2011 IL App (1st) 101750-U

FOURTH DIVISION
December 22, 2011

No. 1-10-1750

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAURA WILSON AND JANET RAMOS,	)	
	)	Appeal from the
Plaintiffs-Appellants,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	
ANTONIO RAMOS ALVARADO and ANA LAURA RAMOS, Husband and Wife; ANGELICA RAMOS; ANTONIO RAMOS RODRIGUEZ; JOSE ARTURO RAMOS; AND ANA LAURA RAMOS,	)	08 CH 44521
	)	The Honorable
	)	Leroy M. Martin,
Defendants-Appellees,	)	Judge Presiding.
	)	
AND	)	
	)	
LUIS ANTONIO RAMOS and TIMOTHY PATRICK RAMOS,	)	
	)	
Intervenors/Plaintiffs,	)	
	)	
vs.	)	
	)	
ANTONIO RAMOS ALVARADO and ANA LAURA RAMOS, Husband and Wife; ANGELICA RAMOS; ANTONIO RAMOS RODRIGUEZ; JOSE ARTURO RAMOS; and	)	

ANA LAURA RAMOS,	)
	)
Defendants/Appellees,	)
	)
and LAURA WILSON and JANET RAMOS,	)
	)
Nominal Defendants.	)

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

HELD: An action brought by plaintiffs who were the beneficiaries of a settlement agreement incorporated into a divorce decree wherein their father promised to create a trust conveying a remainder interest in his property in Mexico was barred because the agreement merged into the divorce judgment and therefore their claims were barred by the twenty-year limitations period for the revival of judgments. Plaintiffs also failed to state a claim for an express trust as the settlement agreement did not create a trust, and also failed to state a claim for a constructive trust where there was no fraudulent concealment of their right to enforce the judgment and plaintiffs failed to sufficiently allege a fiduciary relationship with their father. Plaintiffs also failed to state a claim for conversion. Additionally, the circuit court properly dismissed a claim for contempt against the father because of the application of the doctrine of laches. Plaintiffs also failed to state claims against the father's third wife and children from that marriage for conspiracy and aiding and abetting the breach of the settlement agreement and divorce decree.

¶1 BACKGROUND

¶2 Defendant Antonio Ramos Alvarado (Ramos) is the father of plaintiffs Laura Wilson and Janet Ramos. Ramos had five children during two marriages. Laura Wilson is one of Ramos' children from his second marriage to Houck, and Janet Ramos is one of Ramos' children from his first marriage. In October 1980, Ramos divorced his second wife, Virginia Houck, and entered into a settlement agreement which was then incorporated in a judgment of dissolution of

marriage. That settlement agreement required Ramos to create a trust and put property owned by him in Mexico into that trust for the benefit of his five children from both prior marriages, including four children with Houck and one child from his first marriage. The agreement specifically provided the following:

> "[Antonio] agrees to convey the title to any properties owned by him in the Country of Mexico to a trust to be created by him which trust shall provide that he shall be entitled to the income of any properties held by the trust for his lifetime and thereafter any accrued income or corpus of the trust to be held for the benefit of the four children of the parties plus the daughter of [Antonio] by a previous marriage, JANET RAMOS, in equal shares subject to the right of the settlor-trustee to make disproportionate distributions of income or corpus to one or more but less than all of the children depending upon their then needs and circumstances and to the right of the settlor-trustee to appointment as between the said children beneficiaries."

At the time of the divorce, Ramos' children ranged in age from twelve to twenty-two.

¶3 Following his divorce from Houck, Ramos married defendant Ana Laura Ramos, his third wife and four more children: defendants Angelica Ramos, Antonio Ramos Rodriguez ("Tonito"), Jose Arturo Ramos ("Pepito"), and Ana Laura Ramos. Ramos never created a trust or transferred the Mexican property pursuant to the 1980 settlement agreement. Instead, in 1993, Ramos and his third wife, Ana Laura Ramos, gifted the property to their sons Tonito and Pepito, who were minors at the time. Houck and Ramos' other children were not informed of this transfer of the Mexico property.

¶4 On August 4, 2006, acting under the control and direction of Ramos and Ana Laura Ramos, Tonito and Pepito conveyed the property to a corporation for $2,000,000. That same day, the corporation conveyed the property to a third party for $4,000,000. The deeds for these transfers were recorded in Mexico in November 2006. However, Ramos' other children from his prior two marriages were unaware that the property in Mexico had been sold until 2008, and never received any funds from the property. The property is currently valued at between $6,000,00 and $10,000,000.

¶5 In 2008, Ramos informed Cole Wilson, the husband of plaintiff Laura Wilson, that he had created substantial trusts for his children from his third marriage, funded with proceeds from the sale of the property in Mexico. After learning of the existence of these trusts, plaintiffs reviewed the 1980 divorce decree and the property records in Mexico, and discovered that Ramos failed to comply with the terms of the divorce settlement agreement.

¶6 In November 2008, plaintiffs filed the instant action, alleging claims for breach of contract, a constructive trust, conversion, breach of fiduciary duty, civil conspiracy to defraud, aiding and abetting, and fraud in the concealment/constructive fraud. Plaintiffs joined the third wife, Ana Laura Ramos, as well as Ramos' children from that marriage as defendants based on their alleged role in transferring the property. Count I was for injunctive relief seeking the imposition of a constructive trust and preliminary and permanent injunctive relief, count II was for a constructive trust, Count III was for conversion, Count IV was for breach of contract, based on a third party beneficiary theory, count V was for contempt of court against Ramos, Count VI was for breach of fiduciary duty against Ramos, Count VII was for civil conspiracy to defraud

against Ramos and his third wife, Count VIII was for aiding and abetting against Ramos and his third wife, and Count IX was for fraudulent concealment/constructive fraud against Ramos and his third wife. Two other children from Ramos' second marriage with Houck, Luis Antonio Ramos and Timothy Patrick Ramos moved to intervene, and filed their own complaint, alleging that the settlement agreement and divorce decree were sufficient to create a trust for the benefit of Ramos' children from his prior marriages.

¶7 Defendants moved to dismiss both complaints. Regarding plaintiffs' complaint, defendants argued the following: (1) the merger doctrine precluded plaintiffs from enforcing the agreement and instead limited plaintiffs to enforcing the divorce decree judgment; (2) the twenty-year statute of limitations on the revival of judgments barred plaintiffs' claims based on the divorce decree; and (3) all of plaintiffs' counts failed to state a cause of action. The circuit court dismissed with prejudice claims regarding the enforcement of the judgment as barred by the statute of limitations, but granted plaintiffs leave to amend their complaint to assert other theories, including that the decree or settlement agreement created a trust. The circuit court also dismissed the intervenors' claims without prejudice and granted them leave to amend their complaint.

¶8 Plaintiffs and intervenors both filed amended complaints. Plaintiffs added a claim for an express trust, in addition to again alleging a constructive trust. Defendants moved to dismiss for failure to state a cause of action. The circuit court granted defendants' motion and dismissed plaintiffs' and intervenors' additional claims but granted leave to again amend the complaints.

¶9 Plaintiffs filed a third amended complaint, adding claims for the "declaration of a trust of

contractual rights" and for injunctive relief and an accounting, again based on the settlement agreement and divorce decree. Defendants again moved to dismiss for failure to state a cause of action, and the circuit court granted the motion, dismissing plaintiffs' third amended complaint. The circuit court specifically found that the settlement agreement did not create a trust, that the settlement agreement merged with the divorce decree, and that all of plaintiffs' claims were barred by the twenty-year limitations period for revival of judgments, and that this limitations period was not tolled by the discovery rule. Plaintiffs appeal the dismissal of all three of their complaints.

¶10 ANALYSIS

¶11 On appeal, plaintiffs argue: (1) their claims based on the settlement agreement are not barred by the merger doctrine because they are third-party beneficiaries; (2) their claims are not barred by the twenty-year limitations period for the revival of judgments because the limitations period was tolled by the discovery rule; (3) they stated a claim for an express trust; (4) they are entitled to a constructive trust on the proceeds from the sale of the Mexico property, and that they sufficiently alleged a fiduciary relationship; (5) they stated a claim for conversion; (6) they stated a claim for contempt because there is no statute of limitations for contempt; and (7) they stated claims against Ramos' third wife and children from that marriage for conspiracy and aiding and abetting the breach of the settlement agreement and divorce decree. Plaintiffs also generally argue that they satisfied Illinois' liberal pleading requirements.

¶12 Standard of Review

¶13 Defendants moved to dismiss pursuant to both section 2-615 and section 2-619 as a

combined motion under section 2-619.1 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-615, 2-619, 2-619.1 (West 2008). The court granted the motion to dismiss with prejudice and did not allow plaintiffs any further opportunity to replead. Section 2-619(a)(5) of the Code provides for the dismissal of untimely suits. 735 ILCS 5/ 2-619(a)(5) (West 2008). When considering an appeal from a section 2-619 dismissal, reviewing courts must determine whether a genuine issue of material fact exists which should have precluded dismissal and, if no such issue exists, whether dismissal was proper as a matter of law. *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1001-02 (2010) (citing *Lang v. Silva*, 306 Ill. App. 3d 960, 970 (1999)). "If a cause of action is dismissed during hearing on a section 2-619 motion on the pleadings and affidavits, the question on appeal is whether there is a genuine issue of material fact and whether defendant is entitled to judgment as a matter of law. [Citations.]" *Nichol v. Stass*, 192 Ill. 2d 233, 248 (2000) (quoting *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 494 (1994)). "Where an affirmative defense negates the alleged cause of action, the circuit court may properly dismiss the pleading with prejudice." *Land v. Auler*, 186 Ill. App. 3d 382, 384-85 (1989) (citing *Szczurek v. City of Park Ridge*, 97 Ill. App. 3d 649, 655 (1981)). Our review of dismissals under section 2-619 of the Code is *de novo*. *Janowiak*, 402 Ill. App. 3d at 1002 (citing *Van Meter v. Darien Park District*, 207 Ill.2d 359, 368 (2003); *Lang*, 306 Ill. App. 3d at 970, citing *Spiegel v. Hollywood Towers Condominium Ass'n*, 283 Ill. App. 3d 992, 998 (1996)).

¶14 The standard of review for a motion to dismiss for failure to state a claim under section 2-615 is the following:

"A section 2-615 motion to dismiss challenges the legal sufficiency of a

> complaint based on defects apparent on its face. [Citation.]" "A cause of action should not be dismissed pursuant to a section 2-615 motion unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. [Citation.]" In ruling on such a motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered. [Citation.] We accept as true all well-pleaded facts and all reasonable inferences that maybe drawn from those facts. [Citation.] However, a plaintiff may not rely on mere conclusions of law or fact unsupported by specific factual allegations. [Citation.]." *Cooney v. Magnabosco*, 407 Ill. App. 3d 264, 267-68 (2011) (quoting *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009)).

¶15 A plaintiff is required to allege only the ultimate facts to be proved, and not the evidentiary facts to prove the ultimate facts. *City of Chicago v. Beretta U.S.A. Corp*., 213 Ill. 2d 351, 369 (2005) (citing *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348 (2003)). However, Illinois is a fact-pleading jurisdiction. *Johnson v. Matrix Financial Services Corp.*, 354 Ill. App. 3d 684, 696 (2005) (citing *People ex rel. Madigan v. Tang*, 346 Ill. App. 3d 277 (2004)). "The requirement that a complaint set forth facts necessary for recovery under the theory asserted is not satisfied, in the absence of the necessary allegations, by the general policy favoring the liberal construction of pleadings." *Beretta U.S.A. Corp.*, 213 Ill. 2d at 368 (quoting *Teter v. Clemens*, 112 Ill. 2d 252, 256-57 (1986)). "Under our fact-pleading standard, the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action." *Beretta U.S.A. Corp.*, 213 Ill. 2d at 368 (quoting *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997).

In considering a motion to dismiss, "the pleadings are to be construed strictly against the pleader." *Pelham v. Griesheimer*, 92 Ill. 2d 13, 17 (1982) (quoting *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 421 (1981)). Our review of an order granting a section 2-615 motion to dismiss is also *de novo*. *Cooney*, 407 Ill. App. 3d at 268.

¶16 Leave to amend should generally be granted unless it is apparent that even after amendment no cause of action can be stated. In determining whether a trial court abused its discretion in refusing to allow an amended complaint, we look to the following factors: (1) whether the proposed amended complaint would cure the defects of the dismissed pleading; (2) whether the amendment would prejudice or surprise the other parties; (3) whether the proposed amendment was timely; and (4) whether previous opportunities to amend the pleading can be identified. *City of Elgin v. County of Cook*, 169 Ill. 2d 53, 71-72 (1996) (citing *People ex rel. Hartigan v. E&E Hauling, Inc.*, 153 Ill. 2d 473, 505 (1992)). See, e.g., *Andersen v. Resource Economics Corp.*, 133 Ill. 2d 342, 348-49 (1990) (holding plaintiff's motion to file a third amended complaint was properly denied because it could not be construed as a valid post-judgment motion when it failed to plead any new facts or theories to cure the defect in the second amended complaint). Here, the circuit court did not err in dismissing plaintiff's complaint with prejudice.

¶17 I. All of Plaintiffs' Claims Based on The Settlement Agreement Were Merged Into the Judgment

¶18 Plaintiffs argue that their claims based on the settlement agreement were not merged into the divorce judgment, and therefore they are not barred by the limitations period regarding the

enforcement of judgments. Plaintiffs attempt to circumvent the limitations period by alleging contract claims and various other theories based on the settlement agreement. Defendants maintain that any liabilities based on settlement agreement were merged into the judgment.

¶19 Under Illinois law, the merger doctrine provides that once a judgment based on a contract is entered, all prior claims based on the instrument are merged into the judgment. *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 187 (2010) (citing *In re Werner*, 386 B. R. 684, 694 (Bankr. N.D. Ill.2008), citing *Poilevey v. Spivack*, 368 Ill. App. 3d 412, 414 (2006)). All remaining legal liability is transferred to the judgment. *Johnson v. Johnson*, 267 Ill. App. 3d 253, 256 (1994) (citing *Doerr v. Schmitt*, 375 Ill. 470, 472 (1941)). Thus, defendants are correct that the settlement agreement became merged in the judgment.

¶20 However, plaintiffs maintain that the merger doctrine does not bar them from suing on the settlement agreement because they are third-party beneficiaries and not parties to the agreement. Plaintiffs cite to *Joslyn v. Joslyn*, 386 Ill. 387 (1944), in support of the proposition that the "merger doctrine applies only to parties to a judgment and does not bar third-party beneficiaries from suing on [the] underlying contract." However, there is no such statement in *Joslyn*. *Joslyn* merely held that an action could be maintained by children who are third party beneficiaries to a written settlement agreement. *Joslyn*, 386 Ill. at 400. It is well settled that "[a] property settlement between spouses, which has been approved by the court and incorporated in the judgment of dissolution, becomes merged in the judgment and the rights of the parties thereafter rest on the judgment." *Rafferty-Plunkett v. Plunkett*, 392 Ill. App. 3d 100,

106 (2009) (citing *In re Marriage of Hoffman*, 264 Ill. App.3d 471, 474 (1994); *Olson v. Olson*, 58 Ill. App. 3d 276, 278-79 (1978)). See also *Miller v. Miller*, 163 Ill. App. 3d 602, 616-17 (1987) (applying the merger doctrine). The fact that plaintiffs' rights rest entirely on the divorce judgment is inescapable.

¶21 The merger doctrine does not limit its application to only the original parties to the underlying contract or instrument; rather, the instrument itself is entirely merged into the judgment. "Once the instrument is merged into the judgment, *no further action at law or equity* can be maintained on the instrument." (Emphasis added.) *Poilevey v. Spivack*, 368 Ill. App. 3d 412, 414 (2006) (citing *Doerr v. Schmitt*, 375 Ill. 470, 472 (1941)). Thus, plaintiffs' alleged status as third party beneficiaries is irrelevant. Once the settlement agreement became merged in the judgment, no action could be maintained based upon the settlement agreement itself. The only action that could be maintained is for an enforcement of the judgment. However, as we next discuss, an action to enforce that judgment is time-barred.

¶22 II. All of Plaintiffs' Claims Based on the Settlement Agreement and Divorce Judgment Are Therefore Time-Barred by the Limitations Period for Reviving Judgment

¶23 Regarding the enforcement of judgments, section 12-108 of the Illinois Code of Civil Procedure is titled "Limitation on enforcement" and provides that "no judgment shall be enforced after the expiration of 7 years from the time the same is rendered, except upon the revival of the same by a proceeding provided by Section 2-1601 of this Act [735 ILCS 5/2-1601] ***." 735 ILCS 5/12-108(a) (West 2008). Section 13-218 further provides for a limitations period of 20 years for revival: "Judgments in a circuit court may be revived as provided by

Section 2-1601 of this Act, within 20 years next after the date of such judgment and not after ***." 735 ILCS 5/13-218 (West 2008). Section 2-1601 provides that a judgment may revived by filing a petition in the case in which the original judgment was entered in accordance with section 2-1602. 735 ILCS 5/2-1601 (West 2008). Section 2-1602 also provide that a petition to revive a judgment may be filed only up to 20 years after entry of judgment. 735 ILCS 5/2-1602 (West 2008).

¶24 Plaintiffs argue that the court erred in determining that the suit to enforce the judgment was barred by the twenty-year limitations period for enforcement of judgments and maintain that this limitations period was tolled by the discovery rule. "The typical statute of limitations exists primarily " 'to require the prosecution of a right of action within a reasonable time to prevent the loss or impairment of available evidence and to discourage delay in the bringing of claims.' " *Village of Glendale Heights v. Glen Ayre Enterprises, Inc.*, 404 Ill. App. 3d 205, 211 (2010) (quoting *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet*, 61 Ill.2d 129, 132 (1975)). Under the discovery rule, the running of the statute of limitations is tolled if a party can prove that some fraud prevented discovery of the cause of action. *Hagney v. Lopeman*, 147 Ill.2d 458, 462 (1992).

¶25 However, the discovery rule has no application in the context of revival of judgments. A petition to revive a judgment is not a new cause of action; rather, it seeks to revive the judgment in the original action. A revival of a judgment is not the creation of a new judgment, but merely a continuation of that being revived. *Guertler v. Barlow Woods, Inc.*, 230 Ill. App. 3d 933, 936 (1992) (citing *Bank of Edwardsville v. Raffaelle*, 381 Ill. 486, 488 (1942); *Farmers State Bank v.*

Hansen, 196 Ill. App. 3d 295, 297 (1990)). See also *Revolution Portfolio, LLC v. Beale*, 332 Ill. App. 3d 595, 603 (2002) ("[A]n action to revive a judgment [] is not a new proceeding, but a continuation of the suit in which the judgment was originally entered.") (citing *Dec v. Manning*, 248 Ill. App. 3d 341, 349 (1993)); *Trustees of Schools of Township No. 20, Range No. 5, Whiteside County, Illinois v. Chamberlain*, 334 Ill. App. 83, 90 (1948) ("The proceeding to revive a judgment is not a new suit but a continuation of the old one."). Thus, there is no new cause of action to be "discovered." Rather, the judgment being revived is based on the original cause of action which already accrued and was "discovered" and reduced to judgment.

¶26 "[A] statute of limitation begins to run when the party to be barred has the right to invoke the aid of the court to enforce his remedy." *Sundance Homes v. County of Du Page*, 195 Ill. 2d 257, 266 (2001) (citing *Milnes v. Hunt*, 311 Ill. App. 3d 977, 980 (2000); *Rohter v. Passarella*, 246 Ill. App. 3d 860, 869 (1993)). Plaintiffs argue that the 20-year limitations period began to run only when Ramos "took an action inconsistent with the terms of the Decree," and cite to a New Mexico case dealing with continuing installment payments which is wholly inapposite. See *Dolly v. Nichols*, 386 N.W.2d 261, 263 (Minn. Ct. App. 1986) (holding that only installments which were due more than ten years prior to the commencement of the suit were barred under New Mexico's limitations statute). In Illinois, it is well settled that the limitations period for revival of judgments begins running from the date of judgment. See *Revolution Portfolio, LLC v. Beale*, 332 Ill. App. 3d 595, 601 (2002) ("a judgment *** may be revived up to 20 years after *the judgment is entered*. [Emphasis added.]"); *Tracey v. Shanley*, 311 Ill. App. 529, 535 (1941) ("The statute of limitations begins to run against a judgment from the date of its rendition.").

Plaintiffs are unable to provide us with any authority in Illinois that the discovery rule has any application in the context of revival of a judgment, or that some event other than entry of a judgment triggers the running of the limitations period for revival of judgments.

¶27 Although none of the parties raises this issue, pursuant to our *de novo* review, we address the fact that one of the plaintiffs was a minor at the time of the divorce judgment in 1980. We note that, generally, statutes of limitations are tolled during a plaintiff's infancy, mental incompetency, or imprisonment. *Girman v. Cook County*, 103 Ill. App. 3d 897, 898 (1981). Here the youngest plaintiff, Timothy Patrick, was 12 years old at the time of the divorce judgment. His birth date is listed in the judgment as May 27, 1968. The judgment was entered on October 7, 1980. Pursuant to the revival of judgments limitations period, the statute of limitations ran in October 2000. Even if we were to hold that the statute was tolled until the children reached majority, the youngest plaintiff, Timothy Patrick, would have reached majority by May 27, 1988. Twenty years from that date was May 27, 2008. Plaintiffs did not file the instant action until November 26, 2008, which still would have been beyond the 20-year limitations period, and plaintiffs' claims would still be barred.

¶28 However, section 13-218 (735 ILCS 5/13-218 (West 2008)) and section 2-1602 (735 ILCS 5/2-1602 (West 2008)) provide for a specific defined period of 20 years to revive a judgment, which begins to run from the date of the judgment, with no exceptions. Plaintiffs are unable to provide any authority holding that the discovery rule applies and can toll the limitations period to revive a judgment, and our own research reveals none. Plaintiffs' action to enforce the divorce judgment in this case is well beyond the 20-year period to revive judgments,

and the circuit court correctly dismissed plaintiffs' claims based on the settlement agreement and divorce judgment on this basis.

¶29 III. Plaintiffs Failed to State a Claim for an Express Trust

¶30 Plaintiffs maintain that they sufficiently alleged a claim for an express trust that is not barred by the limitations period for claims based on the judgment, and that they can enforce the terms of that trust and not the judgment. However, contrary to plaintiffs' claim, as the circuit court found, the settlement agreement did not create a trust. Rather, by the plain terms of the settlement agreement, Ramos merely promised he would create a trust.

¶31 "In Illinois, creation of an express trust requires: (1) intent of the parties to create a trust, which may be shown by a declaration of trust by the settlor or by circumstances which show that the settlor intended to create a trust; (2) a definite subject matter or trust property; (3) ascertainable beneficiaries; (4) a trustee; (5) specifications of a trust purpose and how the trust is to be performed; and (6) delivery of the trust property to the trustee." *Eychaner v. Gross*, 202 Ill. 2d 228, 253 (2002) (citing *In re Estate of Zukerman*, 218 Ill. App. 3d 325, 329 (1991); *In re Estate of Wilkening*, 109 Ill. App. 3d 934, 940-41 (1982); *Price v. State*, 79 Ill. App. 3d 143, 148 (1979)). Each element of an express trust must be established; if any one of the necessary elements is not met, no trust is created. *Eychaner*, 202 Ill. 2d at 253-54 (citing *Wilkening*, 109 Ill. App. 3d at 941)). "The findings of the trial court as to the existence of a trust will not be disturbed on review unless such findings are against the manifest weight of the evidence." *Eychaner*, 202 Ill. 2d at 251 (citing *In re Estate of Zukerman*, 218 Ill. App. 3d at 330).

¶32 The language of the settlement agreement here is not ambiguous. It did not create an

express trust. Rather, Ramos agreed he would create a trust in the future. It is undisputed that in fact no trust was ever created. The trust property was never delivered to the trustee, which is one of the elements of an express trust. The circuit court's determination that no trust was created thus was not against the manifest weight of the evidence. Therefore, plaintiffs failed to state a claim for an express trust, and dismissal of this claim was appropriate.

¶33 IV. Plaintiffs Failed to State a Claim for a Constructive Trust For the Proceeds of the Property Against the Defendant Children From Ramos' Third Marriage

¶34 A constructive trust is one raised by operation of law as distinguished from an express trust. *Eychaner*, 202 Ill. 2dat 274 (citing *Suttles v. Vogel*, 126 Ill. 2d 186, 193 (1988)). A constructive trust is considered to be an equitable remedy imposed by a court to prevent unjust enrichment. *Sundance Homes v. County of DuPage*, 195 Ill. 2d 257, 271 (2001). A constructive trust may be imposed when one party receives property belonging to another under circumstances in which the receiver would be unjustly enriched if allowed to retain the property. *In re Estate of Beckhart*, 371 Ill. App. 3d 1165, 1169 (2007) (citing *Estate of Wallen*, 262 Ill. App. 3d 61 (1994); Restatement of Restitution § 160 (1937)). Plaintiffs failed to state a claim for a constructive trust; first, because the property does not belong to them as their right to the property is unenforceable because it is beyond the limitations period, and second, because there was no breach of fiduciary duty and thus no other basis for imposing a constructive trust.

¶35 A. The Property Does Not Belong to Plaintiffs

¶36 Here, yet again, plaintiffs' claim to proceeds of the property is based on the settlement agreement, which was merged into the divorce judgment and any claims are now barred by the

statute of limitations. We note that Ramos transferred the property to Tonito and Pepito in 1993, which was within the 20-year limitations period for enforcement of judgments. Yet, even if plaintiffs had sought to enforce the judgment at that time and a trust was established, under the terms of the trust required by the settlement agreement and divorce judgment, plaintiffs would not have been entitled to the income of the property at that time. Rather, Ramos was to have a life estate in the property and the plaintiffs a remainder interest, with the right to income from the property passing to plaintiffs only after Ramos' life estate terminated. However, no trust was ever created and, thus, plaintiffs' rights never even vested. See *In re Estate of Michalak*, 404 Ill. App. 3d 75, 83-84 (2010) (holding that a beneficiary of a remainder interest acquires a vested interest upon the creation of the trust). Here we do not have a trust but, rather, an agreement to create a trust. Plaintiffs delayed in enforcing their right to a trust granting them a remainder interest in the property under the judgment and now any claim to that property or its income is barred. At this point in time, plaintiffs have no enforceable right to the income from the property in Mexico and it does not belong to them. There simply is no basis to impose a constructive trust.

¶37 B. Plaintiffs Failed to Sufficiently Allege Breach of a Fiduciary Duty

¶38 To the extent plaintiffs attempt to allege a claim for constructive trust based on Ramos' breach of fiduciary duty, plaintiffs have failed to allege sufficient facts to establish any fiduciary duty. "A fiduciary relationship may occur as a matter of law, or it may arise 'as a result of the special circumstances of the parties' relationship where one places trust in another so that the latter gains superiority and influence over the former.' " *Benson v. Stafford*, 407 Ill. App. 3d 902,

912 (2010) (quoting *State Security Insurance Co. v. Frank B. Hall & Co.*, 258 Ill. App. 3d 588, 595 (1994), citing *In re Estate of Rothenberg*, 176 Ill. App. 3d 176, 179 (1988)). "To determine whether a fiduciary relationship exists, courts look at factors including the degree of kinship between the parties, the disparity in age, health, education, or business experience between the parties, and the extent to which the servient party entrusted the handling of its business to the dominant party and placed its trust and confidence in it. [Citations.]" *Benson*, 407 Ill. App. 3d at 913. The party asserting a fiduciary relationship based on special circumstances must prove its existence by clear and convincing evidence. Benson, 407 Ill. App. 3d at 913 (citing *State Security Insurance Co. v. Frank B. Hall & Co.*, 258 Ill. App. 3d 588, 595 (1994)).

¶39 Here, plaintiffs do not allege or argue a fiduciary relationship as a matter of law. Rather, without citation to authority, they merely argue that "a fiduciary relationship can be inferred from the parent/child bond between Antonio and the [plaintiffs]." However, a fiduciary relationship is not present *per se* between a parent and child. *La Salle Nat. Bank v. 53rd-Ellis Currency Exchange, Inc.*, 249 Ill. App. 3d 415, 426-27 (1993) (citing *Pepe v. Caputo*, 408 Ill. 321 (1951)). "A fiduciary relationship does not automatically exist as a matter of law simply because the parties are parent and child." *In re Estate of Kline*, 245 Ill. App. 3d 413, 426 (1993) (citing *In re Estate of Henke*, 203 Ill. App. 3d 975, 981 (1990)). Under Illinois' fact pleading standard set forth above, plaintiffs were required to allege facts establishing a fiduciary duty. Thus, in order to state a claim for breach of fiduciary duty, plaintiffs were required to allege the special circumstances of the parties' relationship and that plaintiffs placed trust in Ramos such that he gained superiority and influence over them. See *Benson*, 407 Ill. App. 3d at 912.

However, in their original complaint, second amended complaint, and third amended complaint plaintiffs failed to allege any facts establishing a fiduciary duty. Thus, plaintiffs failed to state a claim for breach of fiduciary duty and, to the extent plaintiffs attempt to state such a claim, the circuit court properly dismissed plaintiffs' complaints.

¶40 C. Plaintiff's Cited Insurance Beneficiary Cases Are Inapposite Because the Beneficiaries in Those Cases Had an Enforceable Right

¶41 In support of their argument that they sufficiently stated a cause of action for a constructive trust, plaintiffs cite to cases where a parent promised in a divorce settlement agreement to name either the former wife or the children of the marriage as beneficiaries to the parent's life insurance policy, but then never did so, and courts imposed a constructive trust on the proceeds on the life insurance benefits in favor of the wife or children. However, this line of case law is inapposite because the actions for enforcement of the divorce judgments incorporating the settlement agreements in these cases were within the limitations period for enforcing judgments. See *Miller*, 163 Ill. App. 3d at 608 (the divorce decree incorporating the settlement agreement was entered in 1968, and the son filed a motion to enforce payment of his college expenses under the decree in 1984); *Beckhart*, 371 Ill. App. 3d at 1167 (the settlement agreement and judgment was entered in 2001 and the beneficiaries sought a constructive trust to enforce their rights under that agreement in 2005); *Perkins v. Stuemke*, 223 Ill. App. 3d 839, 841 (1992) (the divorce judgment incorporating the settlement agreement was entered in 1973, and the plaintiffs filed their action in 1989); *Appelman v. Appelman*, 87 Ill. App. 3d 749, 754-55 (1980) (the terms of the settlement agreement were incorporated in the divorce judgment in

1972, and the plaintiff wife filed an action in 1978). Here the agreement contained in the judgment sought to be enforced is well beyond the limitations period. Plaintiffs have not cited a single precedent holding that rights in a judgment could be enforced beyond the limitations period for revival of judgments. Accordingly, the circuit court properly dismissed plaintiffs' claim for a constructive trust.

¶42 V. Plaintiffs Failed to State A Claim For Conversion

¶43 Plaintiffs argue that they sufficiently stated a claim for conversion. "To assert a claim for conversion, a plaintiff must establish that: (1) he has a right to the property at issue; (2) he has an absolute and unconditional right to the immediate possession of that property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property." *Howard v. Chicago Transit Authority*, 402 Ill. App. 3d 455, 461 (2010) (citing *Kovitz Shifrin Nesbit, P.C. v. Rossiello*, 392 Ill. App. 3d 1059, 1063-64 (2009).

¶44 Plaintiffs are correct that a cause of action for conversion can lie for money that may be identified not only by segregation but also by its source or description, including in cases involving a failure to transfer money given to it for a specific purpose. See *Roderick Development Investment Co. v. Community Bank*, 282 Ill. App. 3d 1052, 1064 (1996). However, plaintiffs' claim for conversion fails because it is based entirely on the settlement agreement and divorce judgment. Plaintiffs argue that, in support of their claim, they "specifically asserted that they were entitled to beneficial interests in a trust to be created by [Ramos] under the terms of the Agreement and Decree, and funded with the Mexico Property." However, as discussed

above, the settlement agreement was merged into the divorce decree, and enforcement of the decree is barred by the limitations period for revival of judgments. Therefore, the circuit court property dismissed the claim for conversion.

¶45 VI. The Circuit Court Did Not Err In Dismissing Plaintiffs' Claim for Contempt Based On The Doctrine of Laches

¶46 Plaintiffs are correct that the law in Illinois is that there is no statute of limitations applicable to contempt proceedings. *City of Rockford v. Suski*, 307 Ill. App. 3d 233, 243 (1999) (citing *People ex rel. Chicago Bar Ass'n v. Barasch*, 21 Ill. 2d 407, 409 (1961)). However, "[i]n determining whether a petition for contempt is time-barred, the trial court may consider the equitable defense of laches." *Suski*, 307 Ill. App. 3d at 244 (citing *People v. Martin-Trigona*, 94 Ill. App. 3d 519, 522 (1980)). In applying the doctrine of laches in a contempt proceeding, the circumstances in each case should be carefully examined to determine when the lapse of time in bringing the contempt charges would make it unjust or unfair to compel a respondent to answer the charges. *Suski*, 307 Ill. App. 3d at 244. Laches is a doctrine " 'grounded in the equitable notion that courts are reluctant to come to the aid of a party who has knowingly slept on his right to the detriment of the opposing party.' " *Wabash County v. Illinois Mun. Retirement Fund*, 408 Ill. App. 3d 924, 933 (2011) (quoting *Tully v. State*, 143 Ill. 2d 425, 432 (1991)). See also *People v. McClure*, 218 Ill. 2d 375, 389 (2006) ("The “laches” doctrine bars claims by those who neglect their rights to the detriment of others.") (citing *People v. Wells*, 182 Ill. 2d 471, 490 (1998)). "The defense of laches requires a showing that (1) a litigant has exhibited unreasonable delay in asserting a claim; and (2) the opposing party suffered prejudice as a result of the delay."

Wabash County, 408 Ill. App. 3d at 933 (citing *Monson v. County of Grundy*, 394 Ill. App. 3d 1091, 1094 (2009)). Whether a party is guilty of laches such that a contempt action should be barred is a question left to the sound discretion of the trial court, whose decision will not be disturbed on appeal absent an abuse of that discretion. *Suski*, 307 Ill. App. 3d at 244 (citing *In re Estate of Bowman*, 140 Ill. App. 3d 976, 979 (1986)).

¶47 In this case, the passage of nearly thirty years from the date of the judgment, during which Ramos never created the trust, is such a lapse of time that it would be unfair and unjust to compel Ramos to answer a charge of contempt. We find the facts of the instant case satisfy the required showing for a laches bar to contempt in that: (1) plaintiffs unreasonably delayed in attempting to enforce their rights under the judgment for close to 30 years; and (2) defendant Ramos is now prejudiced as a result of the delay in that the property was conveyed to his sons from his third marriage and thereafter sold, during which time plaintiffs did not even inquire as to their rights to the property. We hold the circuit court did not abuse its discretion in concluding that a claim for contempt was time-barred.

¶48 VII. Plaintiffs Failed to State Any Claim Against Ramos' Third Wife and Additional Children

¶49 Plaintiffs alleged counts against Ramos' third wife and his additional children for conspiracy and aiding and abetting. To state a claim for civil conspiracy, plaintiffs must allege: (1) an agreement; and (2) a tortious act committed in furtherance of that agreement. *Lozman v. Putnam*, 379 Ill. App. 3d 807, 827 (2008) (citing *McClure v. Owen Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999)). "A defendant is liable as a conspirator if he or she ' "understands

the general objectives of the conspiratorial scheme, accepts them, and agrees, either explicitly or implicitly to do [his or her] part to further those objectives." ' " *Lozman*, 379 Ill. App. 3d at 827 (quoting *McClure*, 188 Ill. 2d at 133, quoting *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 64 (1994)).

¶50 "In Illinois, to properly plead the tort of aiding and abetting, one must allege the following elements: ' "(1) the party whom the defendant aids must perform a wrongful act which causes an injury; (2) the defendant must be regularly aware of his role as part of the overall or tortious activity at the time that he provides the assistance; [and] (3) the defendant must knowingly and substantially assist the principal violation." ' " *Grimes v. Saikley*, 388 Ill. App. 3d 802, 819 (2009) (quoting *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 27-28 (2003), quoting *Wolf v. Liberis*, 153 Ill. App. 3d 488, 496 (1987)).

¶51 However, plaintiffs have failed to allege any tortious activity or wrongful act on the part of Ramos' third wife and additional children. Plaintiffs' cause of action sounds in contract, not tort, and their claims are barred due to the statute of limitations, despite plaintiffs' repeated attempts to recast their claims and assert novel theories. It is essential for us to evaluate the complaint and ascertain the true character of a plaintiff's cause of action. *Madigan v. Yballe*, 397 Ill. App. 3d 481, 488 (2009) (citing *Armstrong v. Guigler*, 174 Ill. 2d 281, 286-87 (1996)). " '[A] party simply may not circumvent a shorter period of limitations, or attempt to breathe new life into a stale claim, merely by means of artful pleading.' " *Madigan*, 397 Ill. App. 3d at 488-89 (2009) (quoting *Armstrong*, 174 Ill. 2d at 287). Plaintiffs' repeated amended pleadings failed to sufficiently state any cause of action which is not barred by the limitations period for revival of

judgments. Accordingly, the circuit court correctly dismissed plaintiffs' complaints and dismissed their final amended complaint with prejudice.

¶52 CONCLUSION

¶53 We hold that plaintiffs' claims based on the settlement agreement are barred by the merger doctrine because the agreement merged into the divorce judgment and therefore their claims based on the settlement agreement and judgment are barred by the twenty-year limitations period for the revival of judgments. We also hold that plaintiffs failed to state a claim for an express trust, as the settlement agreement did not create a trust, and also failed to state a claim for a constructive trust where there was no fraudulent concealment of the claim and plaintiffs failed to sufficiently allege a fiduciary relationship. Plaintiffs also failed to state a claim for conversion. Additionally, the circuit court properly dismissed the claim for contempt despite the lack of a statute of limitations because of the application of the doctrine of laches. Finally, we hold that plaintiffs failed to state claims against Ramos' third wife and children from that marriage for conspiracy and aiding and abetting the breach of the settlement agreement and divorce decree. Therefore, we affirm the circuit court's dismissal order.

¶54 Affirmed.