

County that granted the motion to dismiss filed by the defendants, Thomas Harmon (Harmon) and Taylor Sawmill, Inc. (the Sawmill), pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-619.1 (West 2008)). In her third amended complaint, the plaintiff asserted causes of action against Harmon and the Sawmill for breach of contract, conversion, and a violation of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/2 (West 2008)). In their motion to dismiss, Harmon and the Sawmill argued that the plaintiff's claims against them were not based upon a written contract, but instead, sounded in tort and therefore were barred by the five-year statute of limitations applicable to civil actions (735 ILCS 5/13-205 (West 2008)). In addition, they argued that the plaintiff was unable to relate her claims back to the filing date of her initial complaint, as required by section 2-616(d) of the Code (735 ILCS 5/2-616(d) (West 2008)). The circuit court agreed and granted the motion, dismissing with prejudice the plaintiff's claims against Harmon and the Sawmill. After the circuit court denied the plaintiff's motion to reconsider, she filed this interlocutory appeal pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). For the reasons discussed herein, we affirm in part and reverse and remand in part.

¶ 3

BACKGROUND

¶ 4 On June 8, 1999, the plaintiff's father, Graham Dagley Mills, died, leaving a will which was admitted to probate in the circuit court of White County. As set forth in his will, he devised a life estate to his widow, Tressa Nadine Mills (Mills), who is the plaintiff's mother, in property referred to as the "homeplace" and property referred to as the "Logan Farm." The plaintiff was devised the remainder interest in both properties.

¶ 5 Section 1 of the last will and testament of Graham Dagley Mills reads, in pertinent part:

"A. I give my Wife, Tressa Nadine Mills, if she survives me, a life estate in the following described real estate, known as the 'Homeplace' and Forty Acres known

as the 'Logan Farm', located in White County, Illinois ***.

* * *

The above life estate shall give my Wife the right to all rent and property from said farms and the management thereof until her death. It shall further entitle her to the right to all delay rentals, bonus money, royalty payments and any other income from these premises for her natural life.

B. I give and devise to my Daughter, Pamela Colson, of Omaha, Illinois, subject to the life estate of my Wife described in Paragraph A above, the remainder interest in the following described real estate known as the 'Homeplace' and 'Logan Farm' ***."

¶ 6 On September 9, 2000, Mills entered into a written contract (the timber contract) with the Sawmill, whereby Mills agreed to allow the Sawmill to commercially harvest certain marked timber from the Logan Farm property in exchange for money. Harmon signed the contract on behalf of the Sawmill. Mills and Thomas Jones, who is the plaintiff's half-brother and Mills' son, hired Joe Newcomb, a consulting forester, to measure the board feet contained in the marked timber on the Logan Farm and to calculate dollar value thereof. In a letter dated July 27, 2000, Mr. Newcomb estimated that the marked timber on Logan Farm, which was the subject matter of the contract, comprised a total of 146,000 board feet, thereby giving a timber value of \$43,800. Harvesting the marked timber was complete sometime between November 27, 2000, and December 4, 2000. However, based on a property evaluation subsequently conducted by the plaintiff's expert witness, Dr. Roth, it is alleged that the Sawmill actually harvested timber in excess of 280,000 board feet, which had a fair market value of approximately \$100,000.

¶ 7 On October 26, 2005, the plaintiff filed her initial complaint against Mills alleging a claim for waste. She later amended her complaint in December 2005 to add another count

against Mills for violation of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/0.01 to 7 (West 2004)), which we later dismissed on interlocutory appeal. *McKinney v. Mills*, No. 5-08-0183 (2010) (unpublished order under Supreme Court Rule 23). In February 2006, the plaintiff amended her complaint a second time to add her half-brothers, Kenneth Jones and Thomas Jones, as defendants, for purposes of a claim for a violation of section 5 of the Uniform Fraudulent Transfer Act (740 ILCS 160/5 (West 2004)) and a claim for civil conspiracy.

¶ 8 In her third amended complaint, filed on September 13, 2010, she added Harmon and the Sawmill as defendants and pled claims against them for breach of contract, conversion, and violation of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/2 (West 2008)). Harmon and the Sawmill filed their motion to dismiss on November 30, 2010. After a hearing, the circuit court took the motion under advisement. In an order filed on March 31, 2011, the circuit court granted the motion and dismissed with prejudice the plaintiff's claims against Harmon and the Sawmill, as pled in her third amended complaint, finding that dismissal was appropriate pursuant to section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2010)).

¶ 9 The plaintiff thereafter filed her motion to reconsider, which the circuit court also denied. This interlocutory appeal followed.

¶ 10 ANALYSIS

¶ 11 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matter appearing on the complaint's face or established by external submissions which defeat the action. 735 ILCS 5/2-619 (West 2010); *AIDA v. Time Warner Entertainment Co., L.P.*, 332 Ill. App. 3d 154, 158 (2002). A section 2-615 motion to dismiss admits all well-pleaded factual allegations and attacks only the legal sufficiency of the complaint. 735 ILCS 5/2-615 (West 2010); *AIDA*, 332 Ill. App. 3d at 158.

Our review of a dismissal pursuant to section 2-615 or 2-619 of the Code of Civil Procedure is *de novo*. *AIDA*, 332 Ill. App. 3d at 158.

¶ 12 The circuit court below dismissed the plaintiff's allegations against Harmon and the Sawmill pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)). However, this court may affirm a correct dismissal by the circuit court for any reason appearing in the record. *AIDA*, 332 Ill. App. 3d at 158. As such, even though the defendants may not have filed a section 2-615 motion to dismiss, we may still affirm the circuit court's dismissal if the record indicates that there were other bases in the record that could have supported the dismissal. See *id.*, 332 Ill. App. 3d at 158.

¶ 13 In asserting her claim for conversion in the circuit court, the plaintiff alleged that Harmon and the Sawmill willfully and maliciously harvested timber located on the Logan Farm property to which they were not contractually or otherwise legally entitled to take. The plaintiff uses these same allegations as the basis for her claim for violation of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/0.01 to 7 (West 2008)) against Harmon and the Sawmill. Because we may affirm the circuit court's dismissal upon any basis in the record (*Olson v. Hunter's Point Homes, LLC*, 2012 IL App (5th) 100506, ¶ 7), we find that the plaintiff has failed to sufficiently plead a cause of action for conversion or for violation of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/0.01 to 7 (West 2008)) against the defendants.

¶ 14 The requisite elements to properly plead a cause of action for conversion are: "a plaintiff must establish that (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property." *Cruthis v. Firststar Bank, N.A.*, 354 Ill. App. 3d 1122, 1131 (2004) (citing *Cirrinzione v. Johnson*, 184 Ill. 2d 109, 114 (1998)). In this case,

the plaintiff, as a remainderman, had no "absolute and unconditional right to the *immediate* possession" of the timber that she alleged Harmon and the Sawmill took in excess of their contractual rights. (Emphasis added.) *Id.* (" 'The essence of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held.' " (quoting *Bender v. Consolidated Mink Ranch, Inc.*, 110 Ill. App. 3d 207, 213 (1982))). Accordingly, the plaintiff cannot properly plead a cause of action for conversion, and therefore, the circuit court properly dismissed the plaintiff's claim for conversion against Harmon and the Sawmill.

¶ 15 The plaintiff also asserted a claim for violation of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/0.01 to 7 (West 2008)) against Harmon and the Sawmill. Section 2 of the Illinois Wrongful Tree Cutting Act provides as follows:

"Any party found to have intentionally cut or knowingly caused to be cut any timber or tree which he did not have the full legal right to cut or caused to be cut shall pay the owner of the timber or tree 3 times its stumpage value." 740 ILCS 185/2 (West 2010).

¶ 16 When this case was previously before us on interlocutory appeal, we concluded that the plaintiff, as the holder of a remainder interest in real estate, could not seek damages pursuant to section 2 of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/2 (West 2008)) from the defendant Mills, as the holder of the life estate interest. *McKinney v. Mills*, No. 5-08-0183 (2010), order at 10 (unpublished order under Rule 23). We now address whether the plaintiff, as a remainderman, can seek damages from persons *other* than the life tenant pursuant to section 2 of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/2 (West 2008)).

¶ 17 In our prior order in this case, we held that a remainderman may not bring suit against a life tenant pursuant to section 2 of the Illinois Wrongful Tree Cutting Act because, "[u]ntil

the expiration of the prior estate makes their interest present and possessory, remaindermen are not the 'the owners' of the timber." *McKinney*, No. 5-08-0183, order at 7. Applying this holding as the law of the case (*People v. Hopkins*, 235 Ill. 2d 453, 474 (2009)), we find that the plaintiff cannot be considered as the "owner" under the language of section 2 of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/2 (West 2008)) and, thus, cannot seek damages against Harmon and the Sawmill pursuant to this statute. Accordingly, the circuit court properly dismissed the plaintiff's claim for violation of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/0.01 to 7 (West 2008)) against Harmon and the Sawmill.

¶ 18 The plaintiff further argues that the circuit court erred in determining that her breach of contract claim was more properly one for conversion and in thereby applying an inapplicable five-year statute of limitations to her breach of contract claim.

¶ 19 The defendants argued below that because the plaintiff was not a party to the written contract, the 10-year statute of limitations applicable to breach of contract actions did not apply but that the 5-year statute of limitations for damage to real and personal property or for a conversion of personal property applied. The circuit court followed the defendants' argument and dismissed the plaintiff's breach of contract action on the basis that "the proper cause of action [wa]s more likely one for conversion" and was not filed within the five-year statute of limitations applicable to a conversion action.

¶ 20 However, the plaintiff pled both a breach of contract action and a conversion action. See *Cruthis*, 354 Ill. App. 3d at 1131 (facts supporting an independent tort for conversion may also support a breach of contract claim); *Bank of Illinois in Mt. Vernon v. Bill's King City Stationery, Inc.*, 198 Ill. App. 3d 434, 437 (1990). By labeling the plaintiff's breach of contract claim as one for conversion and dismissing it pursuant to this mischaracterization, the circuit court failed to identify or address the plaintiff's allegations regarding her breach of contract claim.

¶ 21 We question whether the plaintiff has thus far sufficiently pled a proper cause of action for breach of contract, considering that the plaintiff was not a party to the contract alleged in the action and that, despite her contentions, she does not enjoy privity of estate with Mills. See *Poruba v. Poruba*, 396 Ill. App. 3d 214, 215 (2009) ("[A] single life estate and a single remainder interest are two separate estates in land."); see also *Di Bologna v. Earl*, 23 A.2d 791, 796-97 N.J. Ch. (N.J. Ch. 1942) (Although the term "privity" arises "between mutual or successive holders of title to the same right or interest in the same property," a life tenant and remainderman "are not mutual or successive holders of the same right to the same property."). However, we decline to affirm the circuit court's dismissal on this basis because the circuit court completely failed to address the viability of the plaintiff's breach of contract claim below. Thus, we reverse the dismissal of the plaintiff's breach of contract claim against Harmon and the Sawmill and remand it for further proceedings.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, the order of the circuit court dismissing with prejudice the plaintiff's third amended complaint against the defendants Harmon and the Sawmill is hereby affirmed as to the dismissal of the plaintiff's claims for conversion and for violation of the Illinois Wrongful Tree Cutting Act (740 ILCS 185/2 (West 2008)). We reverse the dismissal of the plaintiff's claim for breach of contract against Harmon and the Sawmill and hereby remand for further proceedings.

¶ 24 Affirmed in part and reversed and remanded in part.