rights under the escrow agreement and to the funds disbursed through it. Plaintiffs further state that if the funds cease to exist, their action for a declaration of rights could be rendered moot and they would have to sue Ladon for wrongfully disbursing the funds or Sheldon's children for wrongfully receiving them. Plaintiffs' procedural concerns do not change the fact that they ultimately seek money. It is true that an injunction is permitted when the claimant has an interest in specific funds held by the other party, but those funds cannot be "cash proceeds from the sale of real estate," (*id.* at 191), which is precisely what plaintiffs seek here. Their claim does not

qualify for a preliminary injunction, and so the circuit court properly denied their request for one. See also *Carriage Way Apartments*, 172 Ill. App. 3d at 839-40 (where goal was "to receive a sum of money" for interest in a partnership, party had an adequate legal remedy and an injunction was improper).

¶ 78 Plaintiffs also sought to remove Ladon as escrowee, stating that Illinois courts have recognized a cause of action for removal of a fiduciary due to misconduct or a conflict. Plaintiffs assert that Ladon owed fiduciary duties to Rhoda akin to those of a trustee, including duties of loyalty and fidelity.

¶ 79 Plaintiffs cite two cases in support. One found that a complaint's allegations were sufficient to state a cause of action to remove a trustee based on a conflict (*Faville v. Burns*, 2011 IL App (1st) 110335, ¶ 45) and the other found that a court properly removed a trustee where the pleadings indicated that the trustee was "less than completely loyal" (*Mucci v. Stobbs*, 281 Ill. App. 3d 22, 31 (1996)). Still, we conclude that plaintiffs have not stated a cause of action to remove Ladon. Plaintiffs seek to remove Ladon as escrowee, not as trustee, but have not cited any cases where a court has removed an escrowee for breach of fiduciary duty and have not explained why we should consider the escrowee of proceeds from the sale of real estate to be the equivalent of a trustee. Even removing a trustee is warranted only "if the trustee endangers the trust fund and removal is clearly necessary to save the trust." *Laubner v. JP Morgan Chase Bank, N.A.*, 386 Ill. App. 3d 457, 467 (2008). Here, as explained above, plaintiffs have a remedy in the form of money damages and plaintiffs can still be compensated despite any alleged misuse of the proceeds of the property. The circuit court properly dismissed the claim to remove Ladon as escrowee under section 2-615.

¶ 80 Lastly, and separate from the injunctive relief included in the amended complaint, plaintiffs contend that the circuit court should have held a hearing on their motion for a preliminary injunction to require Ladon to deposit the disputed funds into escrow. The amount at issue was $573,057.95, which was the amount that Ladon calculated as being due Rhoda for her share of the sale proceeds of the property at issue.

¶ 81 We will not address the merits of plaintiffs' motion. Below, the circuit court set a date for an evidentiary hearing on plaintiffs' motion. After plaintiffs' amended complaint was dismissed, the circuit court struck that hearing date. From our review, the circuit court did not actually rule on plaintiffs' motion, and so we will not review the motion either. See *Ward v. Hilliard*, 2018 IL App (5th) 180214, ¶ 56 (appellate review of the circuit court's decision "should be limited to the issues the circuit court addressed and decided"). We will not address matters on appeal that should first be addressed by the circuit court. See *id.*

¶ 82 To avoid confusion, we note that plaintiffs' motion sought different relief than the injunctive relief sought in their amended complaint. Plaintiffs' amended complaint requested a preliminary injunction "enjoining and prohibiting the withdrawal, disbursement or other dissipation of the funds now held by Defendant which are subject to the Escrow Agreement." In their motion, plaintiffs sought a preliminary injunction to require Ladon deposit the disputed funds into escrow. The specific relief sought in the motion is different, and so it was not necessarily covered by the circuit court's ruling on the preliminary injunction requested in the amended complaint. Thus, we leave it to the circuit court to resolve on remand plaintiffs' motion for a preliminary injunction to require Ladon to deposit disputed funds into escrow.

¶ 83 III. CONCLUSION

¶ 84 For the foregoing reasons, we reverse the circuit court's dismissal of the amended complaint under section 2-619, reverse the dismissal under section 2-615 of plaintiffs' claims for an accounting, breach of fiduciary duty under the escrow agreement, and breach of contract under the escrow agreement, and affirm the dismissal under section 2-615 of plaintiffs' claims for a declaratory judgment, promissory estoppel, equitable estoppel, common law fraud, and injunctive relief and removal of Ladon as the escrowee. We also remand for further proceedings.

¶ 85 Affirmed in part and reversed in part.
Cause remanded.