

FILED-3

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

TOWNSHIP TRUSTEES OF SCHOOLS)
TOWNSHIP 38 NORTH, RANGE 12)
EAST,)

Plaintiff,)

vs.)

LYONS TOWNSHIP HIGH SCHOOL)
DISTRICT NO. 204)

Defendants)

No. 13 CH 23386

Judge Sophia H. Hall

Calendar 14

NOTICE OF FILING

TO: Charles A. LeMoine
Rosa M. Tumialán
Stephen M. Mahieu
Dykema Gossett PLLC
10 S. Wacker Drive, Suite 2300
Chicago, IL 60606

PLEASE TAKE NOTICE that on March 12, 2015, I have filed with the Clerk of the Circuit Court of Cook County, Illinois, the following: **Plaintiff's Motion to Dismiss Counterclaim**, a copy of which is hereby attached and served on you.

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: 

One of its attorneys.

Gerald E. Kubasiak
Barry P. Kaltenbach
Gretchen M. Kubasiak
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PROOF OF SERVICE

The undersigned, an attorney, certifies that copies of the following documents:

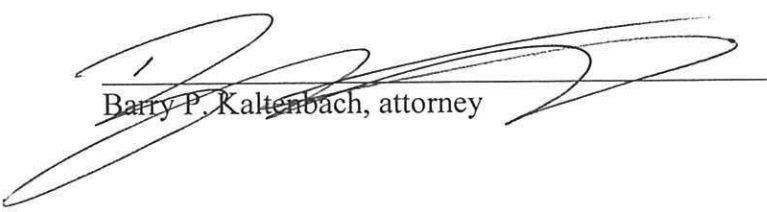
Plaintiff's Motion to Dismiss Counterclaim

has been served upon:

Charles A. LeMoine
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Stephen M. Mahieu
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as follows:

- by personal service on March 12, 2015 before 4:00 p.m.
- by U.S. mail, by placing the same in an envelope addressed to them at the above address with proper postage prepaid and depositing the same in the U.S. Postal Service collection box at 20 S. Clark Street, Chicago, Illinois, on March 12, 2015 before 4:00 p.m.
- by facsimile transmission from 20 S. Clark Street, Suite 2900, Chicago, Illinois to the [above stated fax number/their respective fax numbers] from my facsimile number (312) 630-7939, consisting of ____ pages on March 12, 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 March 12, 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 _____, on March 12, 2015 before 4:00 p.m., the served [party/parties] having consented to such service.


Barry P. Kaltenbach, attorney

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DISTRICT NO. 204)

Defendants

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PLAINTIFF’S MOTION TO DISMISS COUNTERCLAIM

Plaintiff, Township Trustees of Schools Township 38 North, Range 12 East (“Township Trustees”), for its Motion to Dismiss the Verified Counterclaim for Declaratory, Injunctive, and Other Relief (“Counterclaim”), filed by defendant, Lyons Township High School District No. 204’s (“District 204”), states as follows:

I. INTRODUCTION

Count I of District 204’s Counterclaim should be dismissed because it fails to properly allege the pre-requisites to an action for an accounting and because an accounting is unnecessary. Count II should be dismissed because the declaratory relief District 204 seeks amounts to press releases, not findings that would terminate any controversy between the parties. The injunctive relief District 204 seeks in Count II is over broad and vague. Further, District 204 fails to adequately allege the purported 1993 and 1999 Agreements upon which much of its Counterclaim is based; in addition these alleged Agreements are unenforceable as a matter of law.

II. DISMISSAL IS WARRANTED UNDER SECTIONS 2-615 AND 2-619 OF THE CODE OF CIVIL PROCEDURE

Township Trustees brings this Motion pursuant to Section 5/2-619.1 of the Code of Civil Procedure, which authorizes combining Sections 5/2-615 and 5/2-619 into a single motion. *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶31. The majority of this Motion is pursuant to Section 2-615, which tests the legal sufficiency of the Counterclaim. *Id.* In some instances, Township Trustees relies upon additional facts not set forth in the Counterclaim. Such arguments are noted as being brought under Section 5/2-619. Under either section, only well-pled facts are accepted as true. *Id.* The law does not accept as true conclusions of fact unsupported by underlying allegations of specific fact, or conclusions of law. *Id.*

III. AN ACCOUNTING IS NOT ADEQUATELY ALLEGED, OR NECESSARY

District 204 has not adequately alleged that it is entitled to an accounting, particularly under the circumstances of this case. Moreover, District 204 has no need for an accounting because it has been offered, and is obtaining through discovery, all the documents it seeks. Imposing the procedural sideshow of an accounting upon the parties and this Court is unnecessary, and will only result in greater delay and expense.

A. District 204 has not Demanded and Been Denied an Accounting.

District 204 must allege both that it has demanded and been denied an accounting. *American Sanitary Rag Co. v. Dry*, 346 Ill. App. 459, 463 (1st Dist. 1952); *Patterson v. Northern Trust Co.*, 170 Ill. App. 501, 516 (1st Dist. 1912). A demand for copies of books and records is insufficient. *Id.* Yet District 204 does little more than allege that on unspecified occasions it

asked for financial records and Township Trustees failed to provide them. Even accepting these allegations as true,¹ they are not sufficient to support District 204's claim for an accounting.

It is not until paragraph 48 of its Counterclaim that District 204 alleges that it requested a "full accounting for the period of January 1, 1993 through the present, but, *to date*, the TTO has failed to provide the requested accounting." (Emphasis added.) District 204 does not allege *when* it made this request, but District 204 is apparently referring to a letter it sent on January 27, 2015, less than 2 weeks before it filed its Counterclaim. Township Trustees responded to this letter on February 3, 2015, just 7 days later. (Copies of both letters are attached as Exhibit 2.) Township Trustees did not refuse an accounting. To the contrary, it provided a link to audited financial statements for the fiscal years going back 15 years. Township Trustees also offered to look for older financial statements. District 204 did not respond to this offer.² District 204's last-minute request for an accounting leaves it unable to plead that it has both demanded and been refused an accounting. For this reason, Count I of its Counterclaim should be dismissed.

B. District 204 has not Alleged an Accounting Would Reveal Township Trustees Owes District 204 any Sums.

District 204 has not alleged an accounting would reveal that Township Trustees owes it money, nor has District 204 alleged how much it believes is at issue.³ Both are necessary allegations for a party seeking an accounting. *American Sanitary*, 346 Ill. App. at 463; *Gutsch Brewing Co. v. Fischbeck*, 41 Ill. App. 400, 402 (1st Dist. 1891). District 204's failure in this regard warrants dismissal of Count I of its Counterclaim. District 204 might argue it needs an

¹ Because District 204 does not allege anything specific (*e.g.*, what was requested, or when), these allegations are not well-pled. They are also inaccurate. For example, in December 2013, the current Treasurer, Dr. Susan Birkenmaier, invited District 204 to send a representative to her office to inspect financial records. District 204 declined this invitation. (See Affidavit of Dr. Birkenmaier, Exhibit 1 hereto, ¶4.)

² District 204's failure to allege it has been refused an accounting can be evaluated under the governance of Section 2-615. To the extent the Court wishes to consider Exhibit 2, then Section 2-619 governs.

³ District 204 does allege that in recent years it has received less interest income (Counterclaim ¶22), but this does not satisfy pleading requirements. It also overlooks the nation-wide drop in interest rates. The Treasurer cannot invest however she wishes; she is limited to conservative investments that provide minimal return. 105 ILCS 5/8-8.