

Continental Holdings, Inc. (United Continental) and United Airlines, Inc. (United Airlines),¹ in a class action lawsuit for breach of contract; breach of good faith and fair dealing; and specific performance. On appeal, Warner and Driscoll argue that the circuit court erred in dismissing the second amended complaint with prejudice. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

¶ 4 On July 18, 2000 and August 8, 2002, Warner and Driscoll, respectively, purchased a lifetime membership in the Silver Wings Plus Program with United Continental and United Airlines (collectively, United). According to Warner and Driscoll, the Silver Wings Plus Program was a membership-fee-based program that offered savings and other benefits to travelers age 55 or older.

¶ 5 On November 30, 2012, Warner and Driscoll filed a class action complaint, on behalf of themselves and "all others similarly situated," against United for breach of contract (count I), breach of good faith and fair dealing (count II), and specific performance (count III). The complaint alleged that United had "ceased providing benefits" that Warner, Driscoll, and the purported class paid for as lifetime members of the Silver Wings Plus Program—including "significant savings" on airfare within various "zones." The causes of action alleged in the complaint were premised upon purported contracts with United related to the Silver Wings Plus Program. However, Warner and Driscoll neither referenced the program's terms and conditions nor attached them to the complaint.

¶ 6 On January 14, 2013, United filed a combined motion to dismiss the complaint on several grounds pursuant to sections 2-615 and 2-619(a)(9) of the Code of Civil Procedure (Code) (735

¹ United Airlines is allegedly a wholly-owned subsidiary of United Continental.

ILCS 5/2-615, 5/2-619(a)(9) (West 2012)). United argued that Warner and Driscoll failed to attach any documents to their complaint on which the purported contracts were based, failed to recite the program terms and conditions within the body of the complaint, and argued that the program terms and conditions defeated their claims. United attached a copy of the program policies to the motion to dismiss.

¶ 7 On June 6, 2013, the circuit court granted the combined motion to dismiss with leave to replead, but ordered Warner and Driscoll to attach "the contract that they claim was breached, or explain[] why no such contract is attached."

¶ 8 On June 28, 2013, Warner and Driscoll filed an amended class action complaint (amended complaint) against United, again alleging claims of breach of contract (count I), breach of good faith and fair dealing (count II), and specific performance (count III). Attached to the amended complaint as exhibits were documents which Warner and Driscoll claimed constituted their purported contracts with United relating to the Silver Wings Plus Program.

¶ 9 On August 2, 2013, pursuant to section 2-619.1 of the Code, United filed a combined motion to dismiss the amended complaint. United specifically argued, *inter alia*, that none of the documents attached as exhibits in the amended complaint constituted evidence of Warner and Driscoll's purported contracts with United; and that they failed to recite the terms of the contracts in the body of the amended complaint or provide an affidavit showing that the contracts were not accessible to them, as required by section 2-606 of the Code.

¶ 10 On November 14, 2013, the circuit court granted United's combined motion to dismiss the amended complaint, finding that "the documents attached to the [a]mended [c]omplaint are not a contract and that none of the asserted claims can survive without a contract."

¶ 11 On January 8, 2014, Warner and Driscoll filed a second amended class action complaint (second amended complaint) against United, again alleging claims of breach of contract (count I), breach of good faith and fair dealing (count II), and specific performance (count III). The second amended complaint alleged that upon enrollment in the Silver Wings Plus Program, lifetime members such as Warner and Driscoll were promised a "10% discount on all published airfares when [they] fly United, Shuttle by United, or United Express," significantly discounted airfares within various "zones," "discounts of up to 50% at participating *** hotels and resorts," and "even more benefits and opportunities to save." Warner and Driscoll alleged that "[w]hile maintaining a contract exists between the parties, [they] never executed a formal, written contract with United related to their 'lifetime' membership" in the Silver Wings Plus Program. Instead, they alleged that the "terms of the purported contract were contained within correspondence distributed by United to [them] prior to their submission of the 'application' and one-time payment"; and that although they had submitted an "application" and a one-time payment to United directly, they were no longer in possession of such "applications." They further alleged that, despite paying for their lifetime memberships, United "has ceased providing benefits to [Warner and Driscoll] and the proposed class paid for, namely, the promised 'significant savings' on airfare"; that United in fact "has failed to offer any benefits whatsoever to lifetime members of the [p]rogram and *** has essentially abandoned the [p]rogram and the lifetime members." The second amended complaint further alleged that "since September 2005, United has 'modified' the Silver Wings Plus Program to the extent that 'lifetime' members receive no discernible benefit beyond the receipt of their membership card."

¶ 12 Warner and Driscoll attached as exhibits to the second amended complaint the same documents that they had attached to their previously dismissed amended complaint: (1) a

redacted June 12, 1996 letter from United welcoming an unknown person to the Silver Wings Plus Program; (2) a redacted Silver Wings Plus membership card for an unknown person; (3) Driscoll's Silver Wings Plus membership card; (4) a redacted October 1995 letter from United addressed to an unknown person regarding the Silver Wings Plus Program; (5) an October 2011 email response to Warner from Martin Hand (Hand), Vice President of Customer Experience at United Airlines, regarding the Silver Wings Plus Program; and (6) a screenshot from the United website regarding the Silver Wings Plus Program. The October 1995 letter specifically referenced a separate "Silver Wings Membership Acceptance" form, which the recipient was required to return in order to enroll in the program and which was not attached as an exhibit to the second amended complaint.

¶ 13 On January 31, 2014, pursuant to section 2-619.1 of the Code, United filed a combined motion to dismiss the second amended complaint on several grounds. United argued that Warner and Driscoll failed, for the third time, to attach their contracts with United to the pleading; and failed to recite the terms of those contracts in the body of the pleading or provide an affidavit showing that the contracts were not accessible to them, as required by section 2-606 of the Code. United again argued that none of the documents attached as exhibits to the second amended complaint constituted evidence of their purported contracts with United. United further argued that the second amended complaint should be dismissed pursuant to section 2-615 of the Code, where its vague and conclusory allegations failed to state a claim for breach of contract, breach of good faith and fair dealing, or specific performance. United also argued for dismissal pursuant to section 2-619 of the Code, stating that the lawsuit was time barred; that Warner and Driscoll had no standing to sue United; that the program terms and conditions defeated Warner and Driscoll's claims; and that counts II and III were preempted by the Airline Deregulation Act

(49 U.S.C. § 41713). Attached as exhibits to the motion to dismiss the second amended complaint were two affidavits and archived web pages containing information about lifetime membership in the Silver Wings Plus Program as well as its terms and conditions. The first affidavit was submitted by Maria Walter (Walter), who was the Managing Director of Marketing Product Revenue/Policy Management for United (the Walter affidavit). The Walter affidavit stated that applicants were required to agree to the Silver Wings Plus terms and conditions in order to become lifetime members of the program, which included the reservation of rights by United to terminate the program or change its terms and conditions at any time. The second affidavit was submitted by the Office Manager of Internet Archive, Christopher Butler (Butler), regarding the archived internet web pages pertaining to United's Silver Wings Plus Program (the Butler affidavit).

¶ 14 On March 13, 2014, Warner and Driscoll filed a response to United's motion to dismiss their second amended complaint, which did not make any arguments in response to United's statute of limitations arguments pursuant to section 2-619 of the Code. Warner and Driscoll also did not submit a counteraffidavit with their response. On April 1, 2014, United filed a reply in support of its motion to dismiss the second amended complaint.

¶ 15 On May 20, 2014, following a hearing on the motion to dismiss the second amended complaint, the circuit court granted the motion and made the following findings:

"The [c]ourt has given multiple opportunities now to attach the written instrument, and it seems as though there is a refusal to do that. Because clearly there are terms and conditions out there that have been attached by [United], and [Warner and Driscoll]

[are] refusing to attach the written instrument and is relying on a partial correspondence.

I'd give one final opportunity. But if you're not going to attach the terms and conditions, then the [c]ourt finds that you're not compiling [*sic*] with 2-606.

* * *

The [c]ourt finds that 2-606 governs this action and that the terms and conditions that are attached to [United's] brief that is fully supported by an affidavit—by two affidavits govern this action. To the extent that they don't govern this action, then it's an oral contract that is barred by the statute of limitations. There's no opposition to that argument that was forwarded by [Warner and Driscoll] at all, no opposition whatsoever to the statute of limitations argument."

¶ 16 On June 10, 2014, after a hearing confirming with counsel that Warner and Driscoll were not seeking leave to file a counteraffidavit, the circuit court entered an order dismissing with prejudice the second amended complaint. The order stated that Warner and Driscoll "elected to stand on their second amended complaint" and that they had "failed to attach the written contract to the complaint."

¶ 17 On July 9, 2014, Warner and Driscoll filed a timely notice of appeal.

¶ 18 ANALYSIS

¶ 19 We have jurisdiction over this matter pursuant to Supreme Court Rule 303(a)(1) (eff. June 4, 2008)). The sole inquiry before us on appeal is whether the circuit court erred in

dismissing with prejudice the second amended complaint, which we review *de novo*. See *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 14. We may affirm the circuit court's decision on any basis supported by the record. *In re Huron Consulting Group, Inc.*, 2012 IL App (1st) 103519, ¶ 33.

¶ 20 Warner and Driscoll argue that the circuit court erred in dismissing with prejudice the second amended complaint. They contend that the circuit court erred in improperly allowing United, pursuant to section 2-619, to use certain purported terms and conditions and the Walter affidavit, which were attached to its motion to dismiss, to contradict Warner and Driscoll's well-pled allegation that they had "never executed a formal, written contract with United related to their 'lifetime' membership" in the Silver Wings Plus Program. Warner and Driscoll further argue that section 2-606 of the Code was inapplicable as a basis for dismissal, where their breach of contract action was not founded upon a written instrument.

¶ 21 United counters that the circuit court properly dismissed the second amended complaint with prejudice, arguing that Warner and Driscoll failed to comply with the requirements of section 2-606 of the Code. United argues that although Warner and Driscoll deny that section 2-606 applied in the instant case, their argument is undermined by the specific allegations in the second amended complaint that the "terms of the purported contract were contained within correspondence distributed by United"—which they failed to attach to their pleading or recite therein. United further contends that, to the extent that Warner and Driscoll's claims were based on unwritten contracts, they were properly dismissed by the circuit court as time barred under section 2-619(a)(5) of the Code. United also argues that section 2-619(a)(9) was a proper basis for dismissing the second amended complaint, where the program's terms and conditions defeated Warner and Driscoll's claims. Although the circuit court did not dismiss the pleading

on these grounds, United argues that dismissal would also have been proper on the bases that Warner and Driscoll failed to allege sufficient facts to state a claim for counts I to III under section 2-615 of the Code; that they lacked standing to sue United; and that counts II and III were preempted by the Airline Deregulation Act (49 U.S.C. § 41713).

¶ 22 Section 2-606 of the Code provides in pertinent part the following regarding exhibits:

"If a claim or defense is founded upon a written instrument, a copy thereof, *** must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her." 735 ILCS 5/2-606 (West 2012).

Failure to comply with section 2-606 of the Code is grounds for dismissal. *Sherman v. Ryan*, 392 Ill. App. 3d 712, 733 (2009).

¶ 23 In the case at bar, the circuit court, in dismissing the second amended complaint, found that section 2-606 governed, and that, despite multiple opportunities to do so, Warner and Driscoll failed to attach to their pleading the written contractual instrument upon which their claims were based. Warner and Driscoll argue that section 2-606 did not apply to their claims, solely because they have alleged in a conclusory fashion in the second amended complaint that they had "never executed a formal, written contract with United related to their 'lifetime' membership" in the Silver Wings Plus Program. Instead, they alleged in their pleading that the "terms of the purported contract were contained within correspondence distributed by United to [them] prior to their submission of the 'application' and one-time payment," and they attached as exhibits to their pleading documents purporting to support that position.

¶ 24 We find Warner and Driscoll's argument in an effort to avoid the effect of section 2-606, to be without merit. First, Warner and Driscoll seem to argue that section 2-606 did not apply because there was no "formal, written contract" with United, but then proceed to seemingly contradict that position by arguing that "terms of the purported contract" with United were contained within "correspondence distributed by United" and by attaching documents purporting to evidence that contract. However, section 2-606's applicability is not limited only to "formal, written contracts," but instead applies whenever a claim is "founded upon a written instrument." 735 ILCS 5/2-606 (West 2012). Neither Warner nor Driscoll alleged that they entered into oral agreements with United. Rather, because Warner and Driscoll *did* allege in the second amended complaint that there were purported written instruments—correspondences distributed by United—upon which their claims were based, section 2-606 applied and they were required to attach a copy of the written instruments to the pleading or an affidavit stating facts to show why the instruments were not accessible to them. See *Armagan v. Pesh*, 2014 IL App (1st) 121840, ¶ 39 (holding that section 2-606 applies when a claim is based on "any written document").

Second, although Warner and Driscoll attached to the second amended complaint exhibits purporting to support their claims against United, none of those attached documents or any documents recited in the pleading constituted evidence of their purported contracts or the terms of the purported contracts with United. Nor did they explain by affidavit why such written instruments were not accessible to them. Specifically, the June 1996 and October 1995 letters from United, which were attached to the second amended complaint, were neither addressed to Warner nor Driscoll, and were sent several years before they purchased lifetime memberships in the Silver Wings Plus Program. The October 1995 letter also references a "Silver Wings Plus Membership Acceptance" form that must be submitted to enroll in the program, which was not

attached to the pleading and which contradicted Warner and Driscoll's assertions that no "written contract" existed. See *In re Estate of Casey*, 222 Ill. App. 3d 12, 19 (1991) ("[w]here a discrepancy exists between allegations in the complaint and attached exhibits, the exhibits are controlling"). The two Silver Wings Plus membership cards (one for an unknown person and one for Driscoll), did not contain any terms of Warner and Driscoll's contract with United. Nor did the attached partial October 2011 email correspondence from Hand to Warner, or the screenshot of the United webpage, constitute evidence of any terms and conditions in any purported contracts with United. Thus, because Warner and Driscoll failed to comply with the requirements of section 2-606, we hold that the circuit court properly dismissed with prejudice the second amended complaint.

¶ 25 Even assuming, *arguendo*, that section 2-606 did not apply, we nonetheless find that dismissal was proper. To the extent that Warner and Driscoll's claims were based on an oral contract, we find those claims to be time barred under section 2-619(a)(5) of the Code. Section 2-619(a)(5) provides that dismissal is proper when "the action was not commenced within the time limited by law." 735 ILCS 2-619(a)(5) (West 2012). In Illinois, "actions on unwritten contracts, expressed or implied, *** shall be commenced within 5 years next after the cause of action accrued." 735 ILCS 5/13-205 (West 2012). "A cause of action accrues, within the meaning of the statute, when the plaintiff 'knew or reasonably should have known that it was injured and that the injury was wrongfully caused.'" *Lubin v. Jewish Children's Bureau of Chicago*, 328 Ill. App. 3d 169, 171-72 (2002) (quoting *Superior Bank FSB v. Golding*, 152 Ill. 2d 480, 488 (1992)). In the second amended complaint, Warner and Driscoll alleged that "since September 2005, United has 'modified' the Silver Wings Plus Program to the extent that 'lifetime' members receive no discernible benefit beyond the receipt of their membership card." However,

Warner and Driscoll did not file the original complaint against United until November 2012, more than five years after they knew of their alleged injury and after the cause of action accrued. In its motion to dismiss the second amended complaint, United argued, as one of several grounds for dismissal, that the lawsuit was time barred under section 2-619(a)(5) of the Code. However, the record shows that Warner and Driscoll presented no argument in response to United's motion to dismiss regarding the timeliness of the action. Indeed, in dismissing the action, the circuit court expressly noted that Warner and Driscoll made "no opposition whatsoever to the statute of limitations argument." Nor do they now make any arguments in their opening brief before us regarding this issue. Thus, we find that they have forfeited any argument regarding the circuit court's dismissal of the action as untimely under section 2-619(a)(5). See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). Accordingly, we hold that the circuit court did not err in dismissing with prejudice the second amended complaint on this basis.

¶ 26 Moreover, we find that the second amended complaint could also have been dismissed² under section 2-619(a)(9) of the Code, which allows for dismissal when "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012); *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011). A section 2-619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise from those facts. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. Further, in ruling on a section 2-619 motion, a court must interpret all pleadings and supporting documents in favor of the nonmoving party. *Id.*

² Although the circuit court did not dismiss the pleading on this basis, this court can affirm its decision on any basis supported by the record. See *In re Huron Consulting Group, Inc.*, 2012 IL App (1st) 103519, ¶ 33.

¶ 27 In the case at bar, United attached various exhibits to its motion to dismiss the second amended complaint, including the Walter affidavit and archived web pages containing information about the terms and conditions in the Silver Wings Plus Program. The Walter affidavit specifically stated that applicants to the Silver Wings Plus Program must agree to its terms and conditions in order to become lifetime members—such as United's reservation of rights to terminate the program or to change its terms and conditions at any time. However, Warner and Driscoll failed to file a counteraffidavit in response to United's motion to dismiss their second amended complaint, which had the effect of admitting the facts stated in the Walter affidavit. See *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995) ("[w]hen supporting affidavits have not been challenged or contradicted by counteraffidavits or other appropriate means, the facts stated therein are deemed admitted"). The reservation of rights by United to terminate the program or to change its terms and conditions at any time, if admitted, would essentially defeat Warner and Driscoll's claims. See *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24 (a motion to dismiss should be granted where it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery). Even if not admitted, we note that Warner and Driscoll's opening brief before this court does not address the *effect* of these terms and conditions on the claims they asserted in the second amended complaint. Thus, Warner and Driscoll have forfeited any argument on appeal on this basis. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). Rather, Warner and Driscoll, citing *Chicago Title Insurance Co. v. Teachers' Retirement System of the State of Illinois* (2014 IL App (1st) 131452), argue only that the circuit court erred in allowing United to use the terms and conditions attached to its motion to dismiss to "contradict a well-pled allegation of fact"—namely, that they had "never executed a formal,

written contract" with United. We find *Chicago Title* to be inapposite, where it involved a legitimate dispute of specific facts and the court found that "there [was] a conflict between the certificates of error and the warrant books regarding whether the taxes were delinquent." *Chicago Title*, 2014 IL App (1st) 131452, ¶ 15. Here, even taking as true the allegation that Warner and Driscoll never executed a formal written contract, we do not see how the terms and conditions of the program to which they undisputedly agreed in becoming lifetime members, "contradicted" that assertion. Accordingly, we hold that the second amended complaint could also have been dismissed on this basis under section 2-619(a)(9) of the Code. In light of our holding, we need not address United's additional arguments regarding alternative grounds for dismissal.

¶ 28 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.