FOURTH DIVISION
April 16, 2015

No. 1-13-3064

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ERIC ROSIAK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 L 1182
	)	
LAWRENCE C. MANSON, JR.,	)	Honorable
	)	Sanjay Tailor,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Trial court erred in dismissing plaintiff's claim for violation of Illinois Wage Payment and Collection Act. Plaintiff properly pleaded elements of cause of action, and defendant failed to present "affirmative matter" warranting dismissal under section 2-619. Reversed and remanded.

¶ 2 Plaintiff Eric Rosiak sued his former boss, defendant Lawrence C. Manson, Jr., for nonpayment of wages, alleging a violation of the Illinois Wage Payment and Collection Act (Wage Act) (820 ILCS 115/1 *et seq*. (West 2008)). The circuit court of Cook County dismissed the Wage Act claim. Plaintiff appeals. In addition to contesting the merits of plaintiff's appeal,

Defendant challenges jurisdiction in this court. We hold that we have jurisdiction to hear this appeal. On the merits, we hold that the trial court erred in dismissing the Wage Act claim. We reverse and remand for further proceedings.

¶ 3 The underlying dispute between the parties stems from unpaid wages allegedly owed plaintiff. At issue in this appeal is the second amended complaint, and only one count in that pleading—count II, asserting a Wage Act violation against defendant in his individual capacity as CEO and principal shareholder of the company that previously employed plaintiff. We will review the allegations in the second amended complaint only as they pertain to this count.

¶ 4 Plaintiff alleged that he worked as an associate for NexGen Capital Partners (the Company) from July 2008 to March 2009, but that he was only paid from July 2008 to October 2008. On February 6, 2009, in lieu of the payment of past wages due and owing, plaintiff and the Company executed two promissory notes in the amounts of $20,869.26 and $1856.25, plus interest, for the remainder of plaintiff's compensation and unreimbursed expenses. The notes became due and payable on their first anniversary, unless the Company extended the due date by another year. Six weeks after signing the promissory notes, plaintiff resigned from the company.

¶ 5 The original maturity date of the promissory notes was February 6, 2010. But the company invoked its right to extend that date by a year, making them due February 6, 2011. That date in February 2011 came and went without plaintiff receiving any payment. Plaintiff alleged that he was unsuccessful in his demands upon the Company for payment on the notes. The record shows that on March 9, 2012, shortly after plaintiff filed the instant lawsuit, the Company was brought into involuntary bankruptcy.

¶ 6 Plaintiff initially sued his former employer, NexGen Capital Partners (the Company), its subsidiaries and holding company, and defendant, seeking $45,427 in compensatory damages,

plus interest, costs, and attorney fees against defendant personally. In June of 2012, after some motion practice and amendments, plaintiff filed a second amended complaint, including the Wage Act claim before us, directed against defendant only.

¶ 7 On November 5, 2012, plaintiff's case was consolidated with *Christopher M. Pries v. NexGen Capital Partners, LLC et. al*, case no. 11 L 3932, a case with nearly identical issues and the same defendants. The record indicates that Count II of the complaint in *Pries* was similar to plaintiff's claim under the Wage Act: Christopher Pries, another former employee of the Company, likewise alleged that he was due unpaid wages, and that defendant knowingly permitted the Company to violate the Wage Act. That count in *Pries* was dismissed with prejudice on February 8, 2013.

¶ 8 That brings us to the motion to dismiss in the action before us. Defendant moved to dismiss the second amended complaint in its entirety, with prejudice, under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)), including arguments pursuant to sections 2-615 and 2-619(a)(9). Regarding the Wage Act claim, defendant raised two arguments. These arguments were substantively the same as the arguments defendant had successfully raised against the Wage Act claim in the *Pries* matter. First, defendant argued that plaintiff did not adequately allege that defendant "knowingly permitted" the company to violate the Wage Act, the only way that defendant, as an individual corporate officer, could be subjected to personal liability under the Act. Second, defendant argued that the second amended complaint should be dismissed with prejudice—that plaintiff could *never* prove that defendant knowingly permitted the company to deny plaintiff his wages—because the corporation was unable to pay wages to plaintiff due to the company's financial difficulties. As affirmative proof of this fact, defendant attached to its motion to dismiss evidence that the company was forced into involuntary bankruptcy on March

9, 2012, with outstanding debts to several creditors amounting to over $530,000. It is undisputed that on September 9, 2013, the trial court dismissed the second amended complaint in a brief order that did not specify the basis for dismissal, stating only that "Defendant's Motion to Dismiss is granted" and striking a hearing date for oral argument on that motion to dismiss.

¶ 9 The parties disagree, however, on the circumstances leading up to the dismissal order, a dispute that is relevant because it impacts a jurisdictional argument raised by defendant on appeal. Plaintiff's version is that, after the trial court dismissed the *Pries* complaint, "[r]ather than rebrief and reargue the same claim and the same defense based upon virtually identical facts before the same judge, [plaintiff's] counsel proposed that Judge Tailor dismiss the [Wage Act] claim here based upon his ruling in the *Pries* matter." In other words, plaintiff claims that he considered the trial judge's ultimate ruling to be a foregone conclusion, and he wanted appellate review sooner than later. Defendant, on the other hand, claims that plaintiff's counsel told defense counsel that it wanted to "voluntarily dismiss" the second amended complaint. Defendant also notes that plaintiff's counsel drafted the order that the trial court ultimately signed, which we see from the record is true. It is important to emphasize here that, other than this last point as to who drafted the dismissal order, none of the contentions we have described above appear anywhere in the record.

¶ 10 Based on his view of the events below, defendant argues that this court lacks jurisdiction to review the dismissal order. He contends that this order is not "final" under Supreme Court Rule 301 (eff. Feb. 1, 1994), which allows appeals as a matter of right from final orders, because the case was voluntarily dismissed and thus appealable only by defendants. See *Kahle v. John Deer Co.*, 104 Ill. 2d 302 (1984), *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 307 Ill. App. 3d 528 (1999); *Noakes v. National R.R. Passenger Corp.*, 312 Ill. App. 3d 965 (2000).

Plaintiff responds that jurisdiction under Rule 301 is proper because the dismissal was involuntary and with prejudice, and because it disposed of all issues pending in the trial court.

¶ 11 Whether plaintiff took a voluntary dismissal, or whether he just wanted the court to rule expeditiously so he could pursue his appeal, is not something that we can discern, because there is nothing in the record that supports either position. It seems unlikely that plaintiff intended to voluntarily dismiss this case when he clearly wants the issue adjudicated before this court, but we have no way of knowing, and thus we cannot act one way or the other on this speculation. We do not have a stipulation between the parties, any transcript from a hearing, or any indication from the trial court on this point to guide us.

¶ 12 We cannot and will not concern ourselves with behind-the-scenes conversations between counsel as to what "really happened" concerning this dismissal. In circumstances such as these, we will look to the substance of the order to determine whether it was final and appealable. *Hynes v. Dep't of Revenue*, 269 Ill. App. 3d 697, 711 (1995); *Fabian v. BGC Holdings, LP*, 2014 IL App (1st) 141576, ¶ 12. Here, the record discloses a motion seeking dismissal of the entire complaint with prejudice, including two arguments directed against plaintiff's Wage Act claim, and an order from the trial court stating that the "motion to dismiss is granted," without any mention of re-pleading. In our view, that renders the order final and subject to appellate review. *Fabian*, 2014 IL App (1st) 141576, ¶ 12 (order is "final" if it disposes of rights of the parties, either on entire case or on some definite and separate part of controversy); *Schuster Equipment Co. v. Design Electric Services, Inc.*, 197 Ill. App. 3d 566, 568 (1990) ("an order is final and appealable if it terminates the litigation between the parties on the merits").

¶ 13 Defendant, citing *Ben Kozloff Inc. v. Leahy*, 149 Ill. App. 3d 504 (1986), contends that the language of the order does not convey finality because it does not indicate "with prejudice,"

and that an order that merely recites that "the defendant's motion to dismiss is granted" is not sufficient to grant appellate jurisdiction. We disagree. As we said in *Schuster Equipment Co.*, 197 Ill. App. 3d at 568:

> "If a complaint is dismissed because it is legally insufficient to state a cause of action, as opposed to being technically deficient, the order is final and appealable. If there has been no right to amend stated in the order, the dismissal order is final and appealable; the dismissal order does not have to include the words 'with prejudice' for it to be appealable if it is otherwise final."

¶ 14 In *Kozloff*, 149 Ill. App. 3d at 507, we determined that the circuit court's dismissal of a complaint was not final because the trial judge indicated in open court that the factual insufficiency of the complaint could be corrected by amendment. Here, in contrast, neither the dismissal order, nor anything else in the record, indicates that the court believed that the defects in the second amended complaint could be corrected by amendment, or that plaintiff would be allowed to re-plead, nor were there any issues still pending before the court. Under these circumstances, we conclude that the substance of the order shows that it was final. *Fabian*, 2014 IL App (1st) 141576, ¶ 13; *Schuster Equipment Co.*, 197 Ill. App. 3d at 568 (finding dismissal order final where "[p]laintiff did not request leave to amend, nor did the court grant plaintiff that right").

¶ 15 Having determined that we have jurisdiction, we turn to the merits of the appeal. Defendant raises two arguments in support of dismissal of plaintiff's Wage Act claim. We may affirm on any basis appearing in the record. *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 282 (2006).

¶ 16 In his Wage Act claim, plaintiff seeks to hold defendant personally liable on the wages

owed him by the corporation. Generally speaking, the Wage Act only imposes liability on the corporate employer for such nonpayment. 820 ILCS 115/2 (West 2012); see *Andrews v. Kowa Printing Corp.*, 217 Ill. 2d 101, 109 (2005). But under Section 13 of the Act, an individual officer of the corporate employer may be held liable under the Act if and only if he "knowingly permit[s] such employer to violate the provisions of this Act." 820 ILCS 115/13 (West 2012); see *Andrews*, 217 Ill. 2d at 111-12. In that scenario, the individual corporate officer will be considered the "employer," along with the corporate entity. 820 ILCS 115/13 (West 2012); see *Andrews*, 217 Ill. 2d at 111-12.

¶ 17 Defendant's first argument is that the second amended complaint failed to sufficiently allege that defendant "knowingly permitted" the company to violate the Wage Act by not paying plaintiff his wages. While this argument was found under a section of the argument entitled "Section 2-619" in defendant's motion to dismiss, it is clear that this argument is nothing more than a claim that the pleading lacked sufficient facts to state a cause of action, an argument we would expect to fall under section 2-615. See 735 ILCS 5/2-615; *Powell v. American Service Insurance Co.*, 2014 IL App (1st) 123643, ¶ 13 ("The question presented by a section 2–615 motion to dismiss is whether sufficient facts have been pled in the complaint which, if proved, would entitle the plaintiff to relief."). We recognize that there is sometimes overlap between section 2-615 and section 2-619 (see *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994)), and we choose not to reject this argument simply because it was mislabeled. See *Barry Mogul & Associates, Inc. v. Terrestris Development Co.*, 267 Ill. App. 3d 742, 748-49 (1994) (though defendant attacked pleadings based on section 2-619, instead of section 2-615, court chose to hear merits of argument). Plaintiff has not objected to this technicality, and we see no impediment to our review of the substance of the argument.

¶ 18 The purpose of permitting dismissal at the pleading stage is not to create technical obstacles or erect barriers to reaching the merits of a case at trial, but instead to facilitate the resolution of real and substantial controversies. *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 307 (1981); *LaSalle National Trust, N.A. v. Village of Mettawa*, 249 Ill. App. 3d 550, 557 (1993). To that end, a section 2-615 motion to dismiss admits all well-pleaded facts and any reasonable inferences flowing from those facts. *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 46-47 (1991). The question is whether the allegations, construed in the light most favorable to the plaintiff, are sufficient to state a cause of action. *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. The "entire pleading must be considered, and a cause should not be dismissed on the pleadings unless it clearly appears that no facts can be proved which will entitle the pleader to a judgment." *Fahner*, 88 Ill. 2d at 307.

¶ 19 We are mindful that, while courts must liberally construe pleadings, Illinois does not authorize notice pleading. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 22; see 735 ILCS 5/2–603(c), 2–612(b) (West 2010). "Conclusions of fact are insufficient to state a cause of action regardless of whether they generally inform the defendant of the nature of the claim against him." *Id.* "Rather, under Illinois fact pleading, the pleader is required to set out ultimate facts that support his or her cause of action." *Id*; see also *Chandler v. Illinois Central R. R. Co.*, 207 Ill. 2d 331, 348 (2003); *Fahner*, 88 Ill. 2d at 308 ("Although a complaint is deficient when it fails to allege the facts necessary for recovery, the plaintiff is not required to set out evidence; only the ultimate facts to be proved should be alleged, not the evidentiary facts tending to prove such ultimate facts.")

¶ 20 We recognize that "[t]he line between conclusions of law and ultimate facts is sometimes dim." *Fahner*, 88 Ill. 2d at 310. There is no clear distinction between statements of "evidentiary

facts," "ultimate facts," and "conclusions of law." *People ex rel. Hartigan v. All American Aluminum & Construction. Co.*, 171 Ill. App. 3d 27, 36 (1988); *McGill v. 830 S. Michigan Hotel*, 68 Ill. App. 2d 351, 356 (1966). As our supreme court has explained, the same allegation may constitute an "ultimate fact" in one context and a "legal conclusion" in another. *Van Dekerkhov v. City of Herrin*, 51 Ill. 2d 374, 376 (1972). An allegation might constitute a legal conclusion "where from a pragmatic viewpoint some of these words do not give sufficient information to an opponent of the character of the evidence to be introduced or of the issues to be tried." (Internal quotation marks omitted.) *Id*. "What is law, what are facts, and what is evidence, for pleadings purposes, can be determined only by a careful consideration of the practical task of administering a particular litigation." (Internal quotation marks omitted.) *Id*.

¶ 21 With these principles in mind, we will review the allegations of the second amended complaint to determine whether plaintiff sufficiently alleged that defendant "knowingly permit[ted]" the nonpayment of his wages, such that defendant can be personally liable as an "employer" under section 13 of the Wage Act. 820 ILCS 115/13. This review is *de novo*. *White*, 368 Ill. App. 3d at 282.

¶ 22 The second amended complaint alleges that defendant is the CEO and chairman of the board of the NexGen holding company and its three operating affiliates. Defendant is also the majority shareholder. Defendant negotiated the contract with plaintiff for his employment. After the company failed to pay plaintiff for six months, the company executed promissory notes with plaintiff. Defendant was not a party to those notes, but he signed both notes on behalf of NexGen Capital Partners, LLC. When the company later exercised its option to extend the maturity date of those notes for an additional year, until the date of February 6, 2011, it did so through a vote of the board of managers, of which plaintiff was the controlling member. When the company

continued not to pay plaintiff after February 2011, plaintiff continued to demand payment to no avail.

¶ 23 Beyond those allegations, the second amended complaint contains allegations that clearly track the language of Section 13 of the Act—that defendant "knowingly permitted the company not to pay [plaintiff]," that "when the [promissory] note matured [defendant] knowingly allowed the company not to pay it," and that "[a]s the controlling member of NexGen's Board of Managers as well as the majority shareholder and head of operations, [defendant] was the agent of NexGen who knowingly permitted NexGen to violate the [Wage Act]."

¶ 24 Defendant argues that these allegations are insufficient. He claims that all they allege is that defendant was the top-ranking official in the company, and that the final allegations—that he "knowingly permitted" the company not to pay plaintiff—were nothing but "bald legal conclusions" that parroted the controlling statute.

¶ 25 We find, instead, that the allegations properly stated a claim for individual liability against defendant under section 13 of the Wage Act, because plaintiff pleaded the ultimate fact he must prove at trial—that the defendant "knowingly permitted" the nonpayment of his wages. It has been long held, in a variety of contexts, that an allegation of a defendant's "knowledge" in a complaint is an ultimate fact, not an improper conclusion. See, *e.g.*, *Doner v. Phoenix Joint Stock Land Bank of Kansas City*, 381 Ill. 106, 114-15 (1942) (allegation that defendant land purchaser knew of plaintiff's conversion rights in land at time of purchase); *Manuel v. Red Hill Community Unit School District No. 10 Board of Education*, 324 Ill. App. 3d 279, 290 (2001) (allegation that defendant school knew of dangerous conditions on property); *Marshall v. David's Food Store*, 161 Ill. App. 3d 499, 501 (1987) (allegation that defendant grocery store knew of prior criminal attacks near its store against patrons); *Oravek v. Community School*

District, 264 Ill. App. 3d 895, 900 (1994) (allegation that defendant knew of existence of dangerous skateboard ramp on property, though court held that such knowledge was insufficient to establish willful and wanton conduct to overcome tort immunity).

¶ 26 Plaintiff "need allege only the ultimate fact he or she intends to prove, not the evidence by which he or she intends to prove it." *Fahner*, 88 Ill. 2d at 308; see also *Landers-Scelfo v. Corporate Office System, Inc.*, 356 Ill. App. 3d 1060, 1069 (2005) ("a plaintiff may properly allege that a defendant has certain knowledge and need not plead the evidentiary facts tending to show that knowledge"). The ultimate fact that plaintiff must prove is that defendant knowingly permitted the nonpayment of his wages, and he has pleaded that fact.

¶ 27 Even if pleading the ultimate fact were not sufficient, we would still find that plaintiff has adequately pleaded a cause of action under section 13 of the Act. The second amended complaint additionally alleges that defendant personally signed the promissory notes to plaintiff (which can be confirmed by a review of the notes, attached to the complaint), and that defendant was the controlling member of the board of managers that voted to extend the maturity date of the notes after they first came due. Thus, the second amended complaint contains additional factual allegations that defendant was aware that plaintiff was not receiving payment of his wages. These allegations, if proven at trial, could entitle plaintiff to judgment against defendant. See, *e.g.*, *Johnson v. Western Amusement Corp.*, 157 Ill. App. 3d 873, 876 (1987) (defendant officer's familiarity with terms of collective bargaining agreement showed that defendant knew of company's obligations to plaintiffs). Moreover, plaintiff alleges that defendant was, in every sense, the top-ranking officer in the company—an allegation defendant does not contest. If defendant was aware of the nonpayment of wages, then he was certainly in a position to correct

that injustice, but he did not. Drawing all reasonable inferences in plaintiff's favor at the pleading stage, we find that plaintiff has properly pleaded a section 13 violation against defendant.

¶ 28 Defendant relies on *Andrews v. Kowa Printing Corp.*, 217 Ill. 2d 101 (2005), but that case is distinguishable procedurally and factually. First, *Andrews* involved a review of findings of fact following a bench trial. The plaintiffs there failed to *prove* their case; the issue was not whether they adequately pleaded a cause of action. Although our supreme court's analysis in *Andrews* involved an interpretation of the Wage Act, the court's decision was informed by, and depended on, the evidence presented at trial. *Id*. at 112 ("we find no evidence in the record that [defendant] knowingly permitted the unlawful withholding of plaintiffs' *** pay.") Moreover, the facts in *Andrews* are markedly different than the allegations here. The supreme court held that the corporate officer could not be liable for the nonpayment of employee wages because the company did not stop paying employee wages until *after* defendant lost control of the business following a creditor bank's seizure of the company's assets and foreclosure on its loans. *Id*. at 112. *Andrews* does not assist defendant.

¶ 29 We find that plaintiff has adequately pleaded that defendant "knowingly permitted" the nonpayment of plaintiff's wages. The complaint should not have been dismissed on this ground.

¶ 30 We next address defendant's argument that the second amended complaint was correctly dismissed under section 2-619 of the Code. A motion for involuntary dismissal under section 2-619(a)(9) of the Code "admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts that an affirmative matter outside the complaint bars or defeats the cause of action." *Reynolds v. Jimmy John's Enterprises*, LLC, 2013 IL App (4th) 120139, ¶ 31; see also *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Dismissal of a complaint under section 2-619 is appropriate only if the plaintiff

can prove no set of facts that would support a cause of action. *In re Estate of Boyar*, 2013 IL 113655, ¶ 27.

¶ 31 In a motion brought under section 2-619(a)(9), the "affirmative matter" must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). The defendant has the initial burden of establishing that the affirmative matter defeats the plaintiff's claim. *Id*. Once the defendant satisfies the burden of putting forward this "affirmative matter," the burden shifts to the plaintiff to demonstrate that the proffered defense is unfounded or requires the resolution of a material fact. *Id*. If the plaintiff fails to carry the shifted burden of going forward, the complaint will be dismissed. *Id*. The appellate court will review *de novo* a dismissal under section 2-619(a)(9). *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009).

¶ 32 In support of his argument that an "affirmative matter" defeated plaintiff's claim, defendant argued that the company was brought into involuntary bankruptcy and attached an affidavit to that effect. He also attached the bankruptcy filing, which showed that the company had more than a half-million dollars in outstanding debts. The relevance of the company's bankruptcy, defendant argues, is based on case law holding that, if a company is unable to pay wages due to financial difficulties, an officer of that company cannot be held personally liable for the nonpayment—one cannot "knowingly permit" nonpayment when nonpayment is impossible. See *Ashley v. IM Steel, Inc.*, 406 Ill. App. 3d 222, 242 (2010) ("We recognize that a corporation's inability to pay employees eliminates any possibility that the employer acted wilfully [*sic*] when failing to compensate employees, thereby negating liability under the Act."); see also *Stafford v. Puro*, 63 F.3d 1436, 1441 (7th Cir. 1995) (holding that "[a]corporation's inability to pay amounts due negates a finding that it behaved wilfully [*sic*] under the Wage

Act"). Thus, defendant argues, this evidence of the company's involuntary bankruptcy, which demonstrated an inability to pay plaintiff's wages, conclusively demonstrated that plaintiff could prove no set of facts that would entitle him to judgment against defendant.

¶ 33 We hold that the evidence proffered by defendant did not constitute "affirmative matter" within section 2-619(a)(9). Plaintiff alleged, and defendant conceded in his affidavit, that the promissory notes became finally due on February 6, 2011. But the Company was not forced into involuntary bankruptcy until March 9, 2012—thirteen months *after* the date the wages (plus interest) became due. Defendant might have an argument, at the pleading stage, if the bankruptcy preceded the maturity date of the notes, but his wages were due for over a year before that event. Defendant might be entitled to an inference that, going back thirteen months before the bankruptcy, times were tough for the company, but this evidence comes nowhere close to conclusively negating plaintiff's claim. We certainly cannot say, at the pleading stage, as a matter of law, that the company was unable to pay plaintiff his long-overdue wages when they came due on February 6, 2011.

¶ 34 Thus, defendant failed to meet his initial burden of going forward on the section 2-619 motion to dismiss and establishing that the affirmative matter defeats plaintiff's claim. Because we do not find that this evidence constituted sufficient "affirmative matter," the burden never shifted to plaintiff to counter this evidence. See *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 122 (2008). Dismissal of the Wage Act claim under section 2-619(a)(9) was error.[1]

[1] Plaintiff, in responding before this court to defendant's section 2-619 argument, attacks a number of "findings" by the trial court in regard to the significance of the bankruptcy filing and its impact on the company's ability to pay plaintiff. But the trial court made no such findings in this case. Plaintiff is attacking findings made by the trial court in the consolidated *Pries* case. Defendant has correctly stated the obvious: This isn't the *Pries* case. In determining whether the Wage Act claim here was properly

¶ 35 For the foregoing reasons, we reverse the circuit court's dismissal of Count II of the second amended complaint and remand this matter for further proceedings.

¶ 36 Reversed and remanded.

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dismissed under section 2-619(a)(9), we have confined our consideration to the allegations of the second amended complaint and the evidence presented in support of defendant's motion to dismiss in *this* action.