

No. 1-10-0287

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDWARD M. BURKE, in his capacity as)	Appeal from the
successor trustee of the Laurel Christine Trust)	Circuit Court of
dated January 11, 1996, and)	Cook County.
COLLEEN REMEYER,)	
)	
Plaintiffs–Appellants,)	
)	No. 08 CH 10799
v.)	
)	
TIMOTHY MCKERNAN, EDWARD J.)	
MCKERNAN, JIM LEMMONS, and THE)	
E.J. MCKERNAN CO.,)	Honorable
)	William O. Maki,
Defendants–Appellees.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justice Salone concurs in the judgment.
Justice Robert E. Gordon concurring in part and dissenting in part in the judgment.

ORDER

¶ 1 HELD: Plaintiffs' claims for declaratory judgment, civil conspiracy and wrongful registration of a security were not commenced within the time limited by law, and the circuit court correctly dismissed these claims pursuant to section 2–619(a)(5); the circuit court's order dismissing the remaining counts of plaintiffs' third amended complaint pursuant to section 2–619(a)(9) was reversed and remanded where the "other affirmative

matter" as asserted by defendants was insufficient to either avoid the legal effect of the claims or defeat the claims.

¶ 2 On motion of defendants, the circuit court dismissed plaintiffs' third amended complaint with prejudice pursuant to sections 2–619(a)(5) and (a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2–619(a)(5), (a)(9) (West 2008)). The complaint, which was brought by plaintiffs Edward Burke and Colleen Remeyer (Colleen), alleged, *inter alia*, that defendants Edward J. McKernan (Edward) and Timothy F. McKernan (Timothy) conspired to wrongfully attempt to divest Thomas McKernan (Thomas) of his stock in the E.J. McKernan Co., an Illinois corporation. Edward, an incorporator of the E.J. McKernan Co. (Corporation), is the father of Timothy, Thomas and Colleen. Defendant Jim Lemmons was the Secretary of the Corporation from at least 2004. On appeal, plaintiffs argue the circuit court erred in dismissing: counts I (declaratory judgment), IV (civil conspiracy), and VII (wrongful registration of a security) of the complaint pursuant to section 2–619(a)(5); and counts II (breach of fiduciary duty), III (constructive trust), V (conversion), and VI (conversion/fraudulent concealment) pursuant to section 2–619(a)(9). For the reasons set forth below, we affirm in part and reverse and remand in part the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 The following facts are drawn from the complaint. Edward and his wife Laurel¹ jointly owned all of the 1,000 shares of stock in the Corporation, which was organized in 1960. In January 1984 they transferred 470 shares as a gift to Timothy and 470 shares as a gift to Thomas.

¹Edward's wife, Laurel, is now deceased.

1-10-0287

The remaining 60 shares were transferred to Edward in his own name. The gift to Thomas apparently was without restrictions or conditions. The Stock Gift Agreement, a copy of which is attached to the complaint as an exhibit, contains no conditions, restrictions or other limitations on Thomas's ownership of the stock.

¶ 5 Eleven years later, in a letter dated May 14, 1995, Edward demanded that Thomas return the 470 shares of stock. Edward asserted that as "consideration" for the gift of the stock, Edward was to have received "as many dollars as he wanted/needed, but not to the detriment of" the Corporation. According to Edward's letter, Thomas had "defaulted" on that "consideration." Thomas did not return the stock to Edward.

¶ 6 In November 1995 Edward and Timothy, who were officers and directors of the Corporation, allegedly called an emergency telephone meeting of the board of directors in which they attempted to declare null and void the stock given to Thomas and reissue the shares to Edward. Thomas, who was not a member of the board of directors, allegedly was not informed of the meeting or the actions taken.

¶ 7 On January 11, 1996, Thomas set up the Laurel Christine Trust (Trust), naming his two sisters, Patricia McLatcher (Patricia) and Colleen, as beneficiaries, and Paul Polichio as trustee.² Included as part of the Trust property were the 470 shares of Corporation stock which had been given to Thomas, who transferred them to Polichio as trustee. According to the Trust Agreement, which is attached to the complaint as an exhibit, the trustee was to distribute the

²Polichio remained the trustee until early 2009, when plaintiff Edward Burke was appointed successor trustee.

1-10-0287

Trust assets as follows:

"a. One half of the assets remaining in the trust in equal amounts to each of the beneficiaries within five (5) years of the date of the execution of this agreement.

b. Any remaining assets in the trust in equal amounts to each of the beneficiaries within ten (10) years of the date of the execution of this agreement."

¶ 8 On February 7, 1996, shortly after the Trust was created, attorney Bradley Anderson, acting on behalf of Thomas and the Trust, sent a letter to the Corporation returning Thomas's original stock certificate and requesting that the Corporation note the transfer of ownership to Polichio and reissue the stock in the name of the Trust. Anderson further requested that the new stock certificate be sent to his office, and stated he expected to receive it on or before February 22, 1996. The Corporation never reissued the 470 shares in the name of the Trust.

¶ 9 The complaint alleges that Thomas advised both Trustee Polichio and Colleen that he received legal advice as to making the assignment and transfer, that he had taken all steps legally required to make the assignment and transfer, and that the ownership of the stock was legally and properly assigned and transferred to the trustee. Thomas also informed Polichio and Colleen that no further steps or action was required to be taken by anyone regarding the assignment and transfer of stock. The complaint alleges that Polichio and Colleen did not know Anderson, never met or spoke with Anderson, did not communicate with or receive anything from Anderson, and that they were not aware of the letter sent by Anderson.

¶ 10 In November 1995, Edward and the Corporation entered into a stock repurchase agreement whereby Edward purportedly sold the 470 shares back to the Corporation for \$1.034 million.

1-10-0287

¶ 11 In July 2007, Timothy allegedly met with his sisters, Colleen and Patricia, and offered them \$500,000 each if they would consent to and ratify all prior transactions concerning the 470 "Disputed Shares." Timothy allegedly proposed to resolve the issue of stock ownership with a settlement agreement between the Corporation, the Trust, Colleen and Patricia. Prior to this meeting, which Timothy initiated, the sisters averred that they were not aware of any dispute about the ownership of the Trust's stock. According to plaintiffs, neither sister agreed to the settlement.

¶ 12 On October 31, 2007, the Corporation was sold to Richards Packaging, Inc. (Richards), for \$30 million.

¶ 13 Colleen filed her initial complaint in this case on March 21, 2008. After defendants moved to dismiss, Colleen was allowed to file an amended complaint, which the circuit court dismissed on defendants' motion, following argument. The second amended complaint, which was filed in December 2008, named Edward Burke, the successor trustee of the Trust, as an additional plaintiff. The court dismissed this complaint, again on defendants' motion after argument. On April 15, 2009, plaintiffs filed their third amended complaint, which is the subject of this appeal.

¶ 14 The third amended complaint alleges seven counts: (I) declaratory judgment, (II) breach of fiduciary duty, (III) constructive trust, (IV) civil conspiracy, (V) conversion, (VI) conversion and fraudulent concealment, and (VIII) wrongful registration of a security. On January 8, 2010, the trial court granted defendants' motion to dismiss the third amended complaint pursuant to section 2-619. Defendants' motion contained no affidavits, depositions or additional factual support and contained only arguments. The trial court's written order stated:

"IT IS HEREBY ORDERED:

1. Defendants' motion is granted;
2. Counts I, IV and VII of Plaintiffs' Third Amended Complaint are dismissed pursuant to 735 ILCS 5/2-619(a)(5) with prejudice;
3. Counts II, III, V and VI of Plaintiffs' Third Amended Complaint are dismissed pursuant to 735 ILCS 5/2-619(a)(9) with prejudice."

¶ 15 Plaintiffs timely filed a notice of appeal pursuant to Supreme Court Rules 301 (eff. February 1, 1994) and 303 (eff. June 4, 2008).

¶ 16 II. ANALYSIS

¶ 17 Initially, defendants argue that as plaintiffs failed to file any transcripts of the three "hearings" held by the trial court on the motions to dismiss, it should be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis, citing *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984). It should be noted that there is no assertion that any live testimony was presented at the "hearings." Rather, all evidence was taken from the complaint itself. In *Foutch*, the supreme court noted that "it seems from the court's order of denial [of appellant's motion to vacate under section 2-1301(e)] that evidence was presented." *Foutch*, 99 Ill. 2d at 391.

¶ 18 It is true that an incomplete record is a violation of the supreme court rules. Here, plaintiffs failed to file a report of proceedings (Rule 323(a)); nor a bystander's report (Rule 323©; nor an agreed statement of facts (Rule 323(d)). Rule 323(a) requires that the record on appeal "shall include all the evidence pertinent to the issue on appeal." An appellant's failure to provide a report of the trial proceedings will not bar this court's review when the issue involves a

1-10-0287

question of law. *In re Marriage of Hildebrand*, 166 Ill. App. 3d 795, 800 (1988). "[F]ailure to present a report of proceedings does not *per se* require dismissal of the present appeal; it merely requires affirmance of those issues which depend for resolution on facts not in the record."

Rosenblatt v. Michigan Avenue National Bank, 70 Ill. App. 3d 1039, 1042 (1979). In the instant case, the record contains the third amended complaint, defendants' motion to dismiss, plaintiffs' response to the motion to dismiss and defendant's reply. Defendants argued before the trial court and before this court that their affirmative defenses are based upon the face of the complaint.

We also have the briefs of both the plaintiffs and defendants. Our review of the granting of a motion to dismiss under 619 is *de novo*. *Seip v. Rogers Raws Material, L.P.*, 408 Ill. App. 3d 434, 439 (2011).

¶ 19 We are in as good a position to rule on the motion to dismiss as was the trial court.

Although noncompliance with Rule 323(a) is grounds for summary affirmance of the trial court, we choose to address the merits of the appeal. See *Adams v. Sarah Bush Lincoln Health Center*, 369 Ill. App. 3d 988, 997 (2007).

¶ 20 *A. Section 2–619 Motion to Dismiss*

¶ 21 A motion to dismiss under section 2–619 admits the legal sufficiency of the plaintiff's complaint but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). In reviewing a section 2–619 dismissal, a court accepts as true all well-pleaded facts in the plaintiff's complaint, and all inferences that can reasonably be drawn in the plaintiff's favor. *Barber v. American Airlines, Inc.*, 398 Ill. App. 3d 868, 878 (2010), *rev'd on other grounds*, 241 Ill. 2d 450 (2011). A dismissal under section 2–619 is reviewed *de novo*. *Id.* at 877; *De Luna*, 223 Ill. 2d at 59.

¶ 22

B. Section 2–619(a)(5)

¶ 23 Under section 2–619(a)(5), a defendant is entitled to a dismissal if "the action was not commenced within the time limited by law." 735 ILCS 5/2–619(a)(5) (West 2008). Here, the circuit court dismissed counts I, IV and VII of plaintiffs' third amended complaint pursuant to this provision. There is no dispute among the parties that counts I and IV, for declaratory judgment and civil conspiracy, respectively, are subject to a five-year statute of limitations, and that count VII, for wrongful registration, must be brought "within a reasonable time." 810 ILCS 5/8-406 (West 2008). The dispute among the parties concerns the appropriate start date for measuring these time periods.

¶ 24

1. Count I

¶ 25

(Declaratory Judgment)

¶ 26 In count I, plaintiffs sought a declaration of the trustee's ownership of the 470 shares in question, and of plaintiffs' rights to those shares or the proceeds from their sale to Richards. Claims for declaratory judgment are subject to a five-year statute of limitations pursuant to section 13–205 of the Code, which provides that "all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13–205 (2008). Under the Illinois discovery rule, the cause of action accrues, and the statute of limitations begins to run, when the plaintiff knows or reasonably should know of a wrongfully caused injury. See *Superior Bank FSB v. Golding*, 152 Ill. 2d 480, 488 (1992). When a movant properly raises the passage of a statute of limitations based on the face of the complaint with a 619(a)(5) motion, it becomes incumbent upon the plaintiff to come forward with enough facts to avoid application of the statute of limitations. In *re Marriage of Thomsen*, 371 Ill. App. 3d 236, 249 (2007), citing *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 84 (1995).

1-10-0287

Plaintiffs have the burden of showing they neither knew, nor could have known, of the facts supporting their cause of action until a time that is within the five-year limitations period.

Frederickson v. Blumenthal, 271 Ill. App. 3d 738, 742 (1995).

¶ 27 Plaintiffs contend their claim did not accrue until July 2007, when Timothy allegedly met with Colleen and Patricia and proposed a settlement agreement to resolve the question of ownership of the 470 "Disputed Shares." According to plaintiffs, this is when they first learned there was a dispute over ownership of the stock. Colleen filed her initial complaint in March 2008, less than one year later. Defendants counter that the claim accrued long before 2007.

¶ 28 As early as May 1995 Edward wrote a letter to Thomas saying that Thomas had defaulted on one of the conditions of the gift of shares, and demanded that Thomas return the shares to him. Then, in February 1996, shortly after Thomas set up the Trust, counsel for Thomas and the Trust sent a letter to the Corporation returning Thomas's original stock certificate and requesting that the Corporation reissue the stock in the name of the Trust. Counsel asked that the new stock certificate be sent to his office, and stated he expected to receive it by February 22, 1996. It is undisputed that the Corporation never reissued the stock in the name of the Trust. According to defendants, plaintiffs thus were on notice in February 1996 that the Corporation did not reissue the stock in the name of the Trust. The plaintiffs named in the third amended complaint were Colleen Remeyer and Edward Burke, successor trustee to Paul Polichio. It is abundantly clear that Thomas McKernan and attorney Anderson were aware in 1996 that the stock certificate had not been reissued in the name of the trust, or even returned. However, accepting as true all well-pleaded facts in plaintiffs' complaint as true and drawing all reasonable inferences in plaintiffs' favor, as we must, we cannot say that trustee Polichio or Colleen (who were not represented by

1-10-0287

Anderson) knew or reasonably should have known of their injury in 1996. See *Superior Bank FSB v. Golding*, 152 Ill. 2d at 488.

¶ 29 Under the terms of the Trust Agreement, the trustee was to distribute half the Trust assets to the beneficiaries by 2001, *i.e.*, "within five (5) years of the date [January 11, 1996] of the execution of this agreement." Defendants argue the trustee knew or should have known of the wrongfully caused injury at least by 2001, when he knew or should have known he was required to make a distribution of the stock under the Trust. We agree with defendants. Under Illinois law, "a trustee owes a fiduciary duty to a trust's beneficiaries and is obligated to carry out the trust according to its terms ***." *Giagnorio v. Emmett C. Torkelson Trust*, 292 Ill. App. 3d 318, 325 (1997). At oral argument, plaintiffs conceded that trustee Polichio knew that the terms of the trust required him to make a distribution in 2001.

¶ 30 The claim clearly accrued by 2001, when the trustee knew or should have known he was required to make a distribution of the stock under the Trust. Colleen filed her initial complaint seven years later, in March 2008. The circuit court correctly dismissed count I of the third amended complaint pursuant to section 2-619(a)(5).

¶ 31

2. Count IV

¶ 32

(Civil Conspiracy)

¶ 33 In count IV, plaintiffs alleged that beginning in 1995 defendants entered into an agreement and conspired together to (1) divest Thomas and the Trust of Thomas's shares of the Corporation; (2) acquire those shares for their own personal gain; and (3) sell the shares and exclude Thomas and his assigns from sharing in the proceeds. Claims for civil conspiracy are subject to the five-year statute of limitations in section 13-205 of the Code (735 ILCS 5/13-205 (West 2008)). The statute of limitations in a civil conspiracy runs from the commission of the

1-10-0287

last overt act alleged to have caused damage. *MBL (USA) Corp. v. Diekman*, 137 Ill. App. 3d 238, 245 (1985). "But where there is but one overt act from which subsequent damages may flow, it is held that the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the conspiracy." *Id.*, quoting *Austin v. House of Vision, Inc.*, 101 Ill. App. 2d 251, 255 (1968).

¶ 34 Plaintiffs contend the statute of limitations did not begin to run until October 2007, when the Corporation was sold to Richards and Timothy received the proceeds of the sale. Plaintiffs note their complaint alleged a *series* of overt acts beginning in May 1995 with Edward's letter to Thomas and continuing over a span of 12 years, culminating in the 2007 sale, "the ultimate overt act through which Defendants' conspiracy reached fruition and Plaintiffs were deprived of their interest in the Trust property." This sale, plaintiffs contend, was the last overt act alleged to have caused damage. Colleen filed her complaint in March 2008, less than one year after the October 2007 sale.

¶ 35 Defendants counter that "[t]he one overt act from which Plaintiffs' subsequent damages flowed" occurred in November 1995 when defendants allegedly improperly transferred the shares from Thomas to Edward. It was then, when the shares were cancelled and shares were issued to Edward, that defendants "allegedly invaded Plaintiffs' interest in the shares and inflicted injury to them." Alternatively, defendants assert the invasion of plaintiffs' interest occurred, at the latest, in February 1996 "when the Corporation refused Thomas and the Trust's counsel's request to reissue the shares." In defendants' view, the statute of limitations thus began to run in November 1995 or at the latest in February 1996.

¶ 36 "[T]he statute begins to run on the date the defendant invaded the plaintiff's interest and

1-10-0287

inflicted injury, and this is so despite the continuing nature of the conspiracy." *MBL (USA) Corp.*, 137 Ill. App. 3d at 245. Here, the plaintiffs' third amended complaint alleged that the defendants did not return the stock certificates after receiving them in 1996. As a result of this overt act, Trustee Polichio was then unable to make the distribution in 2001 as required by the terms of the Trust. This information is taken from the complaint itself. We find that the plaintiffs' interest was invaded and they suffered injury at the very latest in 2001 when Trustee Polichio was unable to make the required distribution. Plaintiffs' initial complaint was filed in 2008, more than two years after the statute of limitations for the civil conspiracy claim ran out. The circuit court correctly dismissed count IV pursuant to section 2-619(a)(5).

¶ 37

3. Count VII

¶ 38

(Wrongful Registration of a Security)

¶ 39 In count VII of their third amended complaint, plaintiffs allege that under section 8-404 of the Uniform Commercial Code (810 ILCS 5/8-404 (West 2008)), defendants are liable to plaintiffs for wrongful registration of a security. Section 8-404 provides, in pertinent part: "Except as otherwise provided in Section 8-406, an issuer is liable for wrongful registration of transfer if the issuer has registered a transfer of a security to a person not entitled to it." 810 ILCS 5/8-404(a) (West 2008). The wrongful registration at issue here appears to be defendants' "purported conveyance of stock to Edward in 1995, through the attempted cancellation and reissuance of shares that properly belonged to Thomas."³

³In their appellants' brief, plaintiffs focus instead on defendants' allegedly wrongful *failure* to register the stock in the name of the Trust. Plaintiffs cite section 8-401(b), which provides:

"If an issuer is under a duty to register a transfer of a security, the issuer is liable to a person presenting a certificated security or an instruction for registration or to the person's principal for loss resulting from unreasonable delay in registration or failure or refusal to register the transfer." 810 ILCS 5/8-401(b) (West 2008).

1-10-0287

¶ 40 An action for wrongful registration under section 8–404 is barred by section 8–406, where the plaintiff fails to notify the defendant of a wrongfully taken security within a reasonable time. Section 8–406 provides:

"If a security certificate has been lost, apparently destroyed, or *wrongfully taken* (emphasis added), and the owner fails to notify the issuer of that fact within a reasonable time after the owner has notice of it and the issuer registers a transfer of the security before receiving notification, the owner may not assert against the issuer a claim for registering the transfer under Section 8–404 or a claim to a new security certificate under Section 8–405." 810 ILCS 5/8–406 (West 2008).

A central allegation in plaintiffs' third amended complaint was that shares of the Corporation were wrongfully taken from the Trust.

¶ 41 Plaintiffs contend they notified the Corporation of the wrongfully taken security by filing the lawsuit in this case. In their view, this notification was provided within a reasonable time. According to plaintiffs, they themselves did not have notice of the wrongful taking until July 2007 when Timothy allegedly approached Colleen with a settlement agreement that disclosed the disputed nature of the shares. Colleen filed her initial complaint in March 2008, less than one year later. Plaintiffs assert: "Certainly, nine months is a reasonable time after the owner has notice of the wrongful taking of her securities to notify the issuer."

¶ 42 For reasons similar to those set forth above regarding count I, plaintiffs' timeliness argument here is not persuasive. As we noted with respect to count I, plaintiffs were on notice

In resolving this apparent conflict between plaintiffs' brief and the allegations in their third amended complaint, we rely on the allegations in the complaint. See *Barber*, 398 Ill. App. 3d at 878.

1-10-0287

even if plaintiffs' claim did not accrue in February 1996 when the Corporation did not reissue the shares in the name of the trust, it clearly accrued, at the latest, by January 2001 when the trustee knew or should have known he was required to make a distribution of the stock under the Trust. Colleen did not file her initial complaint until seven years later.

¶ 43 There is no fixed rule for determining what constitutes a reasonable time. Such a determination turns on the particular facts and circumstances presented to the court in each case. *Perlstein v. Wolk*, 349 Ill. App. 3d 161, 169 (2004). Here, plaintiffs assert that nine months is a reasonable time after the owner has notice of an alleged wrongful taking of securities. However, Colleen filed her complaint seven years after plaintiffs had notice of the alleged wrongful taking. That is not a reasonable time. It is 84 months, which is 75 months longer than the period plaintiffs consider to be reasonable. The circuit court correctly dismissed count IV pursuant to section 2-619(a)(5).

¶ 44 *C. Section 2-619(a)(9)*

¶ 45 Section 2-619(a)(9) authorizes the dismissal of a complaint if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2008). In the case at bar, the circuit court dismissed counts II, III, V and VI of the third amended complaint pursuant to this section. Plaintiffs argue the circuit court erred in dismissing these counts.

¶ 46 A motion to dismiss under section 2-619 concedes that the plaintiff's claim is legally sufficient but argues that defects or affirmative defenses defeat the claim. *DeLuna v. Burciaga*, 223 Ill. 2d at 59. In ruling on a motion to dismiss based upon certain defects or defenses, the trial court must interpret all pleadings and supporting documents in the light most favorable to

1-10-0287

the nonmoving party. *DeLuna*, 223 Ill. 2d at 59. Section 2-619 requires that "[i]f the grounds [for dismissal] do not appear on the face of the pleading attached, the motion shall be supported by affidavit ***." Defendants filed no affidavits in support of their motion to dismiss.

"Affirmative matter" as that term is used in section 2-619(a)(9), has been described as something in the nature of a defense that negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific facts contained in the complaint. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 659 (2006).

¶ 47 One of the claims asserted by defendants as constituting "other affirmative matter" under section 619(a)(9), is that Colleen did not have standing to bring suit. It is well settled that "a written trust possesses a distinct legal existence that is recognized by statute (760 ILCS 5/4 *et seq.* (West 2000)) and can sue or be sued through its trustee in a representative capacity on behalf of the trust." *Sullivan v. Kodosi*, 359 Ill. App. 3d 1005, 1010 (2005). It is equally well settled that beneficiaries of a trust may be necessary parties because it is their ultimate interest which will be affected in an action to foreclose their interest. *In re Estate of Barth*, 339 Ill. App. 3d 651, 665 (2003). Here, the third amended complaint was filed by successor trustee Burke. Consequently, Colleen's purported lack of standing provides no basis for a dismissal under 619(a)(9).

¶ 48 In the only other ground propounded as supporting dismissal of plaintiffs' claims under 619(a)(9), as opposed to 619(a)(5), defendants assert that plaintiffs improperly rely upon communications between the corporation's attorney, Borcia, and the defendants. Plaintiffs argue that a client may expressly waive this privilege when he or she voluntarily discloses the privileged information. *In re Grand Jury*, 272 Ill. App. 3d 991, 997 (1995). Also, the privilege

1-10-0287

may be impliedly waived when the client asserts claims or defenses that put his or her communications with the legal advisor at issue in the litigation. *Lama v. Preskill*, 353 Ill. App. 3d 300, 305 (2004). Plaintiffs argue that Edward expressly waived the privilege attached to communications between himself and/or Timothy and Borcia by voluntarily providing the correspondence to Colleen. Plaintiffs argue that defendants impliedly waived the privilege when they argued that the cancellation of shares was valid when Borcia had told them it was not. This constitutes a genuine issue of material fact which precludes the dismissal of the plaintiffs' claims at this stage of the proceedings especially in the absence of counter-affidavits.

¶ 49 Finally, defendants argue that we should strike certain portions of the evidentiary allegations based on attorney-client privilege. Defendants cite only an unpublished federal case for this proposition. Moreover, defendants did not raise this issue before the trial court, thus forfeiting their argument. *River Plaza Homeowner's Ass'n v. Healey*, 389 Ill. App. 3d 268, 275 (2009).

¶ 50 Defendants' reply to plaintiffs' response to defendants' motion to dismiss the third amended complaint under section 9 cites only the attorney-client privilege and Colleen's lack of standing. Defendants presented no other evidence or argument supporting a dismissal pursuant to section 9. As defendants do not argue that there is any other "affirmative matter" justifying dismissal, we reverse the trial court's dismissal of counts II, III, V, and VI.

¶ 51 **III. CONCLUSION**

¶ 52 For the previously stated reasons, the circuit court order dismissing counts I, IV and VIII pursuant to section 2-6189(a)(5) is affirmed. The circuit court's order dismissing counts II, III, V and VI pursuant to section 2-619(1)(9) is reversed and this cause is remanded to the circuit court

1-10-0287

for further proceedings.

¶ 53 Affirmed in part and reversed in part; cause remanded.

¶ 54 JUSTICE ROBERT E. GORDON, concurring in part, and dissenting in part:

1-10-0287

¶ 55 For the following reasons, I would reverse the trial court's order in its entirety and remand for further proceedings on all counts. Thus, I concur with the part of the majority's order that reverses the trial court's dismissal of counts II, III, V and VI. However, I must respectfully dissent from the part of the majority's order that affirms the dismissal of counts I, IV and VIII.

¶ 56 As the majority observed, the trial court dismissed plaintiffs' complaint pursuant to section 2-619(a). 735 ILCS 5/2-619(a) (West 2008). Half the counts were dismissed pursuant to section 5, and half were dismissed pursuant to section 9.

¶ 57 Section 5 provides for dismissal on the ground that the action is time-barred. 735 ILCS 5/2-619(a)(5) (West 2008). Section 9 provides for dismissal if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2008). The majority affirmed the dismissals under section 5, and reversed the dismissals under section 9. I dissent from the affirmance, and concur with the reversal.

¶ 58 As a preliminary matter, I agree with the majority that, although the trial court did not provide its reasons for dismissing in its written order and although the appellate record does not contain a transcript or bystander's report, our review is not affected since it is *de novo*.

¶ 59 I. COUNTS DISMISSED UNDER SECTION 5

¶ 60 This is where the majority and I part company: I would reverse the dismissal of the counts dismissed under section 5, whereas the majority affirms.

¶ 61 As noted above, the three counts dismissed under section 5 were dismissed as time-barred. Specifically, the trial court's order dismissed counts I, IV and VII pursuant to section 2-619(a)(5), which provides that "the action was not commenced within the time limited by law." 735 ILCS

1-10-0287

5/2-619(a)(5) (West 2008).

¶ 62 As the majority observed, there is no dispute among the parties that counts I and IV, for declaratory judgment and civil conspiracy, respectively, are subject to a five-year statute of limitations, and that count VII, for wrongful registration, must be brought “within a reasonable time.” 810 ILCS 5/8-406 (West 2008). The dispute among the parties concerns the appropriate start date for measuring these time periods.

¶ 63 *A. Count I: Declaratory Judgment*

¶ 64 Count I sought a declaratory judgment that plaintiffs owned the 470 disputed shares given by Thomas to the trust. As the majority observed, claims for declaratory judgment are subject to a five-year statute of limitations pursuant to section 13-205 of the Code of Civil Procedure which provides that “all civil actions not otherwise provided for, shall be commenced within 5 years next *after the cause of action accrued.*” (Emphasis added.) 735 ILCS 5/13-205 (West 2008). The dispute among the parties concerns when the “action accrued.”

¶ 65 Under Illinois law, the cause of action accrued, and the cause of action began to run, when the plaintiff “knew or reasonably should have known that it was injured, and that the injury was wrongfully caused.” *Superior Bank FSB v. Golding*, 152 Ill. 2d 480, 488 (1992). In announcing this rule, our supreme court stressed that “the purpose of the Code of Civil Procedure is to encourage the trial of cases on their merits and to avoid premature summary dismissals which would frustrate the search for truth.” *Superior Bank*, 152 Ill. 2d. at 488.

¶ 66 In the case at bar, the plaintiffs are the trustee of the Laurel Christine Trust and Colleen. The original trustee was Paul Polichio; and the present trustee is Edward Burke. Applying the *Superior Bank* rule to the case at bar, the question becomes what did these three people know and

1-10-0287

when did they know it, and what should they have reasonably known and when should they have reasonably known it. As I explain in more depth in a later section, the defendants failed to supply any showing by affidavit or documentation to support their position and this is important in our analysis.

¶ 67 As an initial matter, the majority finds, and I agree, that neither the trustee nor Colleen knew or reasonably should have known of their injury in 1996. On February 7, 1996, Brad Anderson, an attorney employed by Thomas, sent a letter to the corporation, in which Anderson returned Thomas' original stock certificate and requested that it be reissued in the name of the trust. Since the corporation never reissued the stock, defendants argue that Anderson knew or should have known of the injury in 1996 and that plaintiffs' claim accrued on that date. In essence, defendants impute Anderson's knowledge to plaintiffs. Both the majority and I reject this argument. First, although an attorney's knowledge may be imputed to a client, Anderson's client was Thomas, not plaintiffs. Second, plaintiffs specifically rebutted this assumption of knowledge in their complaint, stating: "Polichio [the trustee] and Colleen did not know Anderson, never met or spoke with Anderson, did not communicate with or receive anything from Anderson and were not aware of what he did for Thomas or even that he was an attorney who represented Thomas. Polichio and Colleen neither saw nor were aware of Exhibit 7 [the letter sent by Anderson to the corporation]." When reviewing a motion to dismiss under section 2-619, a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor. *Morr-Fitz, Inc. v. Blagojevitch*, 231 Ill. 2d 474, 488 (2008). Accepting as true, as we must, the above well-pleaded facts in plaintiffs' complaint, both the majority and I reject the contention that plaintiffs' claim accrued on the day that Anderson

1-10-0287

arguably had knowledge.

¶ 68 However, defendants argue, and the majority agrees, that Paul Polichio, the trustee, knew or should have known of the injury by 2001, when he was required to make a distribution of the stock under the terms of the trust. I do not agree.

¶ 69 First, the majority is assuming, from the fact that the corporation never reissued the stock certificate, that Polichio must have taken no action to satisfy his obligation under the trust agreement to make a distribution to the beneficiaries. However, there is nothing in the record to indicate what Polichio did or did not do in 2001 to satisfy his obligation, and it is not our role to speculate. It would be premature at this stage, in the absence of any discovery or depositions, to assume that Polichio took no action at all. These are factual issues that are best resolved after discovery and in the trial court. Writing on behalf of this court, Justice McNamara previously held: "On the face of the pleadings, such a claim is not barred by the statute of limitations. Factual issues exist *** regarding when plaintiff actually discovered that an interest adverse to his was asserted ***. While a disposition on this issue must await the resolution of factual issues at a later stage, the pleadings do not warrant a finding of bar at this time." *Connelly v. Dooley*, 96 Ill. App. 3d 1077, 1083 (1981). In sum, at this preliminary stage, we cannot find that defendants' unsubstantiated assumption is enough to refute plaintiffs' well-pleaded denials of knowledge.

¶ 70 Second, there is no argument that then-trustee Paul Polichio acted wrongfully to deprive the beneficiaries of the disputed stock. Thus, there is no reason that Polichio's alleged failure to make a timely distribution would place the beneficiaries on notice of defendants' alleged wrongdoing.

¶ 71 For these reasons, I must dissent from the portion of the majority's order which found that

1-10-0287

count 1 was time-barred.

¶ 72

B. Count IV: Civil Conspiracy

¶ 73 In count IV, plaintiffs alleged that defendants conspired together to deprive Thomas and the trust of the disputed shares of stock. As the majority observed, claims for civil conspiracy are subject to the same five-year statute of limitation. 735 ILCS 5/16-205 (West 2008). The statute of limitations in a civil conspiracy runs from the commission of the last overt act alleged to have caused damage. *MBL (USA) Corp. v. Diekman*, 137 Ill. App. 3d 238, 245 (1985).

¶ 74 Defendants argue that the statute of limitations on the civil conspiracy claim began to run, at the very latest, in February 1996 when the corporation disregarded Anderson's request to reissue the stock in the name of the trust. Defendants claim that this was the last overt act from which plaintiffs' subsequent damages flowed.

¶ 75 The majority rejects this argument and I agree. However, the majority then goes on to make an argument that defendants never made. The majority again assumes that the trustee did not take any action to satisfy his obligation under the trust agreement, and it finds that this assumed inaction was an injury inflicted by defendant. As I observed above, the majority is assuming, from the fact that the corporation never reissued the stock certificate, that Polichio must have taken no action to satisfy his obligation under the trust agreement to make a distribution to the beneficiaries. However, there is nothing in the record to indicate what Polichio did or did not do in 2001 to satisfy his obligation, and it would be premature at this stage, in the absence of any discovery or depositions, to assume that Polichio took no action at all.

¶ 76 Plaintiffs argue, and I agree, that defendants' last overt act from which plaintiffs' subsequent damages flowed was the sale of plaintiffs' claimed stock to a *bona fide* third-party

1-10-0287

purchaser in October 2007.

¶ 77 Thus, I must respectfully dissent from the portion of the order finding that count IV was time-barred.

¶ 78 *C. Count VII: Wrongful Registration of a Security*

¶ 79 In count VII, plaintiffs allege, under section 8-404 of the Uniform Commercial Code (810 ILCS 5/8-404 (West 2008)), that defendants are liable for the wrongful registration of the transfer of plaintiffs' stock. The Code provides that the owner must notify the issuer of the wrongful registration "within a reasonable time after the owner has notice of it." 810 ILCS 5/8-406 (West 2008).

¶ 80 The majority finds, for the same reasons already discussed above with respect to count I, that plaintiffs were on notice in 2001 when Paul Polichio was obligated under the trust agreement to make a distribution to the beneficiaries. For the reasons which I already discussed above with respect to count I, I cannot agree with these findings.

¶ 81 Thus, I must respectfully dissent from the portion of the order that affirmed the dismissal of count VII.

¶ 82 *D. Additional Ground For Reversal*

¶ 83 In addition to the reasons stated above, there is another independent ground for reversing. Defendants presented no counter-affidavits or any other evidence in opposition to plaintiffs' allegations in any of the four complaints. Defendants claim that their statute-of-limitations argument is based on plaintiffs' own factual allegations. However, in their appellate brief, defendants assert that Thomas' shares were declared null and void prior to the establishment of the trust. This "fact" is not uncontroverted but is the basis for the suit – whether Edward could

1-10-0287

void Thomas' 740 shares. Likewise, defendants argue that plaintiffs' allegation that Timothy and Edward told Polichio that the 470 shares had been transferred to the trust is "not based on well pled facts," but defendants cite no case for the proposition that the complaint had to include specific dates; the argument itself is also not based on any counter facts.

¶ 84 The failure of defendants to file any counter-affidavits should have been fatal to their motion to dismiss. Under section 2-619, if the grounds for dismissal do not appear on the face of the pleading attacked, "the motion *shall* be supported by affidavit." (Emphasis added.) 735 ILCS 5/2-619 (West 2008). Defendants focus on two uncontested facts: (1) that Edward wrote a letter to Thomas in 1995 accusing Thomas of not complying with the "gift" and (2) that Polichio was required to distribute the shares to Thomas' sisters pursuant to the trust agreement. However, neither of these facts provide grounds for dismissal. The 1995 letter may not have placed Thomas on notice that Edward was attempting to revoke Thomas' ownership rights. With respect to the requirement that Polichio distribute the shares, defendants argue that Polichio had knowledge of this requirement, but they do not cite a page in the record that shows Polichio failed to take any action to satisfy this requirement. Since the grounds for dismissal did not appear on the face of the pleading attacked, the statute specifically required defendants to support their motion with an affidavit and their failure to do so provides an additional and independent ground for reversing. 735 ILCS 5/2-619 (West 2008).

¶ 85 The majority provides defendant's failure to support their motion with an affidavit as a ground to reverse the dismissal of counts under section 9. I believe that this is also a ground for reversing the dismissal of counts under section 5.

¶ 86

II. COUNTS DISMISSED UNDER SECTION 9

1-10-0287

¶ 87 The majority reverses the portion of the trial court's order that dismissed approximately half the counts pursuant to section 9. Specifically, the trial court's order dismissed counts II, III, V and VI pursuant to section 2-619(a)(9) which provides for dismissal if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2008). I concur in this reversal, and I write separately in this section only to make a few additional points in support.

¶ 88 First, in examining defendants' arguments concerning the bases for dismissal, I observe that defendants rely almost entirely on the statute of limitations (section 5) even when they cite section 9.

¶ 89 Second, in support of their argument that Colleen has no standing, defendants rely on an unpublished federal case. Rule 23 prohibits this. Ill. S. Ct. R. 23(e) (eff. May 30, 2008) ("An unpublished order of the court is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case.").

¶ 90 Third, defendants admit that Burke, the trustee, had authority to file suit. Since Burke filed the third amended complaint, defendant's claim of a lack of standing is not a basis to dismiss the complaint.

¶ 91 Fourth, defendants argue that plaintiffs' claim should be dismissed because some of the factual allegations in the complaint cite communications between the corporate attorney, Borcia, and the McKernans. Defendants are correct when they argue that, since plaintiffs are the proponent of the evidence, it is plaintiffs' burden to show that the criminal fraud exception applies. However, this case was dismissed at the pleading stage before discovery could flesh out these allegations.

1-10-0287

¶ 92 For these reasons and the reasons provided in the majority's order, I concur in the reversal of the trial court's dismissal of the counts under section 9.

¶ 93

III. CONCLUSION

¶ 94 For the foregoing reasons, I would reverse the trial court's dismissal in its entirety and remand for further proceedings on all counts. Thus, I must respectfully dissent in part.