FIRM I.D. NO. 42297

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

TOWNSHIP TRUTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST,

Plaintiff,

v.

LYONS TOWNSHIP HIGH SCHOOL DIST. 204,

Defendants.

Case No. 13 CH 23386

Hon. Sophia H. Hall

NOTICE OF FILING

TO: Gerald E. Kubasiak
Douglas G. Hewitt
Kubasiak Fylstra Thorpe & Rotunno, PC
Two First National Plaza, 29th Floor
20 South Clark Street
Chicago, IL 60603
Fax: 312-630-7939

PLEASE TAKE NOTICE that on **September 15, 2014**, we filed with the Clerk of the Circuit Court of Cook County, Chancery Division, defendant's **Reply in Further Support of Motion to Reconsider Order of June 18, 2014**, a copy of which is served upon you.

Name: Charles A. LeMoine
Rosa A. Tumialán
Stephen M. Mahieu
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Attorney for: Defendant
City: Chicago, Illinois 60606

PROOF OF SERVICE

The undersigned, a non-attorney, states on oath that she served a copy of the foregoing Notice of Filing and Reply in Further Support of Motion to Reconsider Order of June 18, 2014 to the above counsel of record at the above mailing address by depositing a copy of same in the U.S. mail at 10 South Wacker Drive, Chicago, Illinois 60606, postage prepaid, before 5:00 p.m. on September 15, 2014.

[X] Under penalties as provided by law pursuant to 735 ILCS 5/1-109 I certify that the statements set forth herein are true and correct.

FIRM I.D. NO. 42297

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

TOWNSHIP TRUSTEES OF SCHOOLS, TOWNSHIP 38 NORTH, RANGE 12 EAST, Plaintiff, v. LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204, Defendants.	No. 13 CH 23386 Hon. Sophia H. Hall

REPLY IN FURTHER SUPPORT OF MOTION TO RECONSIDER ORDER OF JUNE 18, 2014

Plaintiff attempts to avoid dismissal of its claims for reimbursement of auditing expenses and interest payments by advancing new arguments that directly contradict the allegations of the Complaint. Notwithstanding Plaintiff's assertions to the contrary, the Complaint seeks reimbursement of the auditing expenses Plaintiff long ago paid to Baker Tilly and also demands reimbursement of principal and interest that Plaintiff paid out to District 204. The Complaint does *not* allege, as Plaintiff contends, that the funds were merely *allocated* to District 204 from an accounting standpoint, but rather plainly alleges "District 204 was allocated *and paid*" those funds. Illinois law provides that once Plaintiff paid out funds to third parties—here, Baker Tilly and District 204—any claim relating to those payments became subject to the statute of limitations. Plaintiff also relies on unpled facts in seeking to avoid dismissal of its claims relating to reimbursement of District 204's so-called "pro-rata share" of Plaintiff's expenses. Once again, at the motion-to-dismiss stage, Plaintiff can look only to the allegations of its complaint. Those allegations do not establish that Plaintiff's activities involved a general public interest.

The Court previously erred in applying the law and denying the motion to dismiss. As

such, District 204 has a valid basis for seeking reconsideration of the June 18, 2014 order. Plaintiff urges this Court to ignore the fact-pleading standard applicable in this matter, and insists that it be allowed to proceed with only vague and unsupported claims. The Court should consider only the facts pled in the Complaint. Those facts establish that the bulk of Plaintiff's claims are time-barred.

I. THE STATUTE OF LIMITATIONS BEGAN RUNNING ON CLAIMS RELATING TO PLAINTIFF'S ALLEGED AUDIT EXPENSE PAYMENTS AS THOSE FUNDS LEFT PLAINTIFF'S CONTROL.

Plaintiff's claims for reimbursement of audit expenses it paid more than five years before filing suit are time-barred and must be dismissed. Plaintiff allegedly paid Baker Tilly for auditing services over a period of twenty-one years, with Plaintiff releasing funds to Baker Tilly for those services during each of those years. (Compl. at ¶16.) At the moment those funds left Plaintiff's control with each payment, Baker Tilly took control of the funds and Plaintiff was plainly no longer holding them in trust. Any claim relating to the payment of those funds became subject to the five-year statute of limitations at the time the funds were released.

Plaintiff insists that it "continues[s] to hold in trust" all of the funds at issue in this lawsuit. (Resp. at 2.) Plaintiff repeatedly reiterates that all funds "are and remain to this day in the hands of the Treasurer." (Resp. at 4, 8.) That argument directly contradicts the allegations of the Complaint, wherein Plaintiff alleges that it "*paid* Baker Tilly $473,174.85 for audit services rendered to District 204 . . . ." (Compl. at ¶16 (emphasis added).) Either Plaintiff paid Baker Tilly the total amount alleged in the Complaint *or* those monies "are and remain to this day in the hands of the Treasurer" (Resp. at 4.) Both of Plaintiff's positions cannot be true. To the extent Plaintiff paid Baker Tilly for the auditing expenses, a fact upon which the Verified Complaint relies, those payments triggered application of the statute of limitations. *See School Directors of*

District No. 5. v. School Directors of District No. 1, 105 Ill. 653, 655-56 (1883). To the extent Plaintiff now insists that it did not make payments to Baker Tilly, that argument must be rejected because it contradicts the factual allegations of the Verified Complaint.[1]

Plaintiff attempts to distinguish *School Directors* by claiming that it is not seeking reimbursement from District 204 for the Baker Tilly expenses, but rather prays for a judgment "allocat[ing] public funds in the Treasurer's hands." (Resp. at 7.) First, as discussed above, Plaintiff is alleged to have already paid Baker Tilly for the auditing expenses, such that those funds are not even conceivably still in Plaintiff's custody. Second, Plaintiff's argument about the judgment it seeks directly contradicts the Complaint. Indeed, the prayer for relief specifically seeks a judgment that District 204 "is *legally obligated to pay* the Township Trustees the sum of $473,174.85 that was paid by the TTO for audit services rendered by Baker Tilly on behalf of District 204." (Prayer for Relief, ¶G (emphasis added).) Plaintiff is absolutely seeking a judgment relating to District 204's payment obligations and not simply an allocation of funds. *School Directors* makes clear that once funds are paid out—here, by Plaintiff to Baker Tilly, and in *School Directors* by the township treasurer to District 1—any claim relating to those funds becomes subject to the statute of limitations. The payments to Baker Tilly that took place prior to October 17, 2008 are time-barred.

II. PLAINTIFF'S INTEREST PAYMENTS TO DISTRICT 204 ARE ALSO SUBJECT TO THE STATUTE OF LIMITATIONS.

Plaintiff also seeks to avoid dismissal of its claims for supposed overpayments of principal and interest to District 204 by arguing facts that contradict those alleged in the

[1] Once paid to Baker Tilly, there can be no rational argument that Plaintiff continued holding those funds in trust. Like the parties in *School Directors*, there is no trust relationship between Plaintiff and Baker Tilly.

Complaint. Plaintiff first argues, as it did with the Baker Tilly monies, that all funds at issue in this lawsuit "remain to this day in the hands of the Treasurer." (Resp. at 4.) Yet, the Complaint alleges "District 204 was allocated *and paid* $1,380,496.53 in principal and interest on investments that it was not entitled to receive." (Compl. at ¶14.) The Complaint also seeks a judgment that Plaintiff "paid" District 204 those monies, which "it was not entitled to receive." (*Id.*, Prayer for Relief, ¶E.) Thus, Plaintiff's argument directly contradicts the allegations of the Complaint and must be rejected. The Complaint alleges that the funds were actually paid to District 204. That payment, which by definition would have involved the release of the funds from Plaintiff's custody for use by District 204, triggered the running of the statute of limitations. *See School Directors*, 105 Ill. at 655-56. Just as with the Baker Tilly funds, once Plaintiff paid out and released funds from its custody, District 204 was free to use those funds and Plaintiff was no longer holding them in trust for anyone.

Plaintiff attempts to avoid the limitations period by arguing that "[e]ven when the Treasurer 'pays out' funds to District 204, those funds still remain public trust funds in the Treasurer's custody. In essence, the 'payment' is little more than a bookkeeping entry." (Resp. at 6.) Plaintiff's position, which it makes for the first time in its response brief, is not supported by any allegation in the Complaint. Recognizing that shortcoming, Plaintiff attempts to foist the "burden" onto District 204 to disprove its unpled contention that the funds it seeks to recover from District 204 are in Plaintiff's custody. (*Id.*, n. 6.) Plaintiff's position is inconsistent with Illinois law. It is Plaintiff's burden to plead sufficient facts to establish a cause of action. Here, Plaintiff has pled no facts demonstrating that the funds at issue are public funds not subject to the statute of limitations, especially once those funds were turned over to District 204 (or Baker Tilly). Plaintiff cannot avoid its pleading obligations through unsupported argument in a

response brief. The Complaint alleges the payments were actually made to District 204, an allegation that the Court must accept as true for purposes of the motion to dismiss. Once made, those payments become subject to the statute of limitations.[2]

III. PLAINTIFF HAS NOT PLED SUFFICIENT FACTS TO ESTABLISH A SUFFICIENT GENERAL PUBLIC INTEREST IN ITS ACTIVITIES.

Plaintiff's threadbare Complaint does not include sufficient allegations from which this Court may conclude that District 204's payment of Plaintiff's supposed "pro-rata share" of Plaintiff's expenses affects any general public interest. Recognizing that it has pled virtually no facts in support of its claims, Plaintiff again seeks to shift its pleading obligations onto District 204. (Resp. at 9, n. 2.) If Plaintiff wishes to rely on the various unplead assertions of fact contained in its response brief, it must first plead those facts in an amended complaint. As the Complaint currently reads, there is no factual basis to conclude that Plaintiff's actions involve any general public interest. Rather, the Complaint alleges only that an unknown number of "school districts" and "two additional educational cooperative and a medical self-insurance cooperative" are obligated to permit Plaintiff to act as custodian of certain funds.

Plaintiff's Complaint does not establish any general public interest such as the one displayed in *A, C & S*, the principal case on which Plaintiff relies. In that case, which dealt with claims brought by thirty-four different school districts in the state, the court recognized that the state legislature had expressed a "special concern" in abating asbestos by passing the Asbestos

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[2] Plaintiff also relies on *City of Lincoln* in support of its argument that the statute of limitations cannot apply to one local public entity's claim against another local public entity. (Resp. at 7.) *City of Lincoln* involved a dispute over tax revenues paid by members of the general public that were subject to a formulaic split between a city and a county. The court held that in that circumstance, the statute of limitations would not apply because the funds paid in directly by taxpayers were held in trust by the *municipal corporation*. 81 Ill. at 158. Plaintiff and District 204 are not municipal corporations, there are no alleged tax payments, and the revenues are not alleged to have been received from the general public. Nor does the Complaint allege District is holding the subject funds in trust for Plaintiff (or vice-versa).

Abatement Act. The court found the general "health concern" relating to asbestos was a "sufficient general concern for the people of the State and that the school districts are acting to promote that concern." *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 474-75, 546 N.E.2d 580 (1989). In declining to apply the statute of limitations, the court first found the existence of a broad state interest in the subject matter of the lawsuit. Unlike thirty-four different school districts in the state seeking to abate asbestos and protect the health of Illinois students and staff in accordance with the express wishes of the General Assembly, there are no alleged facts here supporting a general public interest in Plaintiff's activities.[3] In fact, there are no allegations establishing that anything Plaintiff does affects a public interest. Rather, the only specific allegation relating to Plaintiff's activities deal with its apparent inability to calculate proper interest payments to District 204. *A, C & S* is entirely distinguishable from this action and does not support Plaintiff's position. Plaintiff's Complaint also does not allege many of the supposed facts on which Plaintiff relies in attempting to distinguish *Brown*. (Resp. at 10-11.) No general public interest exists regarding Plaintiff's activities, and the statute of limitations applies to Plaintiff's claims for reimbursement of its so-called "pro-rata share" of expenses.

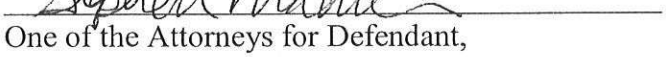
CONCLUSION

Illinois law does not permit Plaintiff to sit on its hands for decades after paying out funds before providing District 204—itself a public entity—with any notice of a claim or concern. District 204 relied on Plaintiff's actions, calculations, and representations in setting annual budgets, all of which are now being thrown into disarray. Plaintiff's attempt to bring stale claims

[3] The only interest Plaintiff claims to be protecting is that a handful of school districts, two educational cooperatives (likely comprised of those same school districts), and a medical-insurance cooperative (likely comprised of those same school districts). (Resp. at 3.) Simply put, Plaintiff wishes to take money from District 204 and redistribute or "re-allocate" it to a small number other member districts and not to the public at large.

against District 204 is patently unfair and would cause substantial harm to thousands of students, faculty, and staff. The statute of limitations applies to bar Plaintiff's claims in existence for more than five years prior to the filing of the Complaint. Accordingly, the Court should reconsider its order of June 18, 2014, and dismiss those claims in existence prior to October 17, 2008.

Dated: September 15, 2014

By: 

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