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,	)	**No. 13CH 23386**
vs.	)	
LYONS TOWNSHIP HIGH SCHOOL DIST 204,	)	
Defendant/Counter-Plaintiff.	)	

NOTICE OF FILING

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

Please take notice that on July 13, 2015, we are filing with the Circuit Court of Cook County, Illinois, **TOWNSHIP TRUSTEES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS FIRST AMENDED VERIFIED COUNTERCLAIM**, a copy of which is hereby served on you.

TOWNSHIP TRUSTEES'

Barry P. Kaltenbach

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PROOF OF SERVICE

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

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

have been served upon:

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

as follows:

☐ by personal service on July 13, 2015 before 4:00 p.m.

☑ by U.S. mail, by placing the same in [an] envelope[s] addressed to [him/her/them] at [the above address/their respective addresses] with proper postage prepaid and depositing the same in the U.S. Postal Service collection box at 20 S. Clark Street, Chicago, Illinois, on July 13, 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 July 13, 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 July 13, 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 July 13, 2015 before 4:00 p.m., the served [party/parties] having consented to such service.

Barry P. Kaltenbach, attorney

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 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.

In two instances, Township Trustees supplied additional factual content in its Motion to Dismiss. First, Township Trustees supplied factual background on page 10 relating to its efforts to recover proceeds from Robert Healy's fidelity bonds. As explained in footnote 6 on that page, "[t]hese additional facts are provided as background information only and their inclusion does not require that this Court analyze this argument under the standard governing a Section 2-[6]19 motion to dismiss." (Motion at 10, n6.) Township Trustees merely wished this Court to have some understanding of the allegations at issue. They are not material to the point that the declaratory judgment District 204 seeks would not terminate the parties' controversy.

Second, Township Trustees supplied additional factual background on pages 12-13 relating to District 204's allegation that it has requested and been denied an accounting and that

an accounting is necessary. In its footnote 7, Township Trustees explained that District 204's allegations are not well-pled. District 204's allegations that it asked for books and records are not sufficient to state a cause of action for an accounting. Township Trustees then provided Dr. Birkenmaier's affidavit to add some depth to the summary allegations that District 204 *did* provide – that at some unspecified point, District 204 requested an accounting. In this instance, Dr. Birkenmaier's affidavit can be used to establish that this request was made on the eve of District 204's pleading being filed (since District 204 does not provide any factual detail in its pleading) and that the response of Township Trustees was to provide audited financial statements and offer to provide other documentation (since District 204 also does not provide any of that detail, either).

Dr. Birkenmaier's affidavit does not refute District 204's allegations, since District 204 never pled any particular facts (beyond mere conclusion) in the first instance. The affidavit provides some additional detail missing from the pleading, and this Court may properly consider such detail since it does not refute any well-pled allegations. District 204's legal authority is not to the contrary. *See, e.g., Provenzale v. Forister*, 318 Ill. App. 3d 869, 878 (2nd Dist. 2001) (holding only that "[t]he 'affirmative matter' must be something more than evidence offered to refute a material fact alleged in the complaint."). One of the purposes of a Section 2-619 motion is to "dispose of . . . easily proved issues of fact at the outset of the case . . . ." *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). The issue of when District 204 made its request and the substance of Township Trustees' response is an easily proved issue of fact. Township Trustees clearly articulated in its footnotes what facts it was providing and how they impacted this Court's standard of review under Sections 2-615 and 2-619. The Motion to Dismiss complies with Section 2-619.1 sufficiently.

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

To be clear – Township Trustees *does* dispute the existence of a valid, enforceable contract that purportedly excuses District 204 from complying with its statutory obligations to pay: (a) its *pro rata* share of the Treasurer's compensation and expenses of office (the purported "1999 Agreement"); and (b) the cost of its audits (the purported "1993 Agreement"). What Township Trustees does *not* dispute that is that Healy failed to actually follow the School Code. Healy did not ensure that District 204 paid its *pro rata* share, and did not ensure that District 204 paid for its own audits – Healy's failures are the entire point of this lawsuit. Township Trustees' argument in support of dismissal is that District 204 provides scant factual allegations respecting these agreements it contends existed. Moreover, even if District 204 alleged the existence of either contract, District 204 has not set forth well-pled allegations establishing that Healy had actual or apparent authority to enter into either contract, or that such contract would be valid under Illinois law in any event.

A. Neither contract is well-plead.

District 204 offers no well-pled factual allegations regarding the purported 1993 Agreement and District 204 thereby fails to allege the existence of the agreement. While more is written about the 1999 Agreement, the additional words are hollow; such agreement is still not well-pled. District 204 relies on conclusory allegations of offer and acceptance. Its own allegations establish that it relied solely on Healy's representation of his own authority after he initially told District 204 he did not have authority to enter into the Agreement, Finally, District 204 does not allege an actual breach that caused it damages, but rather alleges what is akin to an

affirmative defense. In total, District 204 simply fails to properly allege the existence of either contract.

B. Actual and apparent authority are not well-plead.

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-suited factual allegations that "Healy, on behalf of the Trustees, adopted and accepted the [A]greement," and that it "repeatedly received confirmation [*from whom?*] that Healy had discussed the [A]greement with the Trustees . . . ." (Resp. at 8.) These are not well-pled allegations that establish actual authority. They also do not address the point that an agent cannot create his own authority, *Cove Mgmt. v. AFLAC, Inc.*, 2013 IL App (1st) 120884, ¶84, or that 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). They certainly do not address the point that neither the School Code nor case law provides Healy with actual authority to contract away statutory obligations. District 204, again, relies on conclusory allegations devoid of factual detail.

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 9-10.) 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.

C. Both contracts would be invalid under the School Code in any event.

District 204 selectively quotes from the School Code in arguing that Section 5/3-7 does not require District 204 to pay for its own audit fees (Resp. at 7.) 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 a 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 (indeed, Township Trustees paid those). Rather, the argument goes, District 204 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, and the other required under the purported 1993 Agreement? Or is it 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, what the value of that work was, and how Township Trustees breached an obligation to pay for it.

District 204's argument concerning its statutory duty to pay for its *pro rata* equally 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 7-8.) In essence, District 204 argues 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. 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 as part of a barter.

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).

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 investment interest income or must pay fidelity bond proceeds based on gross and not net recovery (Resp. at 11) 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 First Amended Verified 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 produces an extreme result.

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 even 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. No logical reading of the School Code suggest that Section 5/5-17 is intended to be an exhaustive list of the 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 provides that the school districts must pay a proportionate share of the Treasurer's expenses of office. Nowhere in the School Code did the drafters set forth a list of permissible, or impermissible, expenses of the Treasurer's office.

If this Court adopts District 204's argument, it will immediately shut down the Treasurer's office for each and every township in Illinois. 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. 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.[1]

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

District 204 did not demand an accounting until immediately before it filed suit. The fact that, over the years, it has requested various records, is not material to whether District 204 states a cause of action for an accounting. *American Sanitary Rag Co. v. Dry*, 346 Ill. App. 3d 459, 463 (1st Dist. 1952). More importantly, it is within this Court's discretion to conduct 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 has the ability to serve discovery in this case. 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 or that this Court needs to supervise an accounting.

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[1] One of the expenses District 204 challenges is the retention of a "public relations firm." (First Amended Verified 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.

V. 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.

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

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