IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
	)	**No. 13 CH 23386**
Plaintiff,	)	
	)	**Judge Sophia H. Hall**
vs.	)	**Calendar 14**
	)	
LYONS TOWNSHIP HIGH SCHOOL DISTRICT NO. 204	)	
	)	
Defendants	)	

NOTICE OF FILING

TO: Stephen M. Mahieu, Dykema Gossett PLLC, 10 S. Wacker Drive, Suite 2300, Chicago, IL 60606

PLEASE TAKE NOTICE that on August 11, 2015, I have filed with the Clerk of the Circuit Court of Cook County, Illinois, the following: **TOWNSHIP TRUSTEES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS FIRST AMENDED VERIFIED COUNTERCLAIM**, a copy of which is hereby attached and served on you.

TOWNSHIP TRUSTEES

By: _____
One of their Attorneys

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PROOF OF SERVICE

The undersigned, an attorney, certifies that a copy of the following document:

TOWNSHIP TRUSTEES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS FIRST AMENDED VERIFIED COUNTERCLAIM

has been served upon: Stephen M. Mahieu, Dykema Gossett PLLC, 10 S. Wacker Drive, Suite 2300, Chicago, IL 60606 as follows:

☐	by personal service on August 11, 2015 before 4:00 p.m.
☐	by U.S. mail, by placing the same in an envelope addressed to her at the above address with proper postage prepaid and depositing the same in the U.S. Postal Service collection box at 225 W. Washington Street, Chicago, Illinois, on August 11, 2015 before 4:00 p.m.
☐	by facsimile transmission from 225 W. Washington, Chicago, Illinois to the [above stated fax number/their respective fax numbers] from my facsimile number (312) 460-4201, consisting of ____ pages on August 11, 2015 before 4:00 p.m., the served [party/parties] having consented to such service.
☐	by Federal Express or other similar commercial carrier by depositing the same in the carrier's pick-up box or drop off with the carrier's designated contractor on August 11, 2015 before the pickup/drop-off deadline for next-day delivery, enclosed in a package, plainly addressed to the above identified individual[s] at [his/her/their] above-stated address[es], with the delivery charge fully prepaid.
☑	by email, on August 11, 2015 before 4:00 p.m., the served [party/parties] having consented to such service.

Barry P. Kaltenbach, attorney

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff/Counter-Defendant,	)	Case No. 13 CH 23386
v.	)	Hon. Sophia H. Hall
	)	Calendar 14
LYONS TOWNSHIP HIGH SCHOOL DIST. 204,	)	
Defendant/Counter-Plaintiff.	)	

TOWNSHIP TRUSTEES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS FIRST AMENDED VERIFIED COUNTERCLAIM

Plaintiff, Township Trustees of Schools 38 North, Range 12 East ("Township Trustees"), for its Reply Memorandum in Support of Its Motion to Dismiss the First Amended Verified Counterclaim (the "Counterclaim") filed by the defendant, Lyons Township High School District 204 ("District 204"), states as follows:

I. Township Trustees Properly Complied With Section 5/2-619.1.

Township Trustees clearly labeled each Section of the "Argument" portion of its Motion to Dismiss to identify whether it was being brought pursuant to Section 2-615 or Section 2-619 of the Code of Civil Procedure. Section I (addressing the breach of contract claim asserted in Count I of the Counterclaim), Section II (addressing the declaratory relief sought in Count II of the Counterclaim), and Section III (addressing the quasi-contractual relief sought in Counts IV and V of the Counterclaim) are all clearly identified as being brought under Section 2-615. The arguments therein rely solely upon the allegations stated on the face of the Counterclaim.

Section IV of the Motion to Dismiss addresses the claim for an accounting asserted in Count III of the Counterclaim. This Section is clearly identified as being brought under Section 2-619. This is the **only** Section that incorporates the affidavit of Dr. Birkenmaier and the pair of

correspondence attached as the Motion's Exhibit 2. Moreover, **only** paragraph 4 of that affidavit was incorporated. The other paragraphs from Dr. Birkenmaier's affidavit were **not** incorporated and Township Trustees is not asking this Court to consider other factual assertions with her affidavit. The Motion to Dismiss is clearly organized and labeled and District 204's argument that the Motion is procedurally improper is without merit.

II. District 204 Does Not Allege A Valid, Enforceable Contract

The Township Trustees asserts in its Motion that both the purported *pro rata* share agreement and the audit agreement, assuming they were properly alleged and assuming that Robert Healy had actual or apparent authority to enter into either on behalf of Township Trustees, would be unenforceable because they seek to excuse District 204 from its statutory obligations. Township Trustees does not concede, however, that Healy had actual or apparent authority, or that either purported agreement is properly alleged. Nor does Township Trustees concede, as District 204 claims, that the purported agreements were even entered into.

A. Both Purported Agreements Would Violate the School Code.

District 204 selectively quotes from the School Code in arguing that Section 5/3-7 of the School Code does not require District 204 to pay for its own audit expenses (Resp. at 6.) When read as a whole, Section 5/3-7 requires exactly that. Section 5/3-7 provides that each school district must cause an audit of its accounts to be made. If the school district does not do this, then the audit is undertaken on the district's behalf and the cost of the audit is billed to the district. 105 ILCS 5/3-7. It is the logical inference when reading Section 5/3-7 as a whole that the school district is supposed to be paying for its audit, either because it hired the auditor directly, or because it failed to do so and the auditor was hired on its behalf and then billed to the

school district. It is not a logical deduction that the school district is excused from paying for its audit because it, rather than someone else, ordered the audit.

District 204 also argues that it is not suing to recover the costs of its annual audit; rather, District 204 argues it is suing to recover the costs of *other* audit expenses. In this event, the First Amended Verified Counterclaim is confusing. Is District 204 alleging that it undertook two audits? One, statutorily required, which it concedes it had an obligation to pay for, and the other required under the purported "audit agreement?" Or is District 204 alleging that it was one audit that performed two functions and thereby was more expensive? Does District 204 allege that Township Trustees did not pay for this second audit, or expanded audit, as the case may be? District 204 should be required to plainly allege what audit work it contends was undertaken that was not undertaken as a result of the School Code's requirements, what the value of that work was, and how Township Trustees breached an obligation to pay for it.

District 204's argument concerning the "*pro rata* share agreement" likewise fails. Section 5/8-4 of the School Code mandates that that each school district pay for its *pro rata* share of the Treasurer's expenses of office. It sets for a very particular formula for calculating this share. It does not authorize District 204 to reject the formula, alter it, decline certain services, or pick-and-choose for itself what services it wants to accept. Even if it does not use the Treasurer's services, the School Code mandates that District 204 pay for them.

District 204 then argues that it *did* pay its *pro rata* share, because it provided certain other services to the Treasurer. (Resp. at 6-7.) District 204 apparently has taken the position that the School Code permits it to barter with the Treasurer; rather than paying for the services, District 204 may trade something else of value for them. (See Response at 6, "Dollars are fungible.") But the School Code and its formula does not provide this option, plainly stating that

District 204 "shall pay a proportionate share . . . ." 105 ILCS 5/8-4. The formula calculates a certain dollar amount and District 204 must pay that dollar amount. It provides no counter-formula to calculate the value of other services that a member district might contend it supplied.

Each of the two purported agreements would, if enforced, excuse District 204 from its statutory obligations and are, therefore, unenforceable under Illinois law, even if they had been adequately alleged and entered into with proper authority. *South Suburban Safeway Lines, Inc. v. Regional Transp. Auth.*, 166 Ill. App. 3d 361, 366 (1st Dist. 1988).

B. Actual and Apparent Authority are not Well-Pled and the Doctrine of Apparent Authority is Inapplicable Against a Public Body.

In its Motion, Township Trustees explained how the School Code does not provide Healy with actual authority to excuse District 204 from its statutory obligations. District 204's response is to restate its ill-pled factual allegations that "Healy, on behalf of the Trustees, adopted and accepted the agreement," and that District 204 "repeatedly received confirmation that Healy had discussed the agreement with the Trustees . . . ." (Resp. at 7.) These are not well-pled allegations. They former is a mere conclusion and the latter does not identify from whom District 204 purportedly received confirmation that Healy discussed the agreement with Township Trustees, nor does it actually allege that the Township Trustees authorized Healy to enter into the agreement.

Aside from not being well-pled, District 204's theory suffers from other problems. An agent cannot create his own authority. *Cove Mgmt. v. AFLAC, Inc.*, 2013 IL App (1st) 120884, ¶84. Moreover, persons dealing with public bodies are presumed to know the limitations of the public officials with whom they are dealing. *McMahon v. City of Chicago*, 339 Ill. App. 3d 41, 46 (1st Dist. 2003). District 204 is not entitle to rely on Healy's representations that he had actual or apparent authority to enter into an agreement on behalf of Township Trustees.

District 204's attempt to distinguish *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148 – which holds that the doctrine of apparent authority may not be utilized against a municipality – is creative, but ignores the rationale underpinning the holding. In *Patrick Engineering*, the Supreme Court explained that the doctrine does not apply against municipalities because otherwise it would be impossible for municipalities "to escape the financial effects of frauds and thefts by unscrupulous servants . . . ." *Id.* at ¶36. The rationale is that when apparent authority is applied against a municipality, the public suffers; hence, it cannot be applied against a municipality. The rationale was **not**, as District 204 asserts, that municipalities have complicated bureaucracies (Resp. at 8-9.) The situation in this case is the type of situation the Illinois Supreme Court describes in its opinion – an admitted felon failed to ensure that District 204 complied with its statutory obligations. Township Trustees now wishes, on behalf of the other member school districts whose money is at stake, to "escape the financial effect" of this unscrupulous servant's misdeeds. District 204 provides no good basis for this Court to limit *Patrick Engineering* to municipalities, and the Supreme Court's rationale does not suggest it should be limited. The doctrine of apparent authority is not applicable against public bodies.[1]

C. Neither Agreement is Well-Pled.

District 204 offers nothing more than conclusions that the *pro rata* agreement and the audit agreement were entered into by the parties. With respect to the latter, District 204 alleges only that "[Township Trustees]," through its Treasurer, agreed it was appropriate to pay District 204's audit expenses . . . ." (Counterclaim ¶21.) This is not a well-pled allegation. *See*

[1] District 204's argument that "*Patrick* held that equitable estoppel did not apply to a *municipality*" (Resp. at 8) is misleading. The holding addressed both apparent authority (which District 204 asserts) and equitable estoppel (which District 204 does not assert). The Supreme Court explained that "Illinois courts . . . have never held that apparent authority may apply against municipalities." 2012 IL 113148 at ¶35. The doctrine of apparent authority was expressly rejected as being applicable.

Denkewalter v. Wolberg, 82 Ill. App. 3d 569, 572-73 (1st Dist. 1980) (alleging that two parties agreed to enter into a contract is conclusory). With respect to the former, District 204 offers a similar conclusory allegation that "[Township Trustees], through its authorized agent, Healy, adopted and accepted the [*pro rata* agreement] . . . ." (Counterclaim ¶41). This is mere conclusion. *See Pollack v. Marathon Oil Co.*, 34 Ill. App. 3d 861, 866 (5th Dist. 1976) (holding that alleging an offer was "approved" or "accepted" is mere conclusion).

III. District 204 Does Not Seek Proper Declaratory Relief

A key problem with District 204's requested declaratory relief is that it seeks legal opinion that would not really solve anything. A declaration that Township Trustees failed to properly allocate interest income or must pay fidelity bond proceeds (Resp. at 10) would not terminate the controversy. District 204 concedes that these declarations fall short in not stating a specific amount that was improperly allocated or not distributed, but that is only part of the defect. District 204 does not seek a money judgment against Township Trustees, nor an injunction requiring that Township Trustees turn any property over to District 204. District 204 just wants a declaration that Township Trustees has done something improper. That is not appropriate declaratory relief. *Illinois Emasco Ins. Co. v. Waukegan Steel Sales Inc.*, 2013 IL App (1st) 120735, ¶15; *Beck v. Binks*, 19 Ill. 2d 72, 74 (1960); *Illinois Press Ass'n v. Ryan*, 195 Ill. 2d 63, 66-67 (2001).

With respect to its requested declaration that the Treasurer incurred improper expenses of office (requested declaratory judgment "f" from Count II of the Counterclaim), District 204 suggests a declaration that has sweeping ramifications. District 204 contends that the *only* permissible expenses of the Treasurer are set forth in Section 5/5-17 of the School Code. This is

not correct and would lead this Court to issuing a sweeping ruling that would have devastating effects on the operation of public school districts.

Section 5/5-17 does enumerate certain expenses, including the Treasurer's compensation. This Section also lists as expenses: the cost of publishing an annual statement; the cost of a record book; and the cost of dividing school lands and making plats. 105 ILCS 5/5-17. What this Section does **not** do, however, is purport to itemize the Treasurer's permissible expenses of office. The last expense (diving school lands and making plats) is not even a function the Treasurer would perform.

Section 5/5-17 is found within Article 5 of the School Code, which governs the Trustees of Schools. It has nothing whatsoever to do with the Treasurer. The Section merely provides that the Trustees are to pay the expenses enumerated therein out of the "permanent township fund," and then, if that is not sufficient, bill the school districts for those expenses. It describes **how** certain items are to be paid for, it does not identify what are permissible expenses of the Treasurer's office.

The only section of the School Code that discusses the Treasurer's expenses of office is Section 5/8-4. This is a logical place for such a section, because it falls within Article 8 of the School Code, which governs the Treasurer. Notably, Section 5/8-4 only states that the school districts must pay a proportionate share of the Treasurer's expenses of office. Nowhere in the School Code did the General Assembly set forth a list of permissible, or impermissible, expenses of the Treasurer's office.

If this Court adopts District 204's argument that Section 5/5-17 authorizes the Treasurer's compensation but none of the Treasurer's expenses of office, it will immediately shut down every Treasurer's office in Cook County. No Treasurer will be authorized to lease an office,

retain support staff, pay utility bills, or even buy a pad of paper and pencil. District 204, it would seem, wants the Treasurer to calculate *pro rata* shares in her head, since a calculator cannot be purchased. Certainly, no paper or electronic record can exist, since the purchase of neither would be authorized. School districts will be unable to make payroll or purchase supplies, because the Treasurer's office will not be able to process any vouchers or payment orders. District 204's position is a sweeping request that should give this Court great pause, and it is illogical that the General Assembly would have intended this when it drafted the School Code.

The more logical approach is that the Treasurer is entitled to incur reasonable expenses of office at her discretion. So long as her decisions are not the result of fraud, corruption, oppression or gross injustice, *Board of Education v. Board of Education*, 112 Ill. App. 3d 212, 219 (1st Dist.1983), this Court should not substitute its own business judgment of the judgment of another public servant.[2]

District 204 attempts to explain how its Counterclaim might survive under this standard of review, arguing that "[w]hether these and other expenses are oppressive, corrupt, fraudulent, [or] unjust . . . will be the subject of discovery." (Resp. at 11.) But this is just an admission that

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[2] One of the expenses District 204 challenges is the retention of a "public relations firm." (Counterclaim ¶87.) In *Ryan v. Warren Township High School Dist.*, 155 Ill. App. 3d 203 (2d Dist. 1987), the Appellate Court held that a school district was entitled to employ a public relations firm to assist in communicating with the media and the public during a period where it was under scrutiny for planning to demolish a school. This was implicitly authorized by the School Code as a result of the district's obligation to hold meetings open to the public, because retaining the firm would "enhance the school district's communications with the public . . . ." *Id.* at 205. The Township Trustees are similarly required to disseminate information to the community and to hold regular public meetings. 5 ILCS 120/1. The other expense is the use of a financial advisor. (¶83.) Yet District 204 makes this allegation in a conclusory fashion, and on information and belief, essentially admitting it has no clue what services the financial advisor at issue was performing. District 204 essentially admits engaging in a fishing expedition. It is implicit that a financial advisor is a necessary expense, since the Treasurer is not a licensed broker-dealer and cannot buy or sell the bonds and similar securities to which the School Code limits investment of public funds. 105 ILCS 5/8-8. The Treasurer is also authorized to enter into such contracts pursuant to 105 ILCS 5/8-7.

District 204 is engaged in a fishing expedition, and "[d]iscovery cannot be used as a fishing expedition to build speculative claims." *Cooney v. Magnabosco*, 407 Ill. App. 3d 264, 270 (1st Dist. 2011). District 204 must first allege the expenses are improper under this standard before it can be allowed to take discovery of whether those expenses are improper under this standard.

IV. District 204 Cannot Recover Under A Theory of Quasi-Contract

While District 204 argues about whether it has alleged the elements of its quasi-contract claims, District 204 does not respond to Township Trustees' argument that if the two purported agreements are found unenforceable under Illinois law, District 204 would not be entitled to recover in the alternative under a theory of quasi-contract. Just as an express contract in contravention of Illinois law is unenforceable, so too are quasi-contracts based upon unjust enrichment or *quantum meruit*. *See McMahon*, 339 Ill. App. 3d at 48 (holding implied contract with public bodies that are contrary to statute are as unenforceable as are express contracts); *Board of Educ. v. Murphy*, 56 Ill. App. 3d 981, 985 (4th Dist. 1978) (holding unjust enrichment and *quantum meruit* may not be utilized to enforce contracts that are contrary to statute or that are made without legal authority). Counts IV and V, for this reason, should also be dismissed.

V. District 204 Has Neither Adequately Requested Nor Needs An Accounting

This is the **only** Section in the Motion to Dismiss which incorporated certain facts from Dr. Birkenmaier's affidavit (the Motion's Exhibit 1) and which also incorporated a pair of correspondence exchanged between counsel (the Motion's Exhibit 2). Although District 204 contends that Township Trustees are disputing facts alleged in the Counterclaim, this is not true. Neither the cited paragraph from the affidavit nor the correspondence refutes any of the facts that District 204 alleges – they just provide additional factual detail that District 204 neglected to provide.

Cardinally, this is that District 204 did not demand an accounting until immediately before it filed suit and that Township Trustees responded by providing a website link to publicly available, audited financial statements and offered to provide further information if it was requested. This is an adequate response and it did not entitle District 204 to immediately thereafter file its Counterclaim for accounting. *See, e.g., Hutchison v. Woodstock Cmty. Unit School Dist.*, 66 Ill. App. 3d 307, 314 (2nd Dist. 1978) ("As to the allegations that the plaintiffs were entitled to an accounting . . . it is patent that the financial records of the Board were readily available to the plaintiffs as these are matters of public record.").

More importantly, it is within this Court's discretion to deny an accounting, after evaluating the facts and circumstances present before it. *Newton v. Aitken*, 260 Ill. App. 3d 717, 756 (2d Dist. 1994). District 204's unremarkable allegation that the pertinent financial information is on an "encrypted and inaccessible" database (one would hope that confidential financial information is both encrypted and not readily accessible to others) misses the point. District 204 has no need for the procedural sideshow of an accounting, because it is presently conducting discovery as part of this litigation. That is why Township Trustees does not have an obligation to give an accounting based on a pre-litigation demand. District 204 has full access to any documents it wishes, governed only by Illinois law governing the discovery process. It can have any report from the database that is reasonably pertinent to this lawsuit. District 204 does not – and cannot honestly – allege that it has not received over a thousand financial reports to date in response to its discovery requests or that this Court needs to supervise an accounting.

For all of these reasons, the Motion to Dismiss should be granted.

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

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