IN IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL COURT
MCHENRY COUNTY ILLINOIS

ANDREW GASSER, ALGONQUIN TOWNSHIP ROAD COMMISSIONER Plaintiff, v. KAREN LUKASIK, INDIVIDUALLY AND IN HER CAPACITY AS ALGONQUIN TOWNSHIP CLERK, ANNA MAY MILLER AND ROBERT MILLER, Defendants,	)	Case No.: 2017 CH 00435
KAREN LUKASIK, Cross-Plaintiff, v. CHARLES A. LUTZOW JR., Cross-Defendant, ANDREW GASSER, Counter-Defendant	)	

DEFENDANT'S COMBINED MOTION TO DISMISS BROUGHT PURSUANT TO 735 ILCS 5/2-619.1

NOW COMES your Defendant, ROBERT MILLER, by and through his attorneys, THE GOOCH FIRM, and as and for his Motion as aforesaid, states to the Court the following:

INTRODUCTION

This Motion attacks the Fourth Amended Complaint and all of its Counts seeking a dismissal of all Counts in the form of a Judgment on the pleadings pursuant to 735 ILCS 5/2-615(e). Alternatively, Defendants seek the Court to dismiss all Counts pursuant to 735 ILCS 5/2-615(a) for failure to state a cause of action. Additionally, Defendant seeks a dismissal based on the

lack of standing pursuant to 735 ILCS 5/2-619. Further dismissal is sought in the alternative pursuant to 735 ILCS 5/2-615 for the failure to join necessary parties.

Defendants complaints with the Fourth Amended Complaint are similar to Defendants Complaints with all the other Complaints filed in this action. At best, they are hodge podge of allegations set forth mainly in conclusionary form in the first seventy-two (72) paragraphs. If not conclusionary then constitute the pleading of claimed evidence.

Counts I through VI are now alleged breaches of fiduciary duty seeking money to be returned to ANDREW GASSER. The Counts, as argued below, lack the essential allegations that Defendant MILLER actually obtained the money or spent the money. Such an allegation would fly in the face of existing statutes.

Count VII likewise for conversion is a Count lacking in the necessary elements and Count VIII is a duplicate seeking the same relief for the same issue of sick pay only under a constructive fraud theory. As argued below, constructive fraud is a breach of fiduciary duties.

Finally, Count IX combines two causes of action. Something the Court has previously warned Plaintiff over it seeks to combine causes of action for an accounting with injunctive relief.

All of the Counts ignore the Township Code enforced in the State of Illinois and ignore the fact that the Highway Commissioner does not have the ability to pay anyone any amount of money rather it is the town Board of Trustees, which first approve the expenditure. Only after that approval has been given by the Board does the Treasurer pay it. Plaintiffs have chosen to ignore these statutes and have ignored any necessary allegations indicating that MILLER avoided the Board of Trustees and the Treasurer and paid the money out directly without following the statutes.

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As argued below, such allegations would be impossible as Plaintiff is well aware that there has been compliance with the aforesaid procedures making the previous Board necessary parties if the Court allows this matter to proceed.

ARGUMENT

I.
MOTION TO DISMISS SEEKING JUDGMENT ON THE PLEADINGS PURSUANT TO 735 ILCS 5/2-615(e) AS TO COUNTS I, II, III, IV, V, VI, VII, VIII

Counts I through VIII all seek the return of funds allegedly spend by ROBERT MILLER without public benefit. After numerous attempts to plead various causes of action based on the same operative facts, Plaintiff continues to ignore the actual facts and continues to refuse to make necessary allegations. All of which are fatal to these Counts based on the theory as contained in this argument.

Township government has frequently been seen as containing checks and balances on everyone's authority. What the Plaintiff overlooks and refuses to allege, is the necessary steps which must be taken before a Township or a Township Road District can spend money. In fact, Plaintiff fails to point out any statute giving the Highway Commissioner sole authority to spend money.

The law is quite clear that the Highway Commissioner does not have custody of the Road District funds but rather the Road District Treasurer has custody of the funds. 605 ILCS 5/6-205. The supervisor serves as the treasurer. 60 ILCS 1/70-60.

In previous pleadings, the Plaintiff has suggested that the Treasurer must pay out those funds upon the order of the Highway Commissioner. However, the Plaintiff has failed to point out the remaining languages of the statute which provides that no bill should be paid, or monies paid over until "...the Board of Town Trustees or Highway Board of Auditors as the case may be, has

examined and audited the claims or charges upon which such order is drawn…." 605 ILCS 5/6-205.

The Township Code is equally strict when addressing the powers of the Township Board. 60 ILCS 1/80-10 very clearly states that the Township Board shall meet for the purpose of examining and auditing the Township and Road District accounts "….before any bills…are paid….".

In the aforesaid Counts, in each and every instance, Plaintiff has chosen to ignore the fact that all of the complained of expenditures received the legislative approval of the Township Board of Trustees formally known as a Board of Auditors. Plaintiff would have this Court believe that Defendant MILLER simply spent the money. In fact, Defendant MILLER presented the bills, if the statutes were followed, to the Board of Trustees who gave their legislative approval.

What is lacking in these Counts is an allegation that rather than following the prescribed statute, Defendant ROBERT MILLER somehow subverted and spent the money without obtaining the legislative approval of the Township Board of Trustees. Such allegations are essential to maintain the causes of action for breaches of the fiduciary duty. As without those allegations, the Court must presume that the law was followed. In fact, many cases of the common law set forth the broad legal presumption that a public official performs the functions of his office according to law and that he does his duty. See *Lyons v. Ryan*, 201 Ill.2d 529 (2002) also found at 780 N.E. 2d 1098. The quote set forth herein is found at 201 Ill.2d 529 at 539. In *Lyons v. Ryan*, supra, the Supreme Court made it clear that a real party of interest is a person or entity entitled to the benefits if the action is successful. Which in this case would be undoubtedly the Treasurer of the Algonquin Township Road District and/or the Board of Trustees being the legislative party paying the money out to third-parties. This of course begs the questions as to whether the Road District and its

Commissioner has the ability to maintain this lawsuit otherwise. However, the necessary allegations are lacking in the Counts contained within this section of the argument to allege Plaintiff is the real party in interest and in fact such allegations would be impossible to make.

Plaintiff has also failed to make the proper allegations that the accounts of the Board District were never audited as required by statute. 60 ILCS 1/80-20 requires that Townships receiving revenue in excess of $850,000 during any physical year, not including road funds, to have the accounts and all records of the Township thoroughly audited by a Certified Public Accountant within six (6) months after the close of each fiscal year. Which must contain, when complete, the Accountant's report and recommendations. Presumptively, if MILLER had in fact taken and spent this money without legislative approval, such an allegation would be contained in the Counts srought to be dismissed. The failure to contain such an allegation is fatal to the causes of action which Plaintiff has attempted to set forth herein. In fact, such allegations are impossible to make. A fact well known to Plaintiff.

In summary, the allegations of the aforesaid Counts are not only lacking in detail and vague, but they lack the necessary allegation that ROBERT MILLER actually took control of the money without first having the legislative body approve his spending of the money. Such allegations are essential and such allegations have been ignored by Plaintiff and repeatedly ignored by Plaintiff. Such that this Court should grant judgment on the pleadings based strictly on the failure to allege the necessary material facts. There have been numerous grants of amendment given to Plaintiff and warnings that the Plaintiff needed to set forth valid causes of action. The Plaintiff persists in refusing to do so and should suffer the consequences of his failure.

Alternatively, if this Court is disinclined at this juncture to grant judgment on the pleadings, the Defendant makes the same operative allegations contained in this argument and moves this

Court to strike and dismiss the aforesaid Counts due to the failure to state a cause of action. Said dismissal should be with prejudice and is brought pursuant to 735 ILCS 5/2-615(a).

II.
MOTION FOR JUDGMENT ON THE PLEADINGS AND DISMISSAL BASED ON 735 ILCS 5/2-615(e)

There are separate and distinct reasons for the dismissal of Counts I through VIII other than as contained in argument I contained above. This argument is made separately to prevent confusion and to provide the Court with an alternative reason to dismiss the Complaint.

Plaintiff has failed to plead a lack of public purpose for any of the aforesaid expenditures other than in a conclusionary fashion. They argue no ultimate material facts showing that any of the purchases, contained therein, were not to some extent a public benefit. *The People ex rel v. McDavid Barrett*, 370 Ill. 478 (1939) illustrates the issue clearly. *Barrett*, supra stands for the proposition that the Courts should not become involved in issues which require a determination of what is for the public good and what are public purposes. *Barrett*, supra involved issues of taxes and appropriations in the granting of widow benefits for the deceased Circuit Judges. The Court clearly set forth that a determination of what is for the public good and what are public purposes are questions for the legislative body which must first decide it. The Court went on to indicate that in so doing, the legislative body is vested with large discretion, which the Courts cannot control unless its action is evasive of or contrary to some prohibition. The Court went on to find that limitation resting in theory only on the vague ground of doubt for which the people have been satisfied to leave the judgment, patriotism and sense of justice of their representatives are not within the control of Courts. See 370 Ill. 478 at 482, 19 N.E. 2d 356 at 359. The *Barrett* Court went on to hold "....in determining whether or not the sovereign power is used in the public interests, the judgment of the legislature is to be accepted, in the absence of a clear showing that

the purported public purpose is but an evasion and that the purpose is, in fact, private, 370 Ill. 478 at 482, 19 N.E. 2d 356 at 359. Applying this holding to the facts of this case then one should find in determining whether or not the approval and payment of a bill is in the public interests the judgment of the Township Board of Trustees is to be accepted in the absence of a clear showing that the purported public purpose is but an evasion and that only a private person was benefited.

It appears therefore, that *Barrett* is an absolute prohibition on the Plaintiff's attempts to second guess the Board of Trustees and reverse with this Court's assistance the findings of the Board of Trustees and approval of the bills. Unless, and only unless, the Plaintiff can allege that the Board of Trustees never approved payment of the bills in question and somehow Defendant MILLER was able to obtain the money by circumventing the Board of Trustees.

Interestingly, Plaintiff ignores and refuses to allege that the purchases of the personal property were not part of clothing allowances or compensation to an employee and refuses to allege in the case of "*Decorating*" and "*Paving*" that the work was done on property while not owned by the Algonquin Township Road District was not occupied by the Road District.

III.
MOTION TO DISMISS PURSUANT TO 735 ILCS 5/2-615(e) OR ALTERNATIVELY MOTION TO STRIKE AND DISMISS PURSUANT TO 735 ILCS 5/2-615(a) FOR FAILURE TO STATE A CAUSE OF ACTION

This section of the argument addresses Count IX which is a combination of numerous allegations accusing Defendant MILLER of "bid rigging", failure to produce records and accounting for those records, unknown relief regarding the so called "bid rigging" and finally an injunction against destruction of records.

The Court should be aware that the injunction issues have previously been dealt with and a Order remains in effect preventing all parties from disposing of any public record.

The law is also quite clear and well known to the Courts and practitioners, that causes of action are to be pled in separate Counts. That in and of itself would cause the striking of Count IX. However, this Count, in its various forms, has previously been stricken in all of the previous Complaints. Although this Count is more comprehensive than others, it still lacks the necessary detail and combines causes of action. At this juncture proceeding, Count IX should be dismissed with prejudice either by 735 ILCS 5/2-615(a) or with judgment on the pleadings due to a grossly insufficient pleading violating numerous rules which Plaintiff has been previously warned of, pursuant to 735 ILCS 5/2-615(e).

Contrary to Plaintiffs assertions during previous arguments before this Court, there is no rule of law which allows a petition for injunctive relief to be combined with other causes of action. The issuance of an injunction is clearly defined and set forth at 735 ILCS 5/11-101 *et seq*. The aforesaid Injunction Act requires specificity in any type of injunction order entered. Therefore, it stands to reason that the petition for injunction requires the same specificity which is wholly lacking herein. Nowhere has the aforesaid Act allowed the combining of a petition for injunctive relief with any other cause of action.

As to the request for an accounting, paragraph 141 of Count IX clearly shows the true reasons for the accounting. Plaintiff seeks a fishing expedition to see if he could plead additional breaches of fiduciary duties and for no legitimate reason. Further, an accounting can never be used as a substitution for discovery based on a proper and valid complaint. The same issue exists in Count IX as in other Counts. Plaintiff ignores the fact that it was the Board of Trustees of the Township who approved all of the bills set forth in Count IX and not Defendant MILLER. Alternativity, Plaintiff fails to allege that MILLER circumvented the Township Act and somehow approved bills himself without submitting them to the Township Board.

Plaintiff alleges in paragraphs 143 and in following paragraphs that certain payments were made for absolutely no legitimate lawful public purpose. However, such allegations are nothing more than conclusions and ignore the finding set forth above in *The People ex rel v. McDavid Barrett*, 370 Ill. 478 (1939) where the Court discussed public purposes and found it should be left to the legislative body to make that determination. The Complaint is devoid of any allegation that the Board of Trustees, then sitting, powers were circumvented by Defendant MILLER and consequently they did not approve the aforesaid bills as being for a public purpose or at least a partial public purpose.

For reasons known only to Plaintiff, much of Count IX diverges into Plaintiffs interpretation of "big rigging" which at best is a conclusionary statement and is more designed to attempt to inflame the public by reading the Complaint and possibly this Court. However, the Plaintiff ignores and misquotes the statutes regarding bidding by public agencies and alleges that Defendant ROBERT MILLER did not accept "the low bidder" (paragraph 140). Plaintiff fails to point out that the statutes in question require a public body to accept the bid of the "lowest responsible bidder" (emphasis added). Such a failure is fatal to whatever purpose the allegations have been made in Count IX and judgment should be entered accordingly on that issue.

Based on the allegations of Count IX, judgment on the pleadings should be entered. Plaintiff seeks much more than a financial accounting in Count IX. Seemingly, it would require an accounting as to a sweater or purse purchase by Levenger by producing the item in question. By Plaintiff's own allegations, he already has a copy of the bill and the credit card statement what more could be sought? Likewise, two loads of salt theoretically, would involve bringing two loads of salt for Plaintiff to exam, an impossibility. In fact, it is quite clear that an accounting is only a

statement of receipts and disbursements to and from a particular source. *Polikoft v. Levy*, 132 Ill. App.2d 492 at 499, 270 N.E. 2d 540 at 547. Not a request for materials or records.

At the present time, Plaintiff in his capacity as the Algonquin Township Highway Commissioner has complete and unfettered access to the annual audits prepared by an independent accountant and to the financial records of the Township and Road District including the approval of all bills submitted by Defendant ROBERT MILLER. There is no need for this type of accounting sought by Plaintiff. It is in fact unnecessary and a Court will not order such an equitable accounting where it is unnecessary. *Nieberding v. Phoenix Manufacturing Co.*, 31 Ill. App. 2d 350 at 356, 176 N.E. 2d 385 at 387(88) 2nd Dist. (1961). Plaintiff is then unable to establish there is no alternative means to obtain the records he seeks and instead resorts to conclusionary language about the potential destruction of records none of which were ever in his custody or in MILLER's custody as the Highway Commissioner but rather in the custody of the Township Clerk. Utilizing only conclusionary language, the Plaintiff fails to properly establish that he lacks an adequate remedy at law which would cause any type of equitable relief. See *Devyn Corp. v. City of Bloomington,* 2015 IL App. (4th) 140819. 38 N.E. 3d. 1266. In equally confusing fashion, the Plaintiff has chosen to inject the issue of allegedly missing records into his Complaint for financial accounting and for injunctive relief.

The Plaintiff again has an adequate remedy simply by seeking from the custodian of records production of all the alleged records that Plaintiff maintains he does not have. In fact, the Clerk of the Township is the official custodian and keeper of the records, as this Court (*J. Caldwell)* has previously found, a request FOIA would satisfy.

Further, Plaintiff fails to allege and cannot allege that any records that were deleted were in fact records of the Township. The Local Records Act, 50 ILCS 205/3 requires only the

preservation of records made, produced or executed by any officer of the public entity in connection with the transaction of public business. It does not require the preservation of personal documents and the Complaint fails to allege that MILLER destroyed anything other than personal documents. In fact, the destruction of other such documents is specifically allowed by 50 ILCS 205/9 which allows the destruction of other records.

For all the reasons aforesaid, Count IX should be dismissed and should be dismissed with prejudice or judgment on the pleadings should be granted.

IV.
735 ILCS 5/2-615(a) MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES

The treasurer and board of trustees are necessary parties to this action filed by the Plaintiff. Plaintiff alleges a breach of fiduciary duties against Defendant ROBERT MILLER for alleged improper spending however, ROBERT MILLER contends that all of the payments made were approved by the treasurer and board of trustees under the Township Code.

A necessary party is an individual or entity having a present, substantial interest in the matter being litigated, and in whose absence complete resolution of the subject matter in controversy cannot be achieved without affecting that interest. (internal citation omitted) *Brumley v. Touche, Ross & Co.*, 123 Ill.App.3d 636, 643-644 (2nd Dist., 1984).

Joining the treasurer and board of trustees is required. "A necessary party is one whose presence in a lawsuit is required for any of three reasons: (1) to protect an interest which the absentee has in the subject matter which would be materially affected by a judgment entered in his absence; (2) to reach a decision which will protect the interests of those who are before the court; or (3) to enable the court to make a complete determination of the controversy". (internal citations omitted) *Brumley v. Touche, Ross & Co., supra*, at 644.

In this case joining the treasurer and board of trustees is required for two reasons. First, to properly reach a decision which will protect the interests of those who are before the Court. The board and treasurer must be added as necessary parties to protect the interests of ROBERT MILLER. Second, the board and treasurer must be added to enable the court to make a complete determination of the controversy against ROBERT MILLER.

Here, under the Township Code 60 ILCS 1/80-10, the township board examines and audits the road district accounts and approves the bills, before any bills are actually paid. ROBERT MILLER's bills and expenses were approved and paid. If Plaintiff has issues with the approval of the expenses and bills paid by ROBERT MILLER, Plaintiff should have joined the required parties that approved the bills and expenses by ROBERT MILLER. However at this point, five Complaints later, Plaintiff has failed to do this, and at this point Plaintiff's Fourth Amended Complaint must be stricken for failing to join the necessary required parties.

As of the time Defendant ROBERT MILLER left office, the Township had properly accepted all audits through the fiscal year ending February 28, 2015. ROBERT MILLER believes subsequent audits have been completed. See 50 ILCS 310/2 for audit requirements and 50 ILCS 310/5 for the required content of an audit.

"In any event, the non-joinder of parties is not grounds for the dismissal of a complaint unless a reasonable opportunity is provided to add them as parties." (emphasis added) (internal citation omitted) *Brumley v. Touche, Ross & Co., supra*, at 644. In this case, there has been ample opportunities to add the treasurer and board of trustees to Plaintiff's Complaint. In fact, Plaintiff has had five (5) opportunities to add these necessary parties and has failed to do so. Therefore, because of the numerous reasonable opportunities that Plaintiff has had to join the necessary parties and has not done so, is grounds for dismissal of Plaintiff's Fourth Amended Complaint.

V.
735 ILCS 5/2-619(a)(9) MOTION TO DISMISS BASED ON STANDING

Section 735 ILCS 5/2-619 allows for the involuntary dismissal of an action based upon certain defects or defenses.

Section 619(a)(9) states, '[t]hat the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS(a)(9).

The phrase "affirmative matter" is defined as "something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Glisson v. City of Marion*, 188,111.2d 21 1, 220 (1999). "Lack of standing is an 'affirmative matter' that is properly raised under section 2-619(a)(9)." *Id.*

In Plaintiff's Fourth Amended Complaint, Plaintiff is bringing the action "in his official capacity as Algonquin Township Highway Commissioner." (See Fourth Amended Complaint attached hereto without exhibits as **Exhibit A**, ¶1.)

Plaintiff lacks standing to bring this action as the Highway Commissioner. The lack of standing is an affirmative matter that negates a cause of action completely. *Wood River Township. v. Wood River Township. Hospital*, 331 Ill.App.3d 599, 604 (5th Dist., 2002).

Plaintiff cites to 605 ILCS 5/6-201.15, however this statute does not provide standing to Plaintiff to bring suit. This statute states that an annual report must be made and does not give rise to any claims against ROBERT MILLER.

The Township Code is clear. The supervisor of the Township is the treasurer of both the Township and the Road District. If an accounting of the assets of the Township was required, it

would be the responsibility of the Treasurer and not the Highway Commissioner to seek it. See 60 ILCS 1/70-60.

In this case, the Clerk of Algonquin Township is the custodian of all records of the Township. Thus any cause of action for missing documents is owed by the custodian of the records, not Plaintiff. Also, 60 ILCS 1/55-45 provides insight into 60 ILCS 1/55-40 in that it clarified that the demand is to be made of "any person having charge of those books and papers".

Section 60 ILCS 1/75-5 makes it clear that the Township Clerk "shall have the custody of all records, books, and papers of the township".

Lyons v. Ryan, 324 Ill.App.3d 1094 (1st Dist., 2001) is factually similar to the instant case, and the case was dismissed based on lack of standing.

Lyons as a private citizen and Illinois taxpayer and the Better Government Association as a political watchdog group on behalf of or for the benefit of the State of Illinois, brought this action against Ryan, a private official. Plaintiffs were seeking to impose constructive trusts on funds and benefits that were allegedly illegally received by the Defendants in the form of donations and solicitations during fundraising campaigns, while working as the Illinois Secretary of State. The Complaint alleged that the Defendants concealed their actions through obstruction of evidence. The Defendants filed a motion dismiss arguing that the Plaintiffs lacked standing to bring the Complaint on behalf of the State. See *Lyons v. Ryan*, *supra*, generally.

In Defendants' motion they state that the Attorney General is the State's only legal representative in the courts and that neither the legislature nor the judiciary may deprive the Attorney General of his inherent powers under the Illinois Constitution to direct the legal affairs of the State. *Id.*, at 1101-1102.

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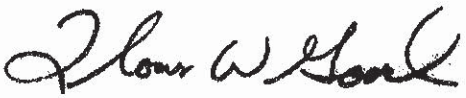
The Supreme Court has consistently stated that the public interest is not served by allowing certain government agencies or private persons to assume the inherent powers of the Attorney General. It is clear under Illinois law that a state taxpayer generally cannot stand in the shoes of the Attorney General. *Id.*, at 1107-1108. The Appellate Court affirmed the trial court's granting Defendants' motion to dismiss based on lack of standing. The Supreme Court affirmed. *Lyons v. Ryan*, 201 Ill.2d 529 (Ill, 2002).

Similarly, GASSER cannot stand in the shoes of the Township Board of Trustees, Township Clerk or Road District Treasurer to bring this cause of action and this case must be dismissed based on lack of standing.

WHEREFORE, your Defendant, ROBERT MILLER, prays this Honorable Court to dismiss Plaintiff ANDREW GASSER's Fourth Amended Complaint with prejudice and for any other relief deemed equitable and just.

Respectfully submitted by,

THE GOOCH FIRM, on behalf of Defendant, ROBERT MILLER,



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