2019 IL App (1st) 180960-U

FIFTH DIVISION
Order filed: March 15, 2019

No. 1-18-0960

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

LEONARD B KOENEN, individually, as grantor, former sole trustee and current beneficiary of the Leonard B. Koenen Trust dated January 28, 1987, and as former sole trustee and current beneficiary of the Carol S. Koenen Trust dated March 24, 1987, and NANCY KOENEN, as next friend,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellees,	)	No. 12 CH 12320
v.	)	
DAVID KOENEN, individually, as a Member of the 4825 West Lawrence LLC, as trustee of the Leonard B. Koenen Trust dated January 28, 1987, and trustee of the Carol S. Koenen Trust dated March 24, 1987, CHRIS KOENEN, individually, as a Member of the 4825 West Lawrence LLC, as trustee of the Leonard B. Koenen Trust dated January 28, 1987, and trustee of the Carol S. Koenen Trust dated March 24, 1987, and as Manager and Member of the Country Estate Investments, LLC, JOHN KOENEN, individually, as a Member of the 4825 West Lawrence LLC, as trustee of the Leonard B. Koenen Trust dated January 28, 1987, and trustee of the Carol S. Koenen Trust dated March 24, 1987, and COUNTRY ESTATE INVESTMENTS LLC,	)	
Defendants	)	

(Chris Koenen, individually, as a Member of the 4825 West Lawrence LLC, as trustee of the Leonard B. Koenen Trust dated January 28, 1987, and trustee of the Carol S. Koenen Trust dated March 24, 1987, and as Manager and Member of the Country Estate Investments, LLC; and John Koenen, individually, as a Member of the 4825 West Lawrence LLC, as trustee of the Leonard B. Koenen Trust dated January 28, 1987, and trustee of the Carol S. Koenen Trust dated March 24, 1987, Defendants-Appellants).	)	Honorable David B. Atkins, Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's order granting partial summary judgment to the plaintiffs on their claims that the defendants breached their fiduciary duty and failed to provide an accounting pursuant to section 11 of the Trust and Trustees Act.

¶ 2 The appellants, Chris Koenen and John Koenen, appeal from an order of the circuit court granting partial summary judgment in favor of the plaintiffs, Leonard Koenen and Nancy Koenen (as next friend to Leonard Koenen) on their claims of breach of fiduciary duty and failure to provide an accounting under section 11 of the Trusts and Trustees Act (760 ILCS 5/11 (West 2010).[1] For the reasons which follow, we affirm.

¶ 3 The following factual and procedural history is derived from the pleadings and exhibits of record.

¶ 4 Leonard and Carol Koenen have three children, David, Chris, and John (hereinafter referred to as "the defendants").

[1] Defendants David Koenen and Country Estate Investments LLC did not participate in this appeal.

¶ 5 In 1987, Leonard and Carol created trusts for estate planning purposes: the Leonard B. Koenen Trust, dated January 28, 1987 (Leonard Trust), and the Carol S. Koenen Trust, dated March 24, 1987 (Carol Trust) (collectively referred to as "the Trusts"). Leonard was the grantor, trustee, and beneficiary of the Leonard Trust. Following Carol's death in 1996, Leonard became the trustee and beneficiary of the Carol Trust. The relevant portions of both the Leonard Trust agreement and the Carol Trust agreement (collectively "the trust agreements") use virtually identical language when it comes to the disposition of trust principal and income, as well as the powers of the trustee.

¶ 6 First, with regard to the disposition of trust principal and income, the relevant sections of the trust agreements direct that the trustee "shall pay" to Leonard, during his life, "the income of the trust and such portion of the principal" as he "may request from time to time by a written instrument" delivered to the trustee. Next, and with regard to the powers of the trustee, section 11.04 of the trust agreements enumerates the administrative and investment powers afforded to the trustee "[e]xcept as otherwise provided in this instrument." Section 11.04(q) provides the trustee with the power to "enter into any transaction authorized by this Article with fiduciaries of trusts or estates in which any beneficiary hereunder or any beneficiary under my will has an interest, even though such fiduciary is also a Trustee hereunder." Section 11.04(t) gives the trustee the following powers with respect to real estate: "to make leases and to grant options to lease for terms of any length, *** to grant or release easements and other interests; to enter into party wall agreements; to develop and subdivide; to dedicate parks, streets and alleys, to vacate any subdivision or alley; to construct, repair, alter, remodel, demolish or abandon improvements;

and to take any other action reasonably necessary for the preservation of the property or the income therefrom."

¶ 7 Until 1993, Leonard and his cousin, Charles Koenen, owned all of the shares in Mayfair Lumber Company (Mayfair Lumber). In 1993, Leonard transferred his Mayfair Lumber shares to the defendants. Additionally, Leonard and Charles each owned a 50% interest in the land on which Mayfair Lumber was located, the property commonly referred to as 4825 West Lawrence Avenue, Chicago, Illinois (the Chicago Property). Leonard's 50% interest in the Chicago Property was held in the Carol Trust until 2013.

¶ 8 At some point in 2011, the 4825 West Lawrence LLC (the 4825 LLC) was created for the purpose of holding title to the Chicago Property. Leonard held a 50% interest in the 4825 LLC.

¶ 9 In mid-March of 2011, Leonard, then 80 years old, attended a meeting with the defendants, Charles, and his accountant, Howard Bloom. The group discussed possible estate planning steps Leonard could undertake to minimize estate taxes upon his death, including the possibility of Leonard gifting his 50% interest in the Chicago Property to the defendants. However, no one at that time had a recent appraisal of the Chicago Property. The defendants were unaware at that time that Leonard's 50% interest in the Chicago Property was held in the Carol Trust.

¶ 10 On July 2, 2011, the defendants met with Leonard at his home. Although several aspects of that meeting are in dispute, the fact that, during the meeting, Leonard signed four documents, which were drafted by John, who is an attorney, is undisputed. The first document, signed by Leonard as trustee of the Carol Trust, transferred ownership of his home, commonly referred to as 40 Valley Drive, Barrington, Illinois, from the Carol Trust to the defendants. The second

document gifted each of the defendants 3,333 units of the 4825 LLC, amounting to just under a 50% interest. The third document was a resignation letter removing Leonard as trustee of the Carol Trust and naming the defendants as co-trustees. Lastly, the fourth document was a resignation letter removing Leonard as trustee of the Leonard Trust and naming the defendants as the successor co-trustees. Under the terms of the trust agreements, Leonard remained the beneficiary during his lifetime.

¶ 11 On July 3, 2011, the defendants, as co-trustees of the Leonard Trust, executed a document that gifted the property commonly known as 3904 North Highway 51, Arbor Vitae, Wisconsin (the Wisconsin Property) to themselves as tenants in common. According to the deed, this transfer was exempt from real estate transfer taxes under Wisconsin law because there was no consideration for the sale of the real estate.

¶ 12 On July 27, 2011, Leonard's attorney wrote a letter to John informing him that Leonard was revoking a number of documents that the defendants had forced him to sign under duress "during the past few weeks."

¶ 13 In November of 2011, David initiated guardianship proceedings against Leonard. Four months later, in January 2012, Leonard married Nancy.

¶ 14 On April 12, 2012, Leonard initiated the instant action by filing a four-count complaint against the defendants both individually and in their capacity as co-trustees of the Trusts. The complaint alleged that, *inter alia*, the defendants breached their fiduciary duties and failed to provide an accounting to Leonard, as beneficiary of the Trusts.

¶ 15 On May 13, 2013, the defendants filed a verified answer denying all of Leonard's allegations.

¶ 16 On July 22, 2013, the probate court entered an order finding Leonard disabled and appointing David as plenary guardian for Leonard's estate.

¶ 17 On August 12, 2013, after learning that the Carol Trust still held Leonard's 50% interest in the Chicago Property, the defendants, as co-trustees of the Carol Trust, executed a Trustee's Deed that deeded the 50% interest in the Chicago Property to 4825 LLC. The Trustee's deed purports to be exempt from real estate transfer taxes because the actual consideration is less than $100.

¶ 18 On December 16, 2014, Leonard filed an amended complaint, adding Country Estate Investments, LLC as a defendant and alleging the same claims. The defendants filed their answer on January 30, 2015, denying all allegations.

¶ 19 On May 16, 2016, Leonard and Nancy Koenen, as his next friend, filed an eight-count second amended complaint. Relevant to this appeal, count I alleged that the defendants, as co-trustees of the Leonard Trust, breached their fiduciary duty to Leonard, as the beneficiary, when they gifted themselves the Wisconsin Property. Count II alleged that the defendants, as co-trustees of the Carol Trust, breached their fiduciary duty to Leonard, as the beneficiary, when they transferred the Chicago Property out of the Carol Trust and to the 4825 LLC, an entity from which they benefitted. Count VII alleged that the defendants, as co-trustees of the Trusts, failed to provide material information and accounting to Leonard, as the sole beneficiary during his lifetime of the Trusts, as required by the Illinois Trust and Trustees Act (Act) (760 ILCS 5/11 (West 2010)).

¶ 20 On June 17, 2016, Chris, John, and Country Estate Investments LLC filed a joint answer to the plaintiffs' second amended complaint, raising four affirmative defenses: laches, estoppel,

waiver, and lack of capacity to verify. That same day, David filed his answer to the plaintiffs' second amended complaint, raising the same affirmative defenses as Chris, John, and Country Estate Investments LLC. Relevant to this appeal, the general thrust of the affirmative defenses is that the defendants were acting on the express wishes of Leonard, as related in the March 2011 meeting, and that Leonard voluntarily consented to all the transactions.

¶ 21 On August 17, 2016, the plaintiffs filed a motion to strike the defendants' affirmative defenses pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016). The defendants filed their response on September 23, 2016.

¶ 22 On October 20, 2016, the circuit court entered an order striking the affirmative defenses of laches and lack of capacity, with prejudice, and striking the affirmative defenses of estoppel and waiver, without prejudice. The circuit court's order indicated that it granted the plaintiffs' motion "for the reasons stated on the record." The record does not include a transcript of the proceedings, a bystander's report, or an agreed statement of facts.

¶ 23 On November 18, 2016, the defendants and Country Estate LLC jointly filed their amended affirmative defenses, which raised, *inter alia*, the following defenses: laches, estoppel, waiver, and ratification. Again, relevant to this appeal, the general thrust of the affirmative defenses is that the defendants were acting on the express wishes of Leonard, as related in the March 2011 meeting, and that Leonard voluntarily consented to all of the transactions.

¶ 24 Leonard filed another motion pursuant to section 2-615 of the Code to strike the defendants' affirmative defenses. The defendants did not file a response. On May 22, 2017, the circuit court entered an order dismissing all of the defendants' affirmative defenses with prejudice.

¶ 25 On July 6, 2017, the plaintiffs filed a motion for summary judgment against the defendants as to counts I, II, and VII of the plaintiffs' second amended complaint.

¶ 26 On September 5, 2017, John filed a late response to the motion for summary judgment without leave of the circuit court. With regard to count I, John argued that: (1) Leonard consented to the gifting of the Wisconsin Property, citing to extracts from the unfiled deposition of Bloom; (2) the gifting of the Wisconsin Property was not prohibited by the trust document; and (3) Leonard cannot claim any damages because (i) he remains free to use the Wisconsin Property and (ii) the defendants have expended their own resources to improve the property. With respect to count II, John argued that the gifting of the Chicago Property to the 4825 LLC was merely a "ministerial act" that furthered Leonard's intentions. In support of his argument, John attached a purported unsigned copy of the operating agreement for the 4825 LLC, as well as alleged copies of the signature pages signed by Charles and Leonard. Leonard's purported signature page is visibly different from the others in that it is on page 13 of 17 whereas Charles's signature and the unsigned signature page are both on page 14 of 18. Lastly, and with respect to count VII, John argued that the accounting for the Trusts is "being handled in the probate court" as a result of the guardianship proceedings.

¶ 27 David and Chris did not file a response.

¶ 28 On April 5, 2018, the circuit court entered an order granting partial summary judgment in favor of the plaintiffs as to counts I, II, and VII. With respect to counts I and II, the circuit court held that the defendants, as co-trustees of the Trusts, owed Leonard, the beneficiary of the Trusts, "a number of fiduciary duties," including an "absolute duty of loyalty," which they violated by engaging in self-dealing. In so holding, the circuit court found that neither trust

document abrogated the trustee's duty of loyalty, nor authorized a trustee to "make gifts of trust property." The circuit court also determined that the exhibit John attached to his response, consisting of a copy of the 4825 LLC Operating Agreement and the two purported signature pages, "in no way evidence[d] [Leonard's] intent" nor did it "justify defendants transfer of trust property to a company they h[e]ld [an interest] in." Regarding count VII, the circuit court held that the trustee's statutory requirement to provide an accounting is "separate and distinct" from David's duty to account in the guardianship proceedings and that the defendants have not proffered any evidence to create a triable issue of fact with regard to count VII. The circuit court's order granted the following relief: (1) the defendants were removed as co-trustees of the Trusts; (2) the deeds transferring the Wisconsin property and the 50% interest in the Chicago property were held void *ab initio*; and (3) the defendants were ordered to file a complete accounting with the circuit court by August 3, 2018.

¶ 29 On April 18, 2018, the circuit court entered an order granting the plaintiffs' request pursuant to Illinois Supreme Court Rule 304(a) for a finding that no just reason existed to delay either enforcement or an appeal of its April 5, 2018 order. This appeal followed.

¶ 30 On appeal, the appellants argue: (1) that the circuit court erred in striking their affirmative defenses of laches, estoppel, and waiver; and (2) that the circuit court erred in granting summary judgment in favor of the plaintiffs on their claims for breach of fiduciary duty because the defendants did not violate the terms of the Trusts and were acting according to Leonard's instructions.

¶ 31 The appellants first argue that the circuit court erred when it granted the plaintiffs motion to strike their affirmative defenses of laches, waiver, and estoppel with prejudice. We conclude

that the appellants have forfeited review of this issue on appeal because they failed to object in the circuit court.

¶ 32 On March 16, 2017, the plaintiffs filed a motion to strike the defendants' amended affirmative defenses with prejudice pursuant to section 2-615 of the Code. On March 28, 2017, the circuit court entered an order requiring the defendants to file a response by April 18, 2017. Nothing in the record indicates that the defendants filed a response. On May 22, 2017, after a status hearing with the defendants present, the circuit court entered a written order granting the plaintiffs' motion and struck the defendants' affirmative defenses with prejudice.

¶ 33 It is a well-established principle of appellate practice that contentions not raised in the trial court are forfeited and may not be raised for the first time on appeal. See, *e.g.*, *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536; *Moore v. Board of Education of the City of Chicago*, 2016 IL App (1st) 133148, ¶ 35 (refusing to consider issue not raised at any point in trial court). A party's failure to first raise an issue or theory in the trial court "weaken[s] the adversarial process and our system of appellate jurisdiction" and prejudices the opposing party by depriving that party of the opportunity to respond to the issue or theory with its own evidence and argument. *Daniels v. Anderson*, 162 Ill. 2d 47, 59 (1994).

¶ 34 We further note that the appellants have failed to furnish this court with an adequate record on appeal. The record contains no transcript, bystander's report, or agreed statement of facts from either the October 20, 2016 or the May 22, 2017 court dates. "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by

the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92.

¶ 35 Accordingly, we conclude that the appellants have forfeited any argument with respect to the circuit court's order striking their affirmative defenses with prejudice.

¶ 36 The appellants next argue that the circuit court erred in granting summary judgment in favor of the plaintiffs on their claims that the defendants, as co-trustees of the Trusts, breached their fiduciary duty to Leonard.

¶ 37 As a preliminary matter, we note that Chris did not file a response to the plaintiffs' motion for summary judgment in the circuit court, nor is there anything in the record to indicate that he relied on, or adopted, John's response. It is well settled that arguments not raised by a party in the circuit court are waived an appeal. *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 15 ("Theories not raised during summary judgment proceedings are waived on review."). Consequently, Chris cannot rely on arguments John raised in the circuit court because he has waived review of those issues.

¶ 38 Turning to the merits, John argues that, because genuine issues of a material fact exist as to whether the defendants' actions were in accordance with the trust documents and directed by Leonard, the circuit court erred in granting summary judgment on the plaintiffs' claims that the defendants breached their fiduciary duty.

¶ 39 Summary judgment is an appropriate means of disposing of a cause of action where the pleadings, depositions, admissions, together with the affidavits on file, viewed in a light most favorable to the nonmoving party, demonstrate the absence of a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West

2018); *Coleman v. East Joliet Fire Protection District*, 2016 IL 117952, ¶ 20. "Summary judgment is appropriate in a case involving the construction of a trust because the ascertainment of the trust's meaning or intent is strictly a matter of law." (Citations omitted.) *BMO Harris Bank N.A. v. Towers*, 2015 IL App (1st) 133351, ¶ 26. We review a circuit court's order granting summary judgment *de novo. Id*.

¶ 40 A trustee owes a fiduciary duty to the beneficiaries of a trust and must carry out the trust according to its terms and to act with the highest degree of fidelity and good faith. *Herlehy v. Marie V. Bistersky Trust*, 407 Ill. App. 3d 878, 896 (2010). "To state a cause of action for breach of a fiduciary duty, a plaintiff must allege and ultimately prove: (1) a fiduciary duty on the part of the defendant; (2) a breach of that duty; (3) damages; and (4) a proximate cause between the breach and the damages." *Herlehy*, 407 Ill. App. 3d at 896. The plaintiff's allegations must be supported by facts. *Chicago City Bank & Trust Co. v. Lesman*, 186 Ill. App. 3d 697 (1989).

¶ 41 Here, the plaintiffs alleged that the defendants, as co-trustees of the Trusts, breached their fiduciary duties to Leonard when they (1) gifted the Wisconsin Property to themselves and (2) gifted the Chicago Property to the 4825 LLC, an entity from which they benefited. Specifically, the plaintiffs allege that both transactions breached the defendants' fiduciary duties because they were unauthorized by the trust and constituted self-dealing. John does not dispute that, beginning on July 2, 2011, the defendants owed Leonard a fiduciary duty, nor does he dispute that the transactions took place. Rather, he argues that the defendants did not breach their fiduciary duties to Leonard because they were acting according to Leonard's instructions as authorized by both trust agreements.

¶ 42 When a court construes a trust instrument, its first purpose is to discover the grantor's intent from the trust as a whole and to give effect to that intent if not contrary to public policy. *Harris Trust & Savings Bank v. Donovan*, 145 Ill. 2d 166, 172 (1991). When construing a trust, the court should apply the same rules that apply to the construction of wills (*Harris Trust & Savings Bank*, 145 Ill. 2d at 172) and contracts (*In re Support of Halas*, 104 Ill. 2d 83, 92 (1984)).

¶ 43 We first consider John's argument that the defendants' transactions, in which they gifted trust property to parties other than the beneficiary, were authorized by the trust agreements and therefore not a breach of their fiduciary duty. After reviewing the trust agreements, it is clear that nothing in them granted the defendants the authority to gift trust property to parties other than the beneficiary. The trust agreements expressly provide that Leonard "shall be paid," during his lifetime, the income and principal of the Trusts. John relies on section 11.04(q) of the trust agreements, which allows the trustee to "enter into any transaction authorized by this Article with fiduciaries of trusts or estates in which any beneficiary hereunder or any beneficiary under my will has an interest, even though such fiduciary is also a Trustee hereunder." However, gifting property is not one of the transactions authorized by the provisions of Article 11. Nor does section 11.04(t) of the trust agreements, which outlines the trustee's powers with regard to real estate, grant authority to gift real estate. Put simply, nothing in the trust agreements indicates that it was Leonard's intent, as grantor of the Leonard Trust, or Carol's intent, as grantor of the Carol Trust, to authorize the trustee to have the authority to gift trust property to parties other than the beneficiary. The defendants were duty bound to follow the strict terms of the trust

agreements, which they failed to do. As a result, they have breached their fiduciary duties to Leonard.

¶ 44 John nevertheless argues that Leonard is not entitled to summary judgment because there is a genuine issue of material fact as to whether the defendants were acting according to Leonard's instructions, and, therefore, Leonard can be said to have consented to the transactions. In support of his contention, John cites to *Home Federal Savings and Loan Ass'n of Chicago v. Zarkin*, 89 Ill. 2d 232 (1982), for the proposition that "[a] beneficiary can consent to a transaction that the duty of loyalty would otherwise prevent a trustee from undertaking, provided that the consent is given voluntarily after full disclosure by the trustees of all facts, and there is no overreaching." *Id.* at 246. We find John's arguments unavailing because his evidence does not establish that Leonard ever consented to the defendants' actions as co-trustees.

¶ 45 John relies on the following evidence to support his claim that Leonard consented to the challenged transactions: John's "verified" statements of facts in his response brief; Bloom's affidavit and abstracts from his deposition; and a purported copy of the unsigned 4825 LLC operating agreement and two undated signature pages allegedly signed by Leonard and Charles, respectively. We address each piece of evidence in turn.

¶ 46 First, in his "verified" statement of facts, John makes several claims that Leonard verbally instructed him regarding his desired estate plans. Such evidence is not sufficient to create a genuine issue of material fact. *National Union Fire Insurance Co. of Pittsburgh v. DiMucci*, 2015 IL App (1st) 122725, ¶ 68 ("Unsupported assertions, opinions, and self-serving or conclusory statements do not comply with the rule governing summary judgment affidavits.").

¶ 47 Next, we note that John merely pasted portions of Bloom's deposition into his response brief. Bloom's full deposition is not contained in the record on appeal. It is the appellant's burden to present this court with a sufficiently complete record, which John has failed to do. *Foutch*, 99 Ill. 2d at 391-92 (1984). We therefore will not consider the extracts of Bloom's deposition.

¶ 48 We next turn to Bloom's affidavit, which states that Leonard and the defendants met at his office in March 2011, where they discussed a plan to "immediately gift" the Wisconsin Property and his shares of the 4825 LLC to the defendants in an effort to reduce possible estate taxes. Bloom states that, at the end of the meeting, "all of the Koenens agreed" to have John draft documents "implementing the transfer." At best, Bloom's affidavit stands for the proposition that Leonard, in March of 2011, was present at a meeting where a possible estate plan was discussed that would involve him "immediately" gifting the defendants the Wisconsin Property and that Leonard agreed to have John draft documents to that effect. Notably, Bloom's affidavit does not state that the discussed plan included Leonard resigning as trustee and the defendants taking over as co-trustees prior to the gifting of the Wisconsin Property. When the March 2011 meeting took place, Leonard was both trustee and the beneficiary of the Trusts, and the defendants owed no duty to Leonard. Thus, even when construed strictly against the plaintiffs, Bloom's affidavit does not create a genuine issue of material fact regarding whether Leonard consented to the transactions after July 2, 2011, which is the relevant time period.

¶ 49 John's final piece of evidence is a purported copy of the unsigned 4825 LLC operating agreement and two undated signature pages allegedly signed by Leonard and Charles, respectively. He argues that the documents are evidence that the August 2013 gifting of the 50%

interest in the Chicago Property was a "ministerial act" that fulfilled Leonard's obligations under the 4825 LLC operating agreement and conformed to his desired estate plans as expressed in 2011. John attached the operating agreement and alleged signature pages to his response brief below. In so doing, John did not make any claims regarding their authenticity or his personal knowledge of the documents. The sole reference to the documents comes in his statement of facts where he claims that "[w]hen the LLC was established both [Leonard] and Charles stated that the land was placed into the LLC as evidenced by the attached LLC Operating Agreement, See Exhibit 1."

¶ 50 "In ruling on a motion for summary judgment, a court can only consider evidence that would be admissible at trial and '[b]asic rules of evidence require that a party must lay the proper foundation for the introduction of a document into evidence' if it wishes to rely on the document in summary judgment proceedings." *Cordeck Sales, Inc. v. Construction System, Inc.*, 382 Ill. App. 3d 334, 384 (2008); see also *Gulino v. Economy Fire & Casualty Co.*, 2012 IL App (1st) 102429, ¶ 27 (in summary judgment proceeding, where proponent failed to provide any evidence establishing foundation for purported business records, trial court did not err in excluding documents). To lay a proper foundation for a document, a party must present evidence that shows that the document is what it purports to be. *Cordeck*, 382 Ill. App. 3d at 384.

¶ 51 John nevertheless argues that the operating agreement is admissible because he "swore under oath that the filed copy was accurate," citing to a sworn affidavit, submitted in a separate case regarding the condemnation of the Chicago Property, where he swore to the authenticity of an unsigned copy of the agreement and the statement of facts in his response to the plaintiffs' motion for summary judgment. The record is clear, however, that John has done no such thing in

this case. John's response to the plaintiffs' motion for summary judgment included a signed and notarized statement that John, "being first duly sworn an oath, deposes and states that *** he has read the foregoing document, and the statements made in the foregoing document are true, correct and complete to the best of his knowledge and belief." However, to the extent that John's statement of facts serve as an affidavit, John did not attest that the attached operating agreement and signature pages were authentic and accurate or that he had any personal knowledge to that effect. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013) ("Affidavits in support of * * * a motion for summary judgment under section 2–1005 of the [Code] *** shall be made on the personal knowledge of the affiants ***."). The time for John to lay that foundation was at the summary-judgment stage and not for the first time on appeal. Having failed to do so, John cannot create an issue of material fact by attaching an unauthenticated, unsigned copy of an operating agreement and two undated signature pages, one of which is clearly distinct in formatting from the other two.

¶ 52 John is correct that, "[g]enerally, a beneficiary cannot hold a trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary, prior to or at the time of the act or omission, consented to it." *Chicago Title & Trust Co. v. Shellaberger*, 399 Ill. 320 (1948). After reviewing John's evidence, however, we conclude that, even when construed strictly against the plaintiffs, it establishes only that Leonard consented to gifting trust property to the defendants in March 2011, when Leonard was both trustee and beneficiary of the Trusts and the defendants owed Leonard no fiduciary duties. On July 2, 2011, the legal relationship between Leonard and the defendants changed and John has made no claim that, during the July 2, 2011 meeting, Leonard instructed the defendants to gift trust property. Nothing in *Zarkin* or *Shellaberger* offers

any support for the proposition that the defendants, as co-trustees of the Trusts, could engage in transactions not authorized by the trust agreement and to the detriment of the beneficiary, based on consent given by the beneficiary prior to the defendants having been made co-trustees.

¶ 53 Having concluded that the defendants breached their fiduciary duty, we also find that the other elements of a breach of fiduciary duty claim have been met. There is no disputing that Leonard, as the beneficiary, has been damaged by the removal of valuable trust property, for no consideration, or that the defendants were the proximate cause. We, therefore, affirm the circuit court's grant of summary judgment on counts I and II of the plaintiffs' second amended complaint.

¶ 54 Lastly, John has not raised any argument that the circuit court erred in granting summary judgment in favor of the plaintiffs on count VII, which alleged that the defendants failed to provide Leonard with an accounting as required by the Act. As a consequence, any claim of error in the granting of the plaintiffs' motion for summary judgment on that count has been forfeited pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), and we, therefore, affirm the summary judgment in favor of the plaintiffs on count VII.

¶ 55 In sum, we affirm the circuit court's motion to strike the defendants' affirmative defenses, with prejudice, because the defendants have forfeited their arguments on appeal by failing to object below. We also affirm the circuit court's order granting summary judgment in favor of the plaintiffs on their claims of breach of fiduciary duty because the defendants violated their fiduciary duties to Leonard by gifting trust property in contravention of the trust agreements.

¶ 56 Affirmed.