FOURTH DIVISION
July 24, 2014

No. 1-13-3444

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALAN VILLANUEVA and MARILYN VILLANUEVA,	)	
	)	Appeal from the Circuit Court
Plaintiffs-Appellants,	)	of Cook County.
	)	
v.	)	
	)	12 L 6951
RAED O. SWEISS and SWEISS & ASSOCIATES, LTD.,	)	
	)	
Defendants,	)	
	)	The Honorable
(JOHN J. BETHANCOURT,	)	Sanjay T. Tailor,
	)	Judge Presiding.
Defendant-Appellee).	)	

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly dismissed as time-barred breach of contract and negligence claims filed by husband and wife taxpayers against an accounting firm and two accountants arising from alleged errors in the preparation of the couple's personal and business tax returns. The amended complaint, on its face, pleaded facts that show that the claims were untimely, and the plaintiffs failed to plead allegations or provide evidence to show the timeliness of the claims.

¶ 2 This appeal addresses when the statute of limitations period commenced in an accountant malpractice action. Appellants Dr. Alan Villanueva and Marilyn Villanueva filed an action against two accountants and an accounting firm based on, among other things, alleged

negligence in the preparation of certain tax returns; the circuit court of Cook County dismissed all claims as time-barred. On appeal, the Villanuevas contend that the circuit court erred in its conclusion that the issuance by the Internal Revenue Service (IRS) of a Form 4549, entitled "Income Tax Examination Changes," triggered the two-year limitations period. Appellee John Bethancourt, one of the defendants, asserts that the circuit court properly dismissed the claims because, among other things, the Villanuevas' amended complaint alleges facts that show that their claims accrued no later than the date of the Form 4549, which was issued by the IRS on March 22, 2010, more than two years before the Villanuevas filed their action on June 21, 2012.

¶ 3 As discussed below, we conclude that the action was time-barred. We agree with Bethancourt that the amended complaint pleads facts that show that the Villanuevas' claims accrued no later than the date the IRS issued the Form 4549. Furthermore, even assuming *arguendo* that the amended complaint, on its face, does not establish the date of the issuance of the Form 4549 as the commencement date of the statute of limitations, dismissal was proper. Under applicable law, the Villanuevas knew or should have known of their injuries by the date they *signed* the Form 4549, thus agreeing to the proposed tax changes. The Villanuevas failed to plead allegations or provide evidence to show the date of their consent and thus the timeliness of their complaint. We reject the Villanuevas' contention that the claims did not accrue until June 28, 2010, the date the IRS "recorded" the executed Form 4549 and issued an assessment. We therefore affirm the judgment of the circuit court dismissing with prejudice all counts of the amended complaint.

¶ 4 I. BACKGROUND

¶ 5 On June 21, 2012, the Villanuevas filed a complaint against an accounting firm, Sweiss & Associates, Ltd. (S&A) and two accountants, Raed O. Sweiss and Bethancourt. The

complaint contained four counts: Counts I and II, against S&A and Sweiss, alleged breach of contract and negligence; Counts III and IV, against Bethancourt, also alleged breach of contract and negligence.

¶ 6 According to the complaint, in late 2007 or early 2008, Alan Villanueva hired Sweiss and S&A for the preparation of the 2007 tax returns for certain businesses owned by Alan; the Villanuevas hired Bethancourt for the preparation of their 2007 personal tax returns. In 2008, the defendants prepared and submitted the returns to the IRS. The complaint provided that "[o]n or about June 28, 2008, an assessment was issued by the IRS showing errors in Villanuevas' personal and business taxes." The complaint further provided, in part:

> "On March 22, 2010, the IRS issued a regular agreed report (Form 4549), attached hereto as Exhibit A, showing that the Villanuevas' 2007 tax payment was deficient in the amount of $45,367.00 and that their 2008 tax payment was deficient in the amount of $39,326.00. The regular agreed report calculated interest on the 2007 tax deficiency at $4,507.92 and interest on the 2008 tax deficiency as $1,631.77. (Exhibit A, regular agreed report.)"

Included as exhibits to the complaint were three letters from accountant Robert H. Lewin to the Villanuevas' counsel discussing alleged errors by S&A and Bethancourt in the preparation of the 2007 tax returns. Lewin, an enrolled agent authorized to practice before the IRS, was hired by the Villanuevas to represent them during their IRS audit and to correct their 2007 and 2008 business and personal taxes.

¶ 7 According to the complaint, beginning in early 2009, the Villanuevas became increasingly unable to pay their business and personal debts, culminating in their joint

bankruptcy filing in June 2011. While the Villanuevas received their bankruptcy discharge in April 2012, they were unable to discharge more than $133,674.00 in tax debt.

¶ 8 Bethancourt filed a motion to dismiss the complaint with prejudice pursuant to 2-619(a)(5) of the Illinois Code of Civil Procedure (the Code). See 735 ILCS 5/2-619(a)(5) (West 2012). Bethancourt noted that the Villanuevas alleged in the complaint that "on or about June 28, 2008, the IRS issued an assessment 'showing errors' in Plaintiffs' 2007 personal tax returns." Based on such allegation, Bethancourt contended that the Villanuevas "knew or reasonably should have known of the alleged accounting errors no later than June 28, 2008," and their June 21, 2012 complaint was thus untimely. Bethancourt also asserted that even if the claims against him accrued on March 22, 2010, the date of the issuance by the IRS of the Form 4549, such claims were time-barred.

¶ 9 The trial court apparently did not rule on the motion to dismiss; the Villanuevas filed an amended complaint on February 20, 2013. Paragraph 10 of the amended complaint provides, "On March 22, 2010, the IRS issued a regular agreed report (Form 4549), attached hereto as Exhibit A, showing errors in the Villanuevas' business and personal taxes for 2007." The breach of contract count against Bethancourt also includes the following paragraph:

> "[T]he IRS regular agreed report (Form 4549), attached hereto as Exhibit A, showed that Mr. Bethancourt had committed errors in the Villanuevas' personal taxes for 2007, and that, as a result of such errors, the Villanuevas' tax payment was deficient in the amount of $45,367.00 and their 2008 tax payment was deficient in the amount of $39,325.00. The regular agreed report calculated interest on the 2007 tax deficiency at $4,507.92 and interest on the 2008 tax deficiency at $1,631.77. (Exh. A.)"

The amended complaint deleted the reference to an assessment on June 28, 2008 that was included in the original complaint, and instead provides that "[o]n or about June 28, 2010 an assessment was issued by the IRS showing errors in Villanuevas' personal and business tax returns for 2007."

¶ 10 Bethancourt filed a motion to dismiss and/or strike the amended complaint, again contending that the counts against him were time-barred given that "by Plaintiffs' own admission, they knew of the alleged accounting errors and the alleged resulting injury on or around March 22, 2010—more than two years before they filed their original complaint on June 21, 2012." Sweiss and S&A filed a combined motion to dismiss, similarly contending, among other things, that the original complaint was not timely filed. Sweiss and S&A asserted that "[i]n order for the Plaintiffs to have received an 'agreed report' from the IRS on March 22, 2010, they must have had knowledge of their allegedly erroneously prepared tax returns at a time prior to March 22, 2010."

¶ 11 In their combined response to the Bethancourt and Sweiss/S&A motions to dismiss, the Villanuevas argued that "Illinois courts have held that the statute of limitations does not begin to run until a deficiency is assessed either through registration of agreement with the IRS or the issuance of a notice of deficiency." The Villanuevas apparently signed and returned the Form 4549, indicating their consent to the changes set forth in the form. Because the complaint was filed within two years of June 28, 2010—the date "when the settlement agreement was registered and the IRS assessed additional tax deficiency"—the Villanuevas contended that their claims were timely.

¶ 12 In an affidavit filed July 8, 2013, the Villanuevas' accountant/agent Lewin described the IRS audit process, in part, as follows:

"6. Once a tax return is selected for an audit, an IRS examiner performs an examination to verify that the income and tax deductions are accurately reported to determine the correct income tax.

7. After the examination, the IRS examiner sends a report to the taxpayers explaining the examiner's findings and any proposed deficiency assessments.

8. The report is a proposed finding that is subject to negotiation prior to any determination of tax deficiency.

9. If the taxpayer agrees with the examiner's proposed findings, the taxpayer will sign either a Form 4549 or a Form 870 acknowledging the increased tax liability.

10. By signing the acknowledgment form, the taxpayer waives the right to receive a statutory notice of deficiency, waives the prohibition on collection for 90 days, and is precluded from litigation the [*sic*] proposed tax deficiency in court.

11. If a taxpayer does not sign and return the Form 4549 or a Form 870 form acknowledging the increased tax liability, the IRS will issue a notice of deficiency, which sets the amount of tax and penalties that the IRS has assessed. The taxpayer may then protest the proposed assessment in a formal hearing.

12. The notice of deficiency is a specific document issued by the IRS, which is labeled as such, and is issued only after the taxpayer fails to sign and return either IRS Form 4549 or Form 870."

¶ 13 In an order entered on July 10, 2013, the circuit court granted the motions to dismiss with prejudice "as to all counts contained in Plaintiffs' amended complaint based on all claims

being time barred; the court having found the applicable statute of limitations began March 22, 2010." After the circuit court denied their motion for reconsideration, the Villanuevas appealed. Neither Sweiss nor S&A has filed an appearance or otherwise participated in this appeal.

¶ 14 II. ANALYSIS

¶ 15 The issue on appeal is whether the circuit court erred in granting dismissal of the Villanuevas' claims pursuant to section 2-619(a)(5) of the Code, which provides that a defendant may file a motion for dismissal if "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (2012). The parties agree that the applicable standard of review is *de novo*. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 100 ("An appeal from a section 2-619 dismissal raises the issue of whether the circuit court's order is proper as a matter of law and is, therefore, reviewed *de novo*.").

¶ 16 As discussed below, we conclude that dismissal of the Villanuevas' claims was proper. First, the claims were time-barred based on the face of the amended complaint. Second, applying the principles set forth in *Federated Industries, Inc. v. Reisin*, 402 Ill. App. 3d 23 (2010), the claims were untimely.

¶ 17 A. The Amended Complaint

¶ 18 As noted above, the amended complaint includes the following paragraphs:

> "10. On March 22, 2010, the IRS issued a regular agreed report (Form 4549), attached hereto as Exhibit A, showing errors in the Villanuevas' business and personal taxes for 2007.
>
> * * *
>
> 30. [T]he IRS regular agreed report (Form 4549), attached hereto as Exhibit A, showed that Mr. Bethancourt had committed errors in the Villanuevas'

> personal taxes for 2007, and that, as a result of such errors, the Villanuevas' 2007 tax payment was deficient in the amount of $45,367.00 and their 2008 tax payment was deficient in the amount of $39,325.00. The regular agreed report calculated interest on the 2007 tax deficiency at $4,507.92 and interest on the 2008 tax deficiency at $1,631.77. (Exh. A.)"

Bethancourt asserts on appeal that "[t]hese allegations demonstrate Plaintiffs were on notice no later than March 22, 2010 that (1) 'Mr. Bethancourt had [allegedly] committed errors in the Villanuevas' personal taxes;' and (2) 'as a result of such errors, the Villanuevas' 2007 tax payment was deficient. . .'"

¶ 19 Section 13-214.2(a) of the Code sets forth the statute of limitations applicable to the Villanuevas' claims:

> "(a) Actions based on tort, contract or otherwise against any person, partnership or corporation registered pursuant to the Illinois Public Accounting Act, as amended, or any of its employees, partners, members, officers or shareholders, for an act or omission in the performance of professional services shall be commenced within 2 years from the time the person bringing the action knew or should reasonably have known of such act or omission." 735 ILCS 5/13-214.2 (West 2012).

Based on the allegations in the amended complaint set forth above—*i.e.*, that the Form 4549 "showed" errors—it appears that the Villanuevas knew or reasonably should have known of the alleged "act or omission" by each of the defendants—*i.e.*, their failure to properly prepare the 2007 tax returns—and the resulting injury to the Villanuevas by no later than the date of the

Form 4549: March 22, 2010.[1] As Bethancourt asserts on appeal, "[b]ased on these admissions, plaintiffs' claims accrued no later than March 22, 2010," and thus the June 21, 2012 complaint was untimely.

¶ 20 The Villanuevas contend that the allegations in their amended complaint that the Form 4549 "shows" errors "was not intended to be an admission on the part of Plaintiffs that their injury occurred or that they were on notice of it prior to signing [the Form 4549]." They claim that "Form 4549 does show errors in Plaintiffs' taxes, *because* Plaintiffs signed it and agreed to those errors" (Emphasis in original). According to the Villanuevas, "[t]he word 'shows' could be interpreted to mean many things, including that Form 4549 showed the findings of the tax examiner, which included a proposed deficiency due to errors in the tax return[.]" Indeed, during the hearing on the motion for reconsideration, the Villanuevas' counsel argued that, to the extent the language of the amended complaint was "sloppy, it's not because my clients at that point knew that this would be the focal point of the case when we pled this."

¶ 21 While we are sympathetic to the Villanuevas' position, we disagree with their characterization of Bethancourt's argument as "semantic." Furthermore, the Villanuevas filed their amended complaint on February 20, 2013, more than three months *after* Bethancourt filed a motion to dismiss the original complaint as time-barred. As Bethancourt asserts on appeal, the Villanuevas had "two opportunities to plead their claims" and were "on express notice that Bethancourt would challenge the timeliness of their claims," but nonetheless "affirmatively pled

[1] Although paragraph 30 of the amended complaint addressed Bethancourt, not S&A and Sweiss, paragraph 10 of the amended complaint stated that Form 4549 showed errors in the Villanuevas' business *and* personal taxes for the 2007. According to the amended complaint, S&A and Sweiss prepared the 2007 business tax returns and Bethancourt prepared the personal return.

in the amended complaint that they were aware of their injury and that it was negligently caused on March 22, 2010."

¶ 22 We conclude that the amended complaint, on its face, includes allegations that indicate the claims were untimely under section 13-214.2(a) of the Code. 735 ILCS 5/13-214.2 (West 2012). However, even assuming *arguendo* that the amended complaint did not expressly establish the trigger date for the limitations period, application of *Federated Industries, Inc. v. Reisin*, 402 Ill. App. 3d 23 (2010), requires dismissal of the action.

¶ 23 B. *Application of Federated Industries, Inc. v. Reisin*

¶ 24 In *Federated*, the appellate court considered the "novel" question of "when taxpayers, whose tax returns have been challenged by the IRS, know or have reason to know that they have a cause of action against their accountants." *Federated*, 402 Ill. App. 3d at 28. Plaintiff Federated Industries, Inc. (Federated) and its owners filed an accountant malpractice action against an accounting firm and its director, alleging that the defendants negligently provided accounting services resulting in additional taxes and penalties to the plaintiffs. *Federated*, 402 Ill. App. 3d at 23. The defendants prepared Federated's tax returns for calendar years 2002, 2003, and 2004. *Id.* at 23-24. Because the defendants undercalculated certain income for those years, Federated's status as a subchapter S corporation was jeopardized. *Id.* at 24. The circuit court dismissed the complaint under section 2-619(a)(5) of the Code, finding that the lawsuit was not timely filed. *Id.* at 27.

¶ 25 Analyzing the timeliness of the action, the appellate court discussed the dates of the key activities, including the following: On September 27, 2004, the IRS notified the plaintiffs that Federated's 2002 tax return had been selected for examination. *Id.* at 24. On November 8, 2004, the IRS held its opening appointment with Federated and defendants. *Id.* at 25. On

February 28, 2005, the IRS issued a "Form 4764-Large Case Audit Plan," which expanded the scope of its audit to cover the 2003 tax year. *Id.* On or about April 19, 2005, the IRS provided its initial conclusions about the 2002 and 2003 calendar-years audits of Federated. *Id.* On May 26, 2005, the IRS issued "Form 4764-Large Case Audit Plan," which confirmed several examination issues for the years 2002 and 2003. *Id.* On July 15, 2005, a director at the defendant accounting firm authored a memorandum concerning examination issues identified by the IRS in preparation for a meeting with the plaintiff's attorneys, which took place on August 30, 2005. *Id.* On September 15, 2005, the IRS issued "Form 5701-Notice of Proposed Adjustment" which, among other things, advised that Federated's subchapter S corporation status would be terminated effective January 1, 2003. *Id.* On October 18, 2005, Federated's attorneys met with the IRS and a director of the defendant accounting firm. *Id.* at 26. During the meeting, the IRS presented a settlement proposal aimed at closing the Federated audit and avoiding termination of Federated's subchapter S corporation status. *Id.* In a letter dated December 27, 2005, Federated and its shareholders "unanimously consented" to the IRS's proposed audit adjustments. On April 25, 2006, the IRS issued a letter to Federated enclosing its examination report and the proposed adjustments to Federated's federal income tax for calendar years 2002 and 2003. *Id.* On May 17, 2006, Federated's representatives returned to the IRS the acceptance of the adjustments proposed in the IRS's examination report. *Id.* Federated also issued a check dated May 12, 2006 to the United States Treasury for the payment of the excess tax. *Id.* On May 15, 2008, the plaintiffs filed a two-count complaint against the defendants.

¶ 26 The appellate court stated that, under Illinois law, the "discovery rule" governs statutes of limitations, such as section 13-214.2(a). *Id.* at 28. Citing *Dancor International, Ltd. v.*

Friedman, Goldberg & Mintz, 288 Ill. App. 3d 666, 672 (1997), the court noted that the effect of the discovery rule is to "dela[y] commencement of the statute of limitations until the plaintiff knows or reasonably should have known of the injury and that it may have been wrongfully caused." *Federated*, 402 Ill. App. 3d at 28.

¶ 27 The plaintiffs argued that the statute of limitations began to run on May 17, 2006, and that the discovery rule had no application where a plaintiff has no damages. *Id.* at 28-29. The defendants responded that the statute of limitations began to run in December, 2005, when the plaintiffs unanimously consented to the IRS's proposed tax adjustments and thus were aware of their injury. *Id.* at 29. After discussing cases from other jurisdictions, the court adopted the approach outlined in *International Engine Parts, Inc. v. Feddersen & Co.*, 9 Cal. 4th 606 (1995), and held that "the statute of limitations in an accountant malpractice action involving increased tax liability begins to run when the taxpayer receives the statutory notice of deficiency pursuant to the Internal Revenue Code section 6212, or at the time when the taxpayer agrees with the IRS' proposed deficiency assessments." *Federated*, 402 Ill. App. 3d at 36. The court stated that this approach creates a "bright-line rule," promotes judicial economy, and preserves the accountant-client relationship. *Id*. Finding that the two-year statute of limitations under 13-214.2(a) began to run on December 27, 2005, when the plaintiffs "registered their unanimous consent to the proposed tax adjustments," the court affirmed the circuit court's dismissal of the action. *Id.* at 36-37. In so holding, the court noted that even though the *amount* of the plaintiffs' tax liability was not "immediately ascertainable" as of December 27, 2005, the statute of limitations was nonetheless triggered. *Id.* at 36.

¶ 28 In their appellate briefs, the Villanuevas contend that the Form 4549 is not the "statutory notice of deficiency" referenced in *Federated*, explaining in detail the purported distinctions.

For example, they contend that the Form 4549 that was sent by the IRS was not a "statutory notice of deficiency" because the Form 4549 set forth "preliminary findings of the tax examiner" as opposed to the "final results of the audit process." Another difference, according to the Villanuevas, is "the issuance of a statutory notice of deficiency has the legal effect of giving the taxpayer the right to file a petition in Tax Court," while the Form 4549 does not.

¶ 29 The Villanuevas' extensive analysis of what constitutes a notice of deficiency is unnecessary in light of the *Federated* court's holding that "the statute of limitations in an accountant malpractice case involving increased tax liability begins to run when the taxpayer receives the statutory notice of deficiency pursuant to Internal Revenue Code section 6212, *or at the time when the taxpayer agreed with the IRS' proposed deficiency assessments.*" (Emphasis added.) *Id.* at 36.[2] The *Federated* court found that the statute of limitations began to run on December 27, 2005, the date of the letter wherein Federated and its shareholders unanimously consented to the IRS's proposed audit adjustments. *Id.* at 36-37. The court reasoned that, on such date, the "plaintiffs agreed to additional tax liability and knew of their injury at that time," even though "the amount of plaintiff's tax liability was not immediately ascertainable." *Id.* at 36. On April 25, 2006, the IRS issued a "letter to Federated enclosing its examination report and the proposed adjustments to Federated's federal income tax"—presumably a Form 4549 or some equivalent form— which was returned to the IRS by Federated's representatives on May 17, 2006. *Id.* at 26. As Bethancourt observes about the *Federated* holding, "[t]he date of plaintiffs' consent"—December 27, 2005—"triggered the

[2] In *Khan v. Deutsche Bank AG*, 2012 IL 112219, the Illinois Supreme Court analyzed statute of limitations decisions, including *Federated*, regarding actions against accountants and other parties. In light of the Villanuevas' contentions that *Khan* "never strayed from or modified *Federated*'s holding or reasoning" and that "the *Khan* court adopted both the holding and reasoning of *Federated*," we limited our focus herein to *Federated*.

statute of limitations even though it was before the IRS issued a Form 4549 to plaintiffs, before the plaintiffs executed Form 4549, before plaintiffs 'registered' their consent with the IRS, and before the IRS issued a final assessment pursuant to Form 4549."

¶ 30 The critical issue under *Federated* is when the Villanuevas knew or reasonably should have known of their injury and that it was caused by the defendants' acts or omissions. As discussed above, we have concluded that the plain language of the Villanuevas' amended complaint indicated that March 22, 2010—the date the IRS issued the Form 4549—triggered the commencement of the limitations period. However, even assuming *arguendo* that the amended complaint, on its face, does not establish the commencement date of the limitations period, we reject the Villanuevas' contention that the operative date is June 28, 2010, which they reference as "when the IRS accepted Plaintiffs' settlement agreement in the form of an executed Form 4549 and assessed a tax deficiency." Regardless of whether Form 4549 constitutes a "statutory notice of deficiency," the date the Villanuevas signed the Form 4549 would begin the statute of limitations under *Federated*.

¶ 31 The record on appeal includes an IRS "account transcript," that lists various "transaction[s]" relating to the Villanuevas' 2007 tax liability. The transcript includes the following entries: "Examination of tax return," with a date of "05-07-2009"; "Appointed representative," with a date of "08-25-2009"; and "Additional tax assessed by examination," with a date of "06-28-2010" and an amount of $45,367.00. Also included in the record on appeal is one page of a seemingly multi-page notice from the IRS, dated June 28, 2010. The notice states, among other things, that there is an "[i]ncrease in tax because of the audit" of $45,367.00 and "[i]nterest charged" of $4,275.59. The notice directs the Villanuevas to pay the full amount by July 19, 2010 to avoid additional penalty and interest.

¶ 32 Based on the foregoing documents, the Villanuevas contend that "the statute of limitations began to run on June 28, 2010 when the Villanuevas settled with the IRS, and that, therefore, Plaintiffs' complaint was timely filed on June 21, 2012." However, the Villanuevas have not cited, nor have we located, any cases that indicate that the limitations clock did not start until the IRS "received and recorded" their consent to the Form 4549. Notably, while the *Federated* court looked to the date of the letter indicating that "unanimous[] consent" of Federated and its shareholders to the proposed tax changes, the court did not examine when the IRS "received and recorded" such letter. Also, as noted above, the court concluded that the limitations period began months before Federated's apparent receipt and return of a Form 4549 or some comparable form.

¶ 33 The Villanuevas assert that their "settlement with the IRS was not final, and their injury not actualized, until the IRS approved the settlement and assessed the deficiency, because according to the terms on the face of Plaintiffs' settlement agreement with the IRS, the settlement agreement was not effective upon the Villanuevas' signature," but rather "its effectiveness was contingent on approval and acceptance by the Area Director, Area Manager, Specialty Tax Program Chief, and Director of Field Operations." The Villanuevas claim that "[t]his acceptance did not occur, and the settlement was not final, until June 28, 2010 when the IRS registered the settlement and assessed the deficiency." Not only does *Federated* not require such assessment, cases from the United States Tax Court consistently have referenced the *signing* of the Form 4549 as the operative event. See, *e.g.*, *Aguirre v. Commissioner*, 117 T.C. 26 (2001) (noting that "by signing Form 4549, petitioners consented to the immediate assessment and collection of their tax liability"); see also, *Hall v. Commissioner*, T.C. M. (RIA) 2013-93 (same); *Perez v. Commissioner*, T.C. M. (RIA) 2002-274 (same).

¶ 34 The Villanuevas further contend that "[e]ven if the statute of limitations began to run on the date that the settlement agreement was signed by Plaintiffs, as opposed to the date that it was accepted by the IRS, Defendants have failed to prove that the settlement agreement was signed prior to June 21, 2010." Although the Villanuevas acknowledge that a plaintiff invoking the discovery rule to delay commencement of the statute of limitations bears the burden of proving the date of discovery, they contend that they are not relying on the discovery rule because they "discovered their injury the same day it was actualized: the date of settlement." However, applying *Federated*, the Villanuevas knew or reasonably should have known of their alleged injuries no later than the date when they signed the Form 4549, agreeing to the modifications proposed by the IRS. In any event, with a section 2-619(a)(5) motion, "the defendant bears the initial burden of going forward on the motion; the burden then shifts to the plaintiff, who must establish the ground asserted either is unfounded as a matter of law or requires the resolution of an essential element of material fact before it is proved." *Smith v. Menold Construction*, 348 Ill. App. 3d 1051 (2004); *Rucklick v. Julius Schmid, Inc.*, 169 Ill. App. 3d 1098, 1107-08 (1988) ("When a defendant raises a statute-of-limitations issue, a plaintiff must set forth facts sufficient to avoid the statute's effect. [Citation.] A plaintiff has a burden of specifically pleading facts showing that the action was brought within the limitation period."). We conclude that the burden shifted to the Villanuevas to establish that the statute of limitation challenge was unfounded or required resolution of an essential element of material fact.

¶ 35 The Villanuevas also argue that, even if the burden shifted to them to "prove the date that the settlement was executed," they met this burden "by presenting the best proof at their disposal: the IRS Transcript." They contend that the date that the settlement agreement was

signed is "unknown and is not present in the record." However, as Bethancourt correctly observes, the date that the Villanuevas signed the Form 4549 is a fact entirely within their own knowledge. We are hard-pressed to understand how the Villanuevas—who signed the form—have no better proof of the date they signed it than the account transcript from the IRS. Indeed, the inclusion of the *unsigned* Form 4549 as an exhibit to the amended complaint and other pleadings seems telling. Furthermore, we are unmoved by the Villanuevas' contention that they were not "provided with a reasonable opportunity to subpoena the IRS in order to obtain the executed and dated settlement agreement, because the date that the settlement agreement was signed was not a major issue in the briefing or hearing on the motion to dismiss at the Circuit Court level." We note that in its May 22, 2013 reply to the Villanuevas' response to his motion to dismiss, Bethancourt argued that "Plaintiffs must have agreed to the proposed additional taxes before the assessment was made on June 28, 2010, and they have not alleged or produced any evidence to show that date occurred between June 21, 2010 and June 28, 2010." In the same reply, Bethancourt also stated: "Alternatively, if the Court believes an issue of fact remains as to when Plaintiffs consented to the tax deficiency, Bethancourt requests the Court allow limited discovery on this issue only." Although the hearing on the motion for reconsideration was held on October 11, 2013, more than four months after Bethancourt's reply, there is nothing in the record that indicates that the Villanuevas took any steps to determine the date they signed the Form 4549 during that time, or even that they asked the court for additional time to obtain a dated copy of the form.

¶ 36 In sum, even if we assume that the amended complaint, on its face, does not establish March 22, 2010 as the commencement date of the limitations period, we cannot agree with the Villanuevas' contention that the claims did not accrue until the IRS "recorded" their executed

Form 4549 and issued an assessment on June 28, 2010. We agree with Bethancourt that the Villanuevas "failed to plead specific allegations to show the timeliness of their claims and they failed to come forward with evidence to save their claims in response to [his] motion to dismiss." Although the circuit court's dismissal of the claims with prejudice may have rested on other grounds—*i.e.*, the court's finding that the statute of limitations commenced on March 22, 2010—"we may affirm the circuit court on any basis warranted by the record." *Holzrichter*, 2013 IL App (1st) 110287, ¶ 140.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated herein, we affirm (a) the judgment of the circuit court granting the motions to dismiss with prejudice all counts of the amended complaint, and (b) the order of the circuit court denying the Villanuevas' motion for reconsideration.

¶ 39 Affirmed.