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

RALPH BRANDOLINO, not individually but as special representative of the Estate of ANNA J. DRABIK, deceased, Plaintiff, v. CATHERINE MCKAY, PALOS BANK AND TRUST COMPANY, and PALOS BANK & TRUST COMPANY, as Trustee under Trust No. 1-6206, and FIRST MIDWEST BANK as successor to Palos Bank & Trust Co., and Palos Bank and Trust Company as Trustee under Trust No. 1-6206; Defendants.	No. 2010 L 005927 Transferred to Chancery Division Honorable Eve M. Reilly

CATHERINE MCKAY'S REPLY IN SUPPORT OF HER CELOTEX MOTION FOR SUMMARY JUDGMENT

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The instant Motion seeks summary adjudication on grounds that after ten years of rudderless and muddled litigation, Plaintiff ("Anna") has failed to adduce any admissible record evidence to support each element of the eight Counts of her Fifth Amended Complaint. Those Counts are Declaratory Judgment as to Title ("Count I); Civil Conspiracy ("Count II); Declaratory Judgment-Constructive Trust ("Count III); Conversion ("Count IV); Violation of the Notary Act ("Count V); Slander of Title ("Count VI); Intentional Infliction of Emotional Distress ("Count VII); and Accounting ("Count VIII," and collective with Count 1 through Count VII, "the Eight Counts").

The instant Motion imposed on Anna an affirmative duty to bring forth evidence of a cognizable cause of action. "Although the plaintiff, as the party opposing summary judgment, is not required to prove [her] case at this stage, [she] must provide a factual basis under which [she] would be entitled to judgment, and [she] has an affirmative duty to bring forth facts and evidence of a cognizable cause of action." *Lohrenz v. Country Mut. Ins. Co.*, 189 Ill.App.3d 810, 813 (3rd Dist. 1989) *citing Burns v. Addison Golf Club, Inc.*, 161 Ill.App.3d 127 (2d Dist. 1987) (affirming summary judgment where plaintiff failed to show evidence regarding element of claim). "If a plaintiff fails to establish an element of the cause of action, then summary judgment for the defendant is proper." *In re Estate of Albergo*, 275 Ill. App.3d 439, 446 (2d Dist. 1995) (affirming summary judgment where review of record showed no evidence defendants acted dishonestly). The party opposing summary judgment "cannot sit quietly by" but is "required to raise defenses and produce evidence tending to show a question of fact exists." *Roth v. Carlyle Real Estate Ltd. Partnership VII*, 129 Ill.App.3d 433 (1st Dist. 1984) *citing Murphy v. Urso* 83 Ill.App.3d 779, 795 (1st Dist. 1980).

In *Pantoja v. Pete's Fresh Mkt. 4700 Corp.*, the First District affirmed summary

judgment for a grocery store ("Pete's") in a premises liability case because

> . . . Pantoja [(plaintiff)] ***was required to present sufficient factual evidence to establish the existence of a duty of care*** owed by Pete's to her . . . . . In order to show a business owner beached its duty . . . the plaintiff must show . . . the proprietor had constructive notice of the [unsafe condition].'" . . . . . ***on this record*** there is no evidence that Pete's had either actual or constructive notice of the condition . . . .
>
> ¶ 15 . . . Pantoja's theory was that Pete's . . . failed to monitor and inspect for . . . dangerous . . . conditions. And ***while this theory would be sufficient to support liability if borne out by the facts, it is insufficient to withstand summary judgment in the absence of any evidence***.
>
> ¶ 16 Although the party opposing summary judgment is not required to prove her case at this stage, ***she must still adduce some evidence to support the elements of her cause of action***. [citation] Pantoja failed to present any evidence . . . of the negligence . . . . [citation]. . . . . Rather, ***Pantoja's contention that . . . Pete's was negligent . . . is mere speculation, which is insufficient to defeat summary judgment***.

Pantoja v. Pete's Fresh Mkt. 4700 Corp., 2017 IL App (1st) 170679-U (Ill. App. 2017), ¶¶13-17 (emphasis supplied).

Rather than point to record evidence that supports the elements of the Eight Counts, the Opposition ("*Opp.*") offers a dog's breakfast of unsupported factual contentions and a newly-minted (and facially meritless) legal theory. The Opposition contains 161 declarative sentences. *See* Group Exhibit 1. The first fourteen sentences are prefatory. The Statement of Facts begins at sentence 15, such that there are potentially 147 sentences to respond by pointing to record evidence that supports elements of the Eight Counts. Of those 147 sentences, at best only 80 purport to state facts, as distinct from opinions, legal argument, or legal conclusions. Of those 80 putatively factual sentences, only 38 purport to cite to the record. Of the 38 putative citations to the record, no fewer than 29 are to the Deposition of Catherine; the nine remaining citations are to the depositions of Moore or Ciolek -- which are not in any way attached to the Opposition in conformity with S Ct. Rule 1991, and can, therefore, be disregard – or, in two cases, to an unattached and unauthenticated February 2003 Trust Agreement, at Art. 3.3. The Opposition's

reliance on Article 3.3 conflicts with Anna's original complaint, which alleges at its ¶27, and attaches and incorporates by reference, as its Exhibit "F," an amendment to the February 2003 Trust Agreement that expressly revokes Art. 3.3. *See* Exhibit 2.

At most, the Opposition points to one or two unauthenticated documents and, as such, is based entirely on characterizations of the deposition of Catherine. None of Anna's citations to any of the depositions include line numbers in addition to a range of whole pages. As a result, all of the citations to the depositions are ambiguous, and most, if not all, mischaracterize the underlying testimony. For example, the Motion states that "Catherine pleaded a number of affirmative defenses to Anna's complaint, but she refused, while under oath, to state any of the facts relevant to these defenses." *Opp*. at p.11 (*citing Catherine Dep.* 108-112). There, Catherine was asked to opine as to facts "relevant" to affirmative defenses set forth in a pleading prepared by counsel, as distinct from answering questions of fact appropriately directed at a percipient lay witness. If Anna felt she was entitled to a lay legal opinion as to legally "relevant" facts, she was free to bring a motion to compel but never did so. Indeed, she did not even request a copy of the deposition transcript until well after the Celotex motion was filed. In any event, this Court would be well advised to read Catherine's deposition and decide whether there is anything there to support the elements of the Eight Counts, and, by extension, to support Anna's contention that a trial is needed to hear Catherine repeat her exculpatory testimony adversely, in open court, where there will be no witness who may be called to refute her.

Anna's newly-minted (and meritless) smokescreen to camouflage her utter inability to respond to the instant Motion is as follows: a) Anna executed a power of attorney in Catherine's favor; b) Catherine thereby became a fiduciary of Anna; c) Anna has "challenged" Catherine by filing her unverified complaint; d) by virtue of that "challenge," Anna thereby become entitled to

a rebuttable presumption that Catherine defrauded her; e) because of this rebuttable presumption of fraud, Anna has no duty to respond to the Motion. *See Opp., passim*. However, neither fraud nor breach of fiduciary duty is pled in Anna's complaint, let alone pled with particularity and supported by record evidence. Undaunted, the Opposition contends that Anna is not only entitled to a "presumption of fraud," but has also been relieved thereby of the burden of proof and the burden of going forward with the evidence because those burdens have shifted to Catherine, such that Anna has no obligation to respond to the Motion, and Catherine is presumed guilty in the absence of affirmative proof that she did not defraud Anna.

Anna last included three counts labeled "fraud" in her second amended complaint, but after they were dismissed, she omitted them in her third amended complaint. In any event, the proper procedure for plaintiffs to assert a new claim at the summary judgment stage is to seek leave to amend the complaint in accordance with 735 ILCS 5/2-616(c). Neither the Illinois nor the Federal Rules of Civil Procedure contemplate that a plaintiff may use argument in a brief opposing summary judgment unilaterally to amend a complaint. *Cf Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir.1996). To avoid the foreseeable consequences of her years-long refusal to appear for a deposition, provide an affidavit, or otherwise adduce admissible evidence in support of each element of the Eight Counts, Anna now seeks, in the Opposition, to sidestep the Celotex issue and burden this Court with a trial where Anna intends to reprise her uneventful three-hour deposition of Catherine. Anna will call Catherine as her one and only witness because "[Catherine] is the one witness from whom the Court most needs to hear." *Opp*. p.1-2.

Anna was, before she died, the only witness this Court needed to hear if this case was to proceed beyond the pleading stage. It would appear that Catherine will be called not because the

Court needs to hear her, but rather because she is the *only* witness who *can* be called. Rather than go all-in with the eleventh-hour burden-shifting theory, the Opposition nonetheless purports to respond, albeit by simply parroting allegations as "undisputed facts" -- as distinct from pointing to pertinent, competent, authenticated evidence or sworn testimony in the record. That is not surprising, because the record is bereft of any pertinent, competent, authenticated evidence or sworn testimony to support each element of Anna's claims -- which claims do not include fraud or breach of fiduciary duty. As such, the Opposition stands in open defiance of the axiomatic principle that when responding to a motion for summary judgment, mere denials and parroting of allegations are not sufficient. *CitiMortgage, Inc. v. Kondilis*, 2019 IL App (1st) 180976-U (Ill. App. 2019) *citing Opalka v. Yellen*, 31 Ill. App. 3d 359, 362 (1st Dist. 1975) (nonmoving party may not rest on pleading or mere denials to survive summary judgment motion).

A. There is No Record Evidence to Support Anna's Complaint

While she was alive, Anna provided no affidavit and refused to appear for a deposition. Anna's brother, Brandolino, was for some months offered as a stand-in for Anna, but after much foot-dragging, provided no affidavit and refused to appear for a deposition or otherwise participate as a witness in this litigation, and cannot be called now. Even a cursory review of the allegations of the various Counts of the complaint and the relief requested therein demonstrates that Anna's case is ripe for summary adjudication on *Celotex* grounds. Such a review follows.

1. There is No Record Evidence to Support Count I

Count I of the unverified complaint alleges that Anna did not sign or deliver a 2003 deed and asks this Court to declare that Anna is, therefore, the sole fee owner of the marital home that she admits to having abandoned no later than 2011. As Judge Hymen found in an Order entered on January 24, 2012,

> [t]he issues of whether plaintiff executed the deed and whether it was delivered are disputed in the record. *See, e.g.*, McKay Answer ¶¶ 11, 14, 23, 24 (denying plaintiff's allegations that she did not know about or sign deed); Exhibit A to complaint (indicating [deed] was recorded and notarized, and stating notary certified that [Anna's husband] and [Anna] appeared before him and "acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act").

See Exhibit 3. The "Exhibit A to complaint" referenced above is a signed and sealed certification by notary David J. Ciolek that Anna had personally appeared and signed the 2003 deed. Ciolek, who did not recant his certification in his deposition (referred to but not attached to the Opposition), is deceased. The Opposition does not contravene the certification by Ciolek in the one place where he is mentioned in the Opposition. *See Opp.* at p. 4. Why Anna did not attach a copy of the deposition of Moore or Ciolek or at least attach excerpts of those depositions in conformity with Rule 191 is anyone's guess. In any case, none of the putative (and unsupported) "facts" presented in the Opposition as "undisputed" supports an inference that Anna did not sign or deliver the 2003 deed. Moreover, the fact that Catherine testified that she did not know whether Anna signed the deed certified by Ciolek does not necessarily lead to an inference that Anna never signed the deed, especially where Catherine has never claimed that she was present when the deed was presented to Anna for execution.

Even if the deposition of Ciolek or Fred Moore provided facts supporting an inference that the 2003 deed was defective, this Court has already found that Anna's claim to ownership of the marital home is collaterally estopped because a sister court in Will County rejected that claim when it granted a judgment of foreclosure and sale to First Midwest Bank ("First Midwest") as the successor to the failed Palos Bank & Trust Company ("Palos"). Collateral estoppel precludes a party from relitigating an issue that had been decided in a prior action. *Herzog v. Lexington Township*, 167 Ill. 2d 288, 294 (1995).

2. There is No Record Evidence to Support Count II

Count II alleges that Catherine, Palos, and First Midwest civilly conspired to dispossess Anna of her interest in the marital home (¶59(a)-(g)) and in various financial assets and chattels (¶59(h)-(k)), and asks the Court to award compensatory and punitive damages against the three conspirators.[1] The elements of an Illinois civil conspiracy are (1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the further of which one of the conspirators committed an overt tortious or unlawful act. *See Fritz v. Johnson*, 209 Ill. 2d 302, 317 (2004). Catherine cannot have conspired with herself as a matter of law. There is no competent evidence in the record to support even the most tenuous inference that Catherine combined with two banks, neither of which are before this Court, unlawfully to defraud Anna of any property. Catherine did not, in her deposition, admit to conspiring with anyone to dispossess Anna of anything. Indeed, she denied doing that, in testimony that stands alone and unrebutted.

3. There is No Record Evidence to Support Count III

Count III ("Declaratory Judgment-Constructive Trust") alleges that "[Catherine] claims to be a trustee for [Anna] and holds herself out as such;" that "[n]o instrument appoints [Catherine] as a trustee for [Anna];" and that "[Catherine] has no authority to take any action in the capacity of a trustee for [Anna]." Count III further alleges that while wrongfully purporting to act as a trustee of Anna, Catherine "deprived [Anna] of the possession of . . . personal property belonging to [Anna]," including various bank accounts, insurance policies, and retirement accounts, as well as chattels that disappeared from the marital home before Anna abandoned it

[1] Palos Bank is defunct. First Midwest is not a party to this action and there is no jurisdiction over First Midwest in this action.

and left it full of garbage but otherwise empty of anything of value. (*Catherine Dep.*, 83:09 – 86:21). By way of relief, Count III asks this Court to declare that Catherine "be declared a constructive trustee for the benefit of [Anna], and . . . be directed to convey and release any purported interest in [the marital home and various financial assets and chattels]."

The elements of a constructive trust include (1) an identifiable property to serve as the basis (or "thing") for the constructive trust, and (2) possession of that property by the person to be deemed the "constructive trustee." There is no competent evidence in the record to support even the most tenuous inference that Catherine wrongfully deprived Anna of any property. Catherine did not, in her deposition, admit to depriving Anna of any property. To the extent that Catherine accessed any financial asset of Anna, that would have necessarily been mediated by the bank or insurance company after the presentation of documents establishing Catherine's authority. Moreover, Catherine testified under oath that she was excluded from the marital home until after Anna and Brandolino had looted it, abandoned it, and left it full of garbage and that she tried to rent or sell the marital home after Anna abandoned it, but was blocked by a court order procured by Anna's lawyer enjoining her from renting or selling the marital home, presumably because that would be inconsistent with Anna's claim to sole ownership. *See Catherine Dep*. at 82:16-84:08; 87:07-89:13.

4. <u>There is No Record Evidence to Support Count IV</u>

Count IV ("Conversion") alleges that Catherine wrongfully and deceptively exercised dominion and control over personal property of Anna, including financial assets (*i.e.*, bank accounts, insurance policies) and twenty gold pocket watches, twenty-five to thirty antique handguns, loose diamonds, jewelry including brooches and necklaces, a 52" television, a video camera and related equipment, four antique wall clocks, three antique Rolex watches, various

furniture including an antique kitchen table, an antique lamp, three bedrooms of furniture, dining room furniture and an antique lamppost from in front of the home (collectively, "the Chattels"). Claims of conversion in Illinois require that plaintiff plead and prove that: (1) they have a personal right to a specific piece of property; (2) they have an absolute and unconditional right to immediate possession of the personal property; (3) they made a demand for possession of the property currently possessed by the defendant; and (4) the defendant wrongfully assumed control of the plaintiff's property. *Fonda v. Gen. Cas. Co. of Ill.*, 279 Ill. App. 3d 894, 899 (1st Dist. 1996). There is nothing in the record as to when any property was taken by Catherine, let alone when Anna made a demand for its return. There is no competent evidence in the record to support even the most tenuous inference that Catherine wrongfully deprived Anna of any property.

The only sworn testimony in the record about the disposition of assets after Joseph's death is from Catherine and stands unrebutted. If called adversely at trial, Catherine will testify consistently with her deposition. In that deposition, Catherine denied wrongfully depriving Anna of any property. Indeed, Catherine testified under oath that after he father's death she was excluded from the marital home by Anna and Brandolino; that she tried to rent or sell the marital home after Anna abandoned it, but was blocked by a court order procured by Angelo Ruggiero, Anna's lawyer; and that whatever chattels were in the house at the time of Joseph's death (other than Anna's jewelry) were removed before Catherine gained access to the home in 2011. Catherine testified that in 2011 she got a court order to enter the locked home, which she found had been emptied of anything valuable and left full of garbage. Catherine also testified that a neighbor saw Brandolino "removing boxes of items from [her] father's house," and that Catherine saw items from her father's clock collection in a resale store owner by Brandolino's

daughter-in-law. *Catherine Dep.* 29:23-30:04.

As such, there is sworn testimony in the record directly pertinent to Anna's claims. That testimony is exculpatory and unrebutted.

5. <u>There is No Record Evidence to Support Count V</u>

Count V ("Violation of the Notary Act") is moot as to Catherine because Catherine is not a notary alleged to have violated the Notary Act and because Count V seeks relief only from First Midwest, an entity that is not a party to this case or otherwise subject to the jurisdiction of the Court in this case.

6. <u>There is No Record Evidence to Support Count VI</u>

Count VI ("Slander of Title") asks this Court to find that Catherine and Palos acted in concert to slander Anna's title to the marital home because they recorded "invalid deeds and mortgages" against the marital home. A plaintiff asserting slander of title bears the burden of proving the following: (1) the defendant made a false and malicious publication; (2) the publication disparaged the plaintiff's title to property; and (3) damages due to the publication. *American National Bank & Trust Co. v. Bentley Builders, Inc.*, 308 Ill. App. 3d 246 (2d Dist. 1999). A plaintiff must also prove that the defendant acted with malice. *Id*., 308 Ill. App. 3d at 252. To prove malice, a plaintiff must show that the defendant knew that the disparaging statements were false or that the statements were made with reckless disregard of their truth or falsity. *Id*., 308 Ill. App. 3d at 252-53. A defendant acts with reckless disregard if he publishes the allegedly damaging matter despite a high degree of awareness of its probable falsity or if he has serious doubts as to its truth. *Id*. There is no competent evidence in the record pertinent to any of the necessary elements of Count VI.

7. There is No Record Evidence to Support Count VII

Count VII ("Intentional Infliction of Severe Emotional Distress") requires proof that (1) that Catherine's conduct was extreme and outrageous; (2) that Catherine intended to cause or recklessly or consciously disregarded the probability of causing emotional distress; (3) that Anna suffered severe or extreme emotional distress; and (4) that Catherine's conduct actually and proximately caused emotional distress. *Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 89-90 (1976). The complaint alleges that Catherine committed extreme and outrageous misconduct when, among other things, Catherine "at least twice attempted to sell the Plaintiff's home at 126 Williams Street, New Lenox, Illinois." *Cmplnt.*, ¶103. This contrasts markedly with the Opposition, which, on page five, claims that Catherine breached fiduciary duties to Anna because she did **not** sell or attempt to sell the marital home. *Opp.* at p.5. Apparently, Anna's present counsel intends to improvise a two-day trial without having reviewed significant pleadings in this now-ancient case. If he had done so, he would know that on March 29, 2012, Catherine filed a petition to sell the marital home under powers granted to her by Paragraph 8 of the Trust and because the Trust had no cash and she believed "that if the subject property is not sold, it will either be lost to a mortgage foreclosure or real estate tax buyer." Anna successfully opposed that motion then, and again in May 2014, when it was amended and refiled. *See* Group Exhibit 4.

The Complaint alleges that trying to sell the house was "outrageous" conduct. The Opposition states that not trying to sell the home was a breach of fiduciary duty. It would appear that Catherine is damned if she tried to sell the marital home (which she indisputably did) and damned if she did not. In any event, there is no competent evidence in the record to support the unsworn and unsupported averment, in the Opposition, that Catherine did not attempt to sell or

rent the marital home, an averment that directly (and frivolously) contradicts the allegations of Anna's pending Complaint and pleadings filed in this Court.

8. There is No Record Evidence to Support Count VIII

To prove a claim for an accounting under Illinois law, a plaintiff must "show the absence of an adequate remedy at law and one of the following: (1) a breach of fiduciary relationship between the parties; (2) a need for discovery; (3) fraud; or (4) the existence of mutual accounts which are of a complex nature." *Kemper Mobile Electronics, Inc. v. Southwestern Bell Mobile Sys*., 428 F.3d 706, 715 (7th Cir. 2005). Count VIII ("Accounting") alleges that Catherine, Palos, and First Midwest had general knowledge of the various acts they are alleged to have committed in the hundred-plus paragraphs of the Complaint and therefore must by some leap of faith have records and knowledge from which facts can be ascertained concerning "the money collected, the property removed from the home, and the disposition of the Plaintiff's property." Based on this unsworn and unsupported allegation, Count VIII asks this Court to order Catherine, Palos, and First Midwest "to account to [Anna] for the rents and profits of the subject property during the period of the Defendant's use and occupancy thereof." An action for accounting is superfluous where a litigant has access to the records sought or has obtained them through discovery. There is nothing in the record to support the elements of an accounting and nothing in the deposition of Catherine that supports such a claim.

B. Anna's Burden-Shifting Theory is Unavailing Here

Anna admits that Catherine cannot be liable for "[a]ny decisions made in good faith ... in distributing tangible personal property . . . ." *Opp*. at p.14. This admission forces Anna to plead that Catherine breached her fiduciary duty by committing fraud. Fraud is a disfavored action that must be pled with particularity not found in the Complaint. It is well-established in Illinois that

for a complaint to state a cause of action for fraud, the essential elements of fraud must be pled with specificity, particularity and certainty. The elements which must be alleged include: (1) a false representation of material fact as opposed to opinion; (2) made by one who knew or believed the representation to be untrue; (3) made to a party who had a right to rely on the representation and, in fact, did so; (4) made for the purpose of inducing the other party to act, or to refrain from acting; and (5) that led to injury to the person who relied upon it. *Trautman v. Knights of Columbus*, 121 Ill.App.3d 911, 914 (1st Dist. 1984). "A complaint alleging fraud must set out the facts with specificity, particularity and certainty under Illinois procedural law governing pleadings. A complaint must clearly and explicitly allege sufficient facts to support a conclusion of fraud, ***which will not be presumed***. Merely characterizing acts as having been done fraudulently is insufficient." *Boatwright v. Delott*, 267 Ill. App. 3d 916, 919 (1st Dist. 1994) (emphasis supplied), *citing Browning v. Heritage Insurance Co.*, 33 Ill. App.3d 943, 948 (1st Dist. 1975); Board of Education v. A, CS, Inc., 131 Ill.2d 428, 457 (1989); *Bridge v. Newridge Chemical Co.*, 88 Ill. App.2d 337, 342 (1st Dist. 1967).

The Complaint does not allege fraud. Instead, the Opposition contends, for the first time, in unsworn argument, that Anna is entitled to a rebuttable *presumption* of fraud and that "[s]ince [Catherine] cannot present any evidence to rebut the presumption of fraud, she certainly cannot obtain summary judgment." But Catherine has already rebutted any presumption of fraud, under oath, in her deposition. *See Catherine Dep., passim.*

Anna's reliance on *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590 (1921), is misplaced. *Geddes* involved the purchase of assets of one mining company ("Alice") by another mining company ("Anaconda") for shares of Anaconda stock in a one-sided transaction arranged by the companies' respective boards of directors, both of which were dominated by the same

Anaconda director. Minority shareholders of Alice brought a suit in equity to set aside the sale of Alice assets to Anaconda on grounds that Alice's directors had breached their fiduciary duties (as distinct from committing common law fraud) in approving the sale for inadequate consideration.

Shlensky v. So. Parkway bldg. Corp., 19 Ill. 2d 268 (1960) is, like *Geddes*, a case "respecting the obligation of corporate directors in transactions between corporations with common directors." The instant litigation, by contrast, does not concern the fiduciary duty of directors on boards that share a common member, or corporate governance, or the sale of corporate assets for inadequate consideration. In *Geddes* and *Shlensky*, the "challenged" sale of Alice assets to Anaconda was not "challenged" by unsupported allegations in an unverified complaint, and the court did not find, as a matter of law, that lasting case-dispositive consequences flow from unverified, unsupported, and unproven accusations of wrongdoing.

C. Unsworn Argument in the Opposition does not Raise a Rebuttable Presumption of Fraud

Presumptions are rules of law that provisionally accept *proof* of one specified fact as proof of a second specified fact, despite the absence of direct proof of the second fact. *McElroy v. Force*, 38 Ill. 2d 528, 532-33 (1967). As rules of law, presumptions draw a mandatory connection between a *proven* fact and an unproven fact. *Id*. 38 Ill. 2d at 531. In short, presumptions permit a litigant provisionally to prove fact "A" by proving fact "B." However, even where they properly arise on a foundation of competent evidence, presumptions are subject to rebuttal by contrary evidence. This means that if a presumption arises, it ceases immediately to exist if the presumption's opponent introduces evidence contrary to the presumption. Forty-four years ago, in the case of *Diederich v. Walters*, 65 Ill. 2d 95 (1976), the Illinois Supreme Court held that as soon as any evidence is produced that is contrary to a rebuttable presumption, the presumption vanishes entirely. *Id*. at 100-102. For example, there is a universally recognized

presumption that the addressee will receive a properly addressed and posted letter. However, this "mail presumption" is wholly rebutted and disappears altogether if the person to whom the letter was addressed denies receiving it. At that point, the presumption ceases to operate, and the issue becomes one of disputed fact. *See, e.g., Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 158 (1896). Here Catherine provided sworn testimony in her deposition denying any wrongdoing. *See* Dep. of Catherine, *passim*. Even if there ever were a presumption of fraud, that presumption ceased to exist when Catherine testified under oath in her deposition that she did nothing wrong. That testimony stands alone and unrebutted.

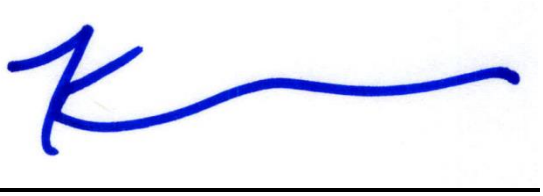
CONCLUSION

Anna is unable to present a coherent argument in the Opposition. How, then, can she be expected to conduct a one-witness and no-document trial that is not a complete waste of time?

WHEREFORE, for all of the foregoing reasons, Defendants request that this Court grant summary judgment in favor of Catherine and against Plaintiff on all Counts of the Complaint, and grant such other and further relief as this Court deems appropriate and just.

Dated: August 23, 2020

Respectfully submitted,
CATHERINE MCKAY



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