2017 IL App (1st) 162378-U

No. 1-16-2378

Fourth Division
September 7, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

BALDEV RAJ BHUTANI, Plaintiff-Appellant, v. THE COURTS OF NORTHBROOK CONDOMINIUM ASSOCIATION, LIEBERMAN MANAGEMENT SERVICES, and MR. CASEY DUGAN OF "GOT JUNK," Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 M2 00884 The Honorable Thaddeus S. Machnik, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's judgment is affirmed, where: (1) this court does not have subject matter jurisdiction over the dismissal of defendant "Got Junk" due to plaintiff's failure to file an amended notice of appeal; (2) plaintiff's claim of false arrest and imprisonment was barred by the statute of limitations; (3) plaintiff's claim of breach of a fiduciary duty was barred by the doctrine of collateral estoppel; (4) defendants did not commit conversion by failing to return the personal property to plaintiff; and (5) replevin cannot be found against defendants because the personal property is no longer in defendant's possession.

¶ 2 Plaintiff, Baldev Raj Bhutani, was evicted from his condominium unit in 2013 by defendants, the Courts of Northbrook Condominium Association (Association) and the Association's property manager, Lieberman Management Services (Lieberman), for failure to pay monthly assessments. Shortly after this eviction, the Association and Lieberman hired defendant "Got Junk" to remove plaintiff's personal property from the condominium premises. A short time later plaintiff was arrested and later convicted of criminal trespass for entering the condominium unit. In 2015, plaintiff filed a complaint against the Association and Lieberman alleging four counts: (1) false arrest and imprisonment, (2) breach of a fiduciary duty, (3) conversion of personal property, and (4) replevin of personal property, seeking both damages and the return of the personal property still in defendants' possession. Plaintiff also alleged the counts of conversion and replevin of personal property against "Got Junk," seeking both damages and the return of the personal property still in "Got Junk's" possession. Defendants filed separate motions to dismiss all counts, and the trial court granted the motions to dismiss all counts against all defendants under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)). On this *pro se* appeal, plaintiff argues that the trial court's grant of the motions to dismiss should be reversed because: (1) his claim for false arrest and imprisonment was not barred by the statute of limitations; (2) his claim for breach of a fiduciary duty was not barred by the doctrine of collateral estoppel; and (3) he did not abandon his personal property as a matter of law, so his claims for conversion and replevin were improperly dismissed. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On March 4, 2015, plaintiff filed a complaint against defendants. The complaint was amended twice and it is the second amended complaint, filed on December 11, 2015, that is at issue on appeal. The complaint alleges that plaintiff was the rightful owner of a condominium unit located at 26 Avon Road in Northbrook, Illinois, from February 13, 2013, through February 20, 2013, and that he owned all personal property contained therein during the same period.

¶ 5 The complaint alleges that the Association had obtained a judgment for possession of plaintiff's condominium unit for unpaid monthly assessments in a prior lawsuit (the forcible detainer action). The complaint also alleges that plaintiff's timely posttrial motion to reconsider and the filing of a notice of appeal stayed enforcement of the judgment, and that the stay of enforcement was recognized by this court in a March 5, 2013, order that granted plaintiff's motion for a stay order in the appellate court.

¶ 6 The complaint further alleges that on February 13, 2013, while the stay was in effect, the Association changed the locks to the condominium unit without giving plaintiff access to the personal property contained therein, did not give plaintiff notice of the legal authority by which it claimed possession of the condominium unit or the personal property, and made several calls to the Northbrook police department, intentionally making false reports that plaintiff was trespassing on his own property. These calls led to plaintiff's arrest and conviction for criminal trespass. The Association later hired defendant "Got Junk" to confiscate and remove plaintiff's personal property from the condominium unit. After plaintiff's conviction, the Association leased plaintiff's condominium unit and collected rents

without crediting them to plaintiff's mortgage lender, causing the lender to file a foreclosure action against plaintiff.

¶ 7 The complaint alleges four causes of action against defendants, including false arrest and imprisonment, breach of a fiduciary duty, conversion, and replevin of personal property.

¶ 8 Count I alleges false arrest and imprisonment and alleges that the Association made false police reports on or around February 13, 2013, through February 20, 2013, despite knowing that plaintiff was the rightful owner of the condominium unit and that there was a valid stay of enforcement in effect. The Association's calls and claims made to the police led to plaintiff's wrongful arrest and imprisonment from February 20, 2013, to February 21, 2013, and prosecution for criminal trespass on his own property.

¶ 9 Count II alleges breach of a fiduciary duty and alleges that the Association and Lieberman, its agent, breached their fiduciary duties owed to plaintiff pursuant to section 18.4 of the Condominium Property Act (765 ILCS 605/18.4 (West 2012)). The count included six separate alleged breaches of fiduciary duty: (1) use of collection efforts that violated the Fair Debt Collection Practice Act (15 U.S.C. § 1692); (2) failure to serve a 30-day notice as required by the Condominium Property Act; (3) failure to provide plaintiff with an accurate account of his association monthly assessments prior to initiation of the forcible detainer action; (4) violation of the March 5, 2013, stay order; (5) filing of a false report with the Northbrook police department; and (6) taking possession of plaintiff's personal property without authority or authorization.

¶ 10 Count III alleges conversion and alleges that plaintiff had the right to the possession of his personal property, and that the Association denied him access to his condominium unit to remove his personal property on multiple occasions. Plaintiff also alleges he was later denied

access to "Got Junk's" premises to remove his personal property. The complaint alleges that these actions were willful and malicious and constituted a conversion of his property.

¶ 11 Count IV alleges replevin and alleges that when the personal property was in "Got Junk's" possession, defendants continued to refuse plaintiff access to the property.

¶ 12 A list of the personal property was attached to the complaint but did not include the value of individual items of property.

¶ 13 On January 13, 2016, the Association and Lieberman jointly filed a combined motion to dismiss plaintiff's complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)), seeking to dismiss the complaint under both sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2014)). In support of dismissal, the motion claims that plaintiff's allegation that a valid stay of enforcement was in effect was false. The motion claims that the stay in the appellate court was not granted until March 5, 2013, after plaintiff's eviction from the condominium unit had already occurred.

¶ 14 In response to count I alleging false arrest and imprisonment, the motion claims that the October 24, 2012, forcible detainer action order granted the Association rightful possession of the condominium unit and that the Association was still in rightful possession of the condominium unit on February 20, 2013, when the arrest occurred. As a result, the motion claims that plaintiff's allegation of false arrest and imprisonment for criminal trespass within the condominium unit was improper. Even if not improper, the motion claims that plaintiff's allegation for false arrest and imprisonment was barred by a two-year statute of limitations because the false arrest and imprisonment allegedly ended on February 21, 2013, and the law suit was not filed until March 4, 2015.

¶ 15 In response to count II alleging breach of a fiduciary duty, the motion claims that plaintiff's allegation of breach of a fiduciary duty was barred by the doctrines of collateral estoppel and *res judicata*. The claim pointed to a previous decision issued by this court to show that plaintiff's accusations of breaches on the grounds of failure to give notice, failure to provide an accurate account, violation of the March 5 stay order, and wrongful possession of the condominium unit had all been decided in a previous action. See *Courts of Northbrook Condominium Ass'n v. Bhutani*, 2014 IL App (1st) 130417. Further, the motion claims that the alleged violation of the Fair Debt Collection Practice Act was not properly pled because it is a separate cause of action.

¶ 16 In response to count III alleging conversion, the motion claims that the conversion cause of action was improper because plaintiff had five months between the October 24, 2012, forcible detainer action order and his February 13, 2013, eviction to remove his property, as well as the period of time leading up to this court's March 14, 2014, affirmance of the entry of the order of possession. In fact, plaintiff had another two weeks to remove his property from the condominium unit before it was transferred by "Got Junk" to its storage facility. The motion claims that any personal property not collected by plaintiff prior to March 29, 2014, was abandoned as a matter of law.

¶ 17 In response to count IV alleging replevin, the motion claims that replevin could not apply to the Association because plaintiff's complaint alleged that the personal property was in the possession of "Got Junk," not the Association.

¶ 18 The motion attached this court's March 14, 2014, opinion affirming the October 24, 2012, order of possession. The opinion also denied plaintiff's motion to compel the Association to return possession of the condominium unit based on this court's March 5,

2013, grant of a stay of eviction proceedings because the stay was not granted until after possession was transferred to the Association. See *Courts of Northbrook Condominium Ass'n*, 2014 IL App (1st) 130417.

¶ 19 In regards to the Association's claim of legal possession of the condominium unit, the motion attached a sheriff's notice of eviction dated February 13, 2013, stating that plaintiff had been evicted from the property. It also stated that the Association was required to allow plaintiff reasonable time to retrieve his personal property, though it was not required to allow him back into the condominium unit.

¶ 20 In regards to plaintiff's arrest, the motion attached a certified statement of conviction for criminal trespass against plaintiff following the events alleged in the complaint. Plaintiff's conviction was affirmed by this court in *People v. Bhutani*, 2016 IL App (1st) 140915-U.

¶ 21 Finally, the motion attached three separate affidavits from Jennifer O'Reilly, Howard Dakoff, and defendant Casey Dugan, the owner of "Got Junk." Jennifer O'Reilly and Howard Dakoff are attorneys for the Association. No timely counter-affidavits were filed by plaintiff-appellant.

¶ 22 In her affidavit, Jennifer O'Reilly averred that "immediately after the February 13, 2013, eviction," she asked plaintiff to remove his property and informed him that his property would be deemed abandoned if he did not remove it himself. She averred that she gave him multiple other opportunities to remove his property throughout the spring of 2013, but plaintiff would consistently deny that he was required to remove the property.

¶ 23 In his affidavit, Howard Dakoff averred that plaintiff had been given multiple opportunities to retrieve his property prior to and on March 29, 2014. He also affirmed his belief in the accuracy of a letter he sent to plaintiff on April 10, 2014. The correspondence

noted that plaintiff had been told to remove his personal property after the February 13, 2013, eviction but that he refused to do so, and that he continued to refuse to remove his property after the forcible detainer action's order of possession was affirmed by this court. It also noted that plaintiff and Northbrook police officers were present at the condominium unit on March 29, 2014, when plaintiff's property was being removed. The Northbrook police officers, after reviewing "the facts and applicable court orders," advised plaintiff that "the Association has legal possession of the [condominium unit]" and that plaintiff could not prevent the removal of his property. At this time, plaintiff was also given authorization to retrieve his personal property from "Got Junk" after its removal from the condominium unit.

¶ 24 In his affidavit, Casey Dugan averred that "shortly after" March 29, 2014, he gave plaintiff authorization to retrieve his personal property from the "Got Junk" facility. Plaintiff took items on multiple occasions, loading them into a vehicle and trailer. Casey Dugan also averred that plaintiff took additional property that did not belong to him during these visits.

¶ 25 In response to the Association and Lieberman's joint motion to dismiss, plaintiff supplemented the record with a September 4, 2013, order from the criminal trespass case. The order directed that plaintiff be allowed to enter the condominium unit to retrieve his personal property if he was accompanied by Northbrook police and "with notice to Karen Balinski [Lieberman's regional director] or other member" of the Association.

¶ 26 On April 20, 2016, the trial court entered an order granting the Association and Lieberman's motion to dismiss all counts. All four counts, including breach of a fiduciary duty, false arrest and imprisonment, conversion, and replevin, were dismissed pursuant to section 2-619 of the Code (735 ILCS 2-619 (West 2014)). None of the parties motioned for the trial court to find "no just reason for delaying either enforcement or appeal" pursuant to

Rule 304(a), Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2015), and the Rule 304(a) language was absent from the order. The trial court instead scheduled a May 10, 2016, status hearing for plaintiff's claims concerning "Got Junk."

¶ 27 In its order, the trial court found that count I, which alleged false arrest and imprisonment, was barred by the two-year statute of limitations because plaintiff alleged that the imprisonment ended on February 21, 2013, while plaintiff did not file his first complaint until March 4, 2015.

¶ 28 The trial court found that count II, which alleged breach of a fiduciary duty, was dismissed as a matter of law. The trial court addressed each of the six alleged breaches of fiduciary duty in turn, and it found that: (1) the violation of the Fair Debt Collection Practice Act was "insufficiently pled;" (2) the second through fifth alleged breaches of fiduciary duty were barred by collateral estoppel and *res judicata*; and (3) defendants' taking of property could not be supported due to the affirmative matters raised in the affidavits that had been introduced by defendants and remained unrefuted by plaintiff.

¶ 29 Finally, the trial court found that both count III, which alleged conversion, and count IV, which alleged replevin, were dismissed as a matter of law. Based on defendants' uncontroverted affidavits, the trial court found that plaintiff's personal property had been legally abandoned and that this acted as an affirmative defense to plaintiff's claim of conversion. Based on the same affidavits, it found that plaintiff's personal property had not been wrongfully detained, barring plaintiff's replevin claim.

¶ 30 Plaintiff's motion for reconsideration was denied on July 28, 2016.

¶ 31 On August 24, 2016, plaintiff filed a notice of appeal for the April 20, 2016, and July 28, 2016, orders, naming the Association and Lieberman as defendant-appellees.[1]

¶ 32 On May 10, 2016, before plaintiff moved for reconsideration of the April 20, 2016, order dismissing his claims against the Association and Lieberman, the trial court granted "Got Junk" leave to file a motion to dismiss all counts against it *instanter*.

¶ 33 On May 31, 2016, in his response to "Got Junk's" motion to dismiss and while his motion for reconsideration was pending, plaintiff supplemented the record with an affidavit. In his affidavit, plaintiff averred that he was owner of all personal property within the condominium unit as of his February 13, 2013, eviction, and that he did not abandon his property. However, since the trial court had already ruled on the Association and Lieberman's motion to dismiss, the trial court and this court cannot consider plaintiff's affidavit on the matters already decided because plaintiff failed to file it as a response to the other defendants' motion to dismiss. We will discuss this further under our analysis.

¶ 34 On September 14, 2016, the trial court granted "Got Junk's" motion to dismiss all counts. Defendants claim that plaintiff did not file an amended notice of appeal following this order and this court's records show that no additional notice of appeal was filed.

¶ 35 This appeal follows. Defendant "Got Junk" disputes this court's jurisdiction over an appeal concerning them because plaintiff did not file an amended notice of appeal following their dismissal, and in the alternative if we find jurisdiction, "Got Junk" joins with the briefs filed by the other defendants.

[1] It is not clear whether plaintiff included defendant "Got Junk" in his August 24, 2016, notice of appeal. He included *et al* after naming the Association and Lieberman, suggesting that other parties were included in the appeal, but there was no final order that disposed of counts against "Got Junk" at this point in time. We address the issue of whether we have jurisdiction over the dismissal of the complaint as to "Got Junk" in our analysis.

¶ 36 ANALYSIS

¶ 37 On appeal, with respect to the Association and Lieberman, plaintiff argues that counts I through IV were improperly dismissed under section 2-619 of the Code. Plaintiff also argues that counts III and IV were improperly dismissed under the same section with respect to "Got Junk." We consider his arguments in turn.

¶ 38 I. Jurisdiction

¶ 39 As an initial matter, we must determine whether this court has jurisdiction over all claims against all defendants. The question of whether we have jurisdiction over the instant appeal presents a question of law, which we review *de novo*. *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 25; *In re Marriage of Gutman*, 232 Ill. 2d 145, 150 (2008). "*De novo* consideration means we perform the same analysis that a trial judge would perform." *Accel Entertainment Gaming, LLC v. Village of Elmwood Park*, 2015 IL App (1st) 143822, ¶ 27.

¶ 40 Plaintiff argues on appeal that this court's jurisdiction extends to the trial court's grant of the motions to dismiss all three defendants, including "Got Junk." He claims that he "did not request for [the] circuit court clerk to prepare [his notice of appeal] until October 14, 2016," after the trial court's September 14, 2016, final appealable order. However, defendants claim that plaintiff actually filed his notice of appeal on August 24, 2016, in response to the trial court's grant of the Association and Lieberman's joint motion to dismiss. They claim that plaintiff's failure to file an amended notice of appeal following the trial court's September 14, 2016, order granting "Got Junk's" motion to dismiss denies us jurisdiction over plaintiff's claims against defendant "Got Junk."

¶ 41 An appellate court's jurisdiction is dependent on the appellant's timely filing of a notice of appeal. *Huber v. American Accounting Ass'n*, 2014 IL 117293, ¶ 19. In fact, the timely

filing of a notice of appeal is the only jurisdictional step needed for initiating appellate review. *People v. Patrick*, 2011 IL 111666, ¶ 20. An appellant's failure to file a timely notice of appeal leaves this court without jurisdiction to hear his or her appeal. *Huber*, 2014 IL 117293, ¶ 19 (where the appellant filed his notice of appeal after the 30-day deadline provided in the relevant supreme court rule, the appellate court properly dismissed the appeal for lack of jurisdiction); *Patrick*, 2011 IL 111666, ¶ 20. To ascertain whether a notice of appeal was timely filed, we turn to the relevant supreme court rules which govern filing.

¶ 42 Illinois Supreme Court Rule 303(a)(1) provides that a notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from. Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015). Rule 303 further provides that, if a timely posttrial motion directed against the judgment is filed, then the notice of appeal must be filed within 30 days after the entry of the order disposing of that motion. Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015).

¶ 43 In the case at bar, plaintiff filed his notice of appeal on August 24, 2016, within 30 days of the July 28, 2016, order denying plaintiff's motion to reconsider the trial court's April 20, 2016, grant of the Association and Lieberman's joint motion to dismiss all counts. However, this notice of appeal was premature because it was not until September 14, 2016, that the trial court granted "Got Junk's" separate motion to dismiss all counts and entered an order stating that "all matters are now final and there is no just cause to delay the appeal or enforcement of the Orders in this cause of action."

¶ 44 Nonetheless, Rule 303(a)(2) provides that, when a timely postjudgment motion has been filed by any party, a notice of appeal filed before the entry of the order disposing of the last pending postjudgment motion, or before the final disposition of any separate claim, becomes

effective when the order disposing of the motion or claim is entered. Ill. S. Ct. R. 303(a)(2) (eff. Jan. 1, 2015). Therefore, plaintiff's notice of appeal was effective as of September 14, 2016, the date of the final disposition of the separate claims against "Got Junk."

¶ 45 Section 303(a)(2) further provides, in relevant part:

> "A party intending to challenge an order disposing of any postjudgment motion or separate claim, or a judgment amended upon such motion, *must* file a notice of appeal, or an amended notice of appeal within 30 days of the entry of said order or amended judgment ***." (Emphasis added.) Ill. S. Ct. R. 303(a)(2) (eff. Jan. 1, 2015).

¶ 46 In interpreting this quote, in *Hollywood Boulevard Cinema, LLC v. FPC Funding II, LLC*, 2014 IL App (2d) 131165, ¶ 28, the Second District found, as we do here: "to the extent that [appellant] challenges only the undisturbed portion of the [original] judgment, he was not required to file a new or an amended notice of appeal after the trial court amended the judgment. [Appellant's] premature notice of appeal *** became effective once the court disposed of his postjudgment motion *** and it confers jurisdiction on this court to review the undisturbed portion of the [original] judgment." We adopted this holding in *A.M. Realty Western L.L.C. v. MSMC Realty, L.L.C.*, 2016 IL App (1st) 151087, where the plaintiff filed a premature notice of appeal of the trial court's grant of a motion for summary judgment. The notice of appeal was premature because it was filed before the trial court resolved an outstanding motion to grant attorney fees and costs. *A.M. Realty Western L.L.C.*, 2016 IL App (1st) 151087, ¶¶ 77-81. We found that the premature notice of appeal gave jurisdiction over the summary judgment claim but not the fees and costs claim. *A.M. Realty Western L.L.C.*, 2016 IL App (1st) 151087, ¶¶ 82-83.

¶ 47 Similarly, in the instant case, plaintiff did not file a new or amended notice of appeal after the entry of the trial court's September 14, 2016, order granting defendant “Got Junk's” motion to dismiss. Since plaintiff chose not to file a new or amended notice of appeal to include “Got Junk” as a defendant-appellee after his claims against “Got Junk” were dismissed, we have no jurisdiction to hear an appeal considering claims against “Got Junk.”

¶ 48 However, as noted, the claims against the Association and Lieberman are properly before this court because the notice of appeal became effective once the trial court issued its order disposing of “Got Junk’s” claims. Thus, we have jurisdiction to consider the undisturbed portion of the original judgment which, in the case at bar, was the trial court's grant of the Association and Lieberman’s motion to dismiss and denial of plaintiff’s motion to reconsider.

¶ 49 II. Standard of Review

¶ 50 "A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that appear on the face of the complaint." *Krilich v. American National Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 569-70 (2002). An affirmative matter is "a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Krilich*, 334 Ill. App. 3d at 570. The trial court may dismiss a complaint under section 2-619 after considering issues of law. *Krilich*, 334 Ill. App. 3d at 570. The trial court may consider pleadings, depositions, and affidavits to determine if any issue of fact exists. *Krilich*, 334 Ill. App. 3d at 570. In reviewing the dismissal of a complaint, the court must take all well-pled facts as true and draw all reasonable inferences from those facts that are favorable to the

pleader. *Canel & Hale, Ltd. v. Tobin*, 304 Ill. App. 3d 906, 912 (1999). However, "if evidentiary facts asserted in an affidavit filed in support of a motion to dismiss are not refuted by a counteraffidavit, the court will take those facts as true, notwithstanding contrary unsupported allegations in the plaintiff's pleadings." *In re Marriage of Kohl*, 334 Ill. App. 3d 867, 877 (2002).

¶ 51 We review a motion to dismiss under section 2-619 of the Code *de novo*. *Krilich*, 334 Ill. App. 3d at 569. As noted in our jurisdictional analysis, *de novo* consideration means we perform the same analysis that a trial judge would perform. *Accel Entertainment Gaming, LLC*, 2015 IL App (1st) 143822, ¶ 27. We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992). "The question on appeal is 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Krilich*, 334 Ill. App. 3d at 570 (quoting *Zedella v. Gibson*, 165 Ill. 2d 181, 185-186 (1995)).

¶ 52 III. False Arrest and Imprisonment

¶ 53 We first consider plaintiff's argument concerning the dismissal of count I for false arrest and imprisonment pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). In dismissing count I, the trial court found that the claim was barred by the two-year statute of limitations for false imprisonment claims. 735 ILCS 5/13-202 (West 2014). Citing the holding in *Wallace v. Kato*, 549 U.S. 384, 389 (2007), specifically that "limitations begin to run against an action for false imprisonment when the alleged false imprisonment ends," the trial court determined that plaintiff's cause of action accrued on February 21, 2013, when

plaintiff alleged that he was released from jail. It then found that plaintiff's claim was untimely because he did not file his complaint until March 4, 2015.

¶ 54 We note that plaintiff made two arguments against this conclusion, one before the trial court and a second on appeal. We will address both of his arguments in turn.

¶ 55 First, plaintiff argued before the trial court[2] that the statute of limitations had been tolled. Under section 13-202 of the Code, "actions for damages for *** false imprisonment *** shall be commenced within 2 years next after the cause of action accrued." 735 ILCS 5/13-202 (West 2014). The section also includes a tolling provision that states that "if the compelling of a confession or information by imminent bodily harm or threat of imminent bodily harm results in whole or in part in a criminal prosecution of the plaintiff, the 2-year period set out in this section shall be tolled *** until criminal prosecution has been finally adjudicated in favor of the above referred plaintiff." 735 ILCS 5/13-202 (West 2014).

¶ 56 Based on the above statute, plaintiff argued that the two-year statute of limitations should have been tolled during his subsequent criminal prosecution pursuant to the section's tolling provision. Plaintiff claimed that the application of the tolling provision prevents his claim from being barred by the two-year statute of limitations because his criminal prosecution extended past March 4, 2013.

[2] Since plaintiff did not make this argument in his brief on appeal, we may choose not to consider it under Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued [in the appellant's brief] are waived ***."). However, "waiver and forfeiture rules serve as an admonition to the litigants rather than a limitation upon the jurisdiction of the reviewing court and *** courts of review may sometimes override considerations of waiver and forfeiture in the interests of receiving a just result and maintaining a sound and uniform body of precedent." *Jackson v. Board of Election Commissioners of the City of Chicago*, 2012 IL 111928, ¶ 33. In the case at bar, plaintiff is a *pro se* litigant and the Association and Lieberman address this argument in their brief on appeal. Thus, we choose to consider the merits of plaintiff's argument, even if not properly preserved.

¶ 57 However, as correctly noted by the trial court, section 13-202 of the Code expressly applies plaintiff's method of tolling only in cases where a plaintiff confessed or gave information by threat of imminent bodily harm (735 ILCS 5/13-202 (West 2014)). In the case at bar, plaintiff did not allege that he confessed by threat of bodily harm. Thus, on the facts pled by plaintiff in the instant case, the tolling exception is not applicable.

¶ 58 On appeal, plaintiff makes a second argument: that the trial court misapplied the law when it relied on *Wallace*, 549 U.S. 384, rather than *Heck v. Humphrey*, 512 U.S. 477 (1994), to determine the date of accrual for his cause of action.

¶ 59 As an initial matter, we note that both are United States Supreme Court cases that dealt with federal rights violation claims under 42 U.S.C. § 1983, and plaintiff did not plead a federal rights violation here, instead claiming false arrest and imprisonment under state law. However, as observed by the trial court, this court has accepted § 1983 accrual reasoning in state claims that deal with wrongful arrests. See *Smith v. Boudreau*, 366 Ill. App. 3d 958, 968 (2006) (citing *Wallace v. City of Chicago*, 440 F.3d 421, 427 (7th Cir. 2006), *aff'd*, 549 U.S. 384 (2007)). The reasoning accepted by the *Smith* court aligns with the general principles of limitations periods outlined by the Illinois Supreme Court: "a limitations period begins to run when facts exist that authorize one party's action against another," and in cases of continuing torts, "the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278 (2003). As a result, we discuss both United States Supreme Court cases to analyze the merits of plaintiff's argument on the question of accrual.

¶ 60 In *Heck*, the plaintiff filed a civil suit against prosecutors who allegedly used unlawful methods of arrest and prosecution to obtain a criminal conviction against him. *Heck*, 512

U.S. at 479. The plaintiff's conviction had not been reversed before it reached the United States Supreme Court, so the primary question was whether the plaintiff's § 1983 claim was cognizable when he brought it. *Heck*, 512 U.S. at 483. The Supreme Court concluded that civil causes of action that could impugn a preceding criminal conviction or sentence did not accrue until that preceding conviction or sentence "has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to make such a determination, or called into question by a federal court's issuance of habeas corpus." *Heck*, 512 U.S. at 486-87.

¶ 61 In *Wallace*, the plaintiff had been convicted on the basis of a confession in 1994, but in *People v. Wallace*, 324 Ill. App. 3d 1139 (2001), this court remanded for a new trial because it found that the plaintiff's confession was inadmissible because his arrest had been unlawfully obtained. *Wallace*, 549 U.S. at 386-87. Charges against him were dropped in 2002, and he brought a § 1983 suit for damages arising from his arrest in 2003. *Wallace*, 549 U.S. at 387. Even though he was arrested in 1994 and the statute of limitations for false arrest was only two years in length, the plaintiff argued that his cause of action for false imprisonment was still timely because the doctrine developed in *Heck*, 512 U.S. 477, delayed its accrual until 2002, when the charges against him were dropped. *Wallace*, 549 U.S. at 392. The *Wallace* court held that the *Heck* bar to a cause of action's accrual only applied in cases where a conviction preceded the potential accrual because otherwise the *Heck* bar could be used to delay an action's accrual indefinitely in anticipation of an uncertain future conviction. *Wallace*, 549 U.S. at 393. The United States Supreme Court found that claims for false arrest and imprisonment accrue as soon as a false imprisonment ends. *Wallace*, 549 U.S. at 389. Since no conviction was in place when the plaintiff's alleged false imprisonment ended in

1994, *Heck* was inapplicable to the plaintiff's false imprisonment claim, and the claim was untimely. *Wallace*, 549 U.S. at 397. The *Wallace* dissent argued in favor of introducing an equitable tolling system that would toll the statute of limitations while subsequent criminal proceedings were ongoing, but the majority rejected the dissent's approach in favor of a system that instead relied on state tolling provisions and court-imposed stays. *Wallace*, 549 U.S. at 396-97.

¶ 62 Despite the fact that both *Wallace* and *Heck* dealt with false arrest and imprisonment claims against prosecutors, their reasoning remains applicable to the instant case, in which plaintiff alleges that the Association and Lieberman, both private parties, unreasonably called for the Northbrook police to arrest plaintiff. "Illinois courts have held that a plaintiff can recover against a private defendant for false arrest where the defendant directed the officers to make the arrest or the defendant's complaint was the sole basis for the arrest." *Boyd v. City of Chicago*, 378 Ill. App. 3d 57, 70 (2007) (citing *Randall v. Lemke*, 311 Ill. App. 3d 848, 852 (2000)). Therefore, we turn to plaintiff's argument regarding whether *Wallace* applies here.

¶ 63 Plaintiff contends that *Wallace*'s rule of accrual for false imprisonment claims can be distinguished from his case because there was no pending appeal in *Wallace* that could toll the statute of limitations, making it inapplicable to his case because of its discussion of equitable tolling. See *Wallace*, 549 U.S. at 387. In support of his contention, plaintiff claims within his brief that on December 5, 2013, an assistant State's Attorney performed a title search of plaintiff's condominium unit that showed the Association and Lieberman's police reports to be false on their face. Based on this claim, plaintiff argues that the *Heck* bar delayed his cause of action's accrual until that date, when the Association and Lieberman's

police reports were allegedly shown to be false. Under plaintiff's theory, his cause of action, filed on March 4, 2015, would have been filed within the two-year statute of limitations and therefore was not time-barred.

¶ 64 However, plaintiff's citation to the record in support of his asserted December 5, 2013, event does not clearly lead to any relevant documents. This leaves plaintiff's claim effectively unsupported, in violation of Supreme Court Rule 341(h)(7). Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Argument *** shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on."). As we have frequently observed, this court is not a depository in which the burden of research and argument may be dumped. *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010); *People v. Hood*, 210 Ill. App. 3d 743, 746 (1991) ("A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository into which the appealing party may dump the burden of argument and research."). The conclusion that plaintiff's claim lacks support is bolstered by this court's opinion affirming plaintiff's conviction because it does not mention either the December 5, 2013, events or that the Association's police reports were shown to be false, both of which presumably would have been relevant to an appeal of his conviction. See *Bhutani*, 2016 IL App (1st) 140915-U. Also, plaintiff emphasizes in his brief that his attorney asked a regional director working for Lieberman in court whether she falsely reported that she owned the condominium unit, but that an objection to the question was sustained. To the extent that this sustained objection is

plaintiff's "evidence" of the December 5, 2013, events, it provides no valid support for his claim.[3]

¶ 65 Additionally, plaintiff's focus on the presence or absence of a pending appeal is irrelevant because the *Wallace* court's discussion of false imprisonment accrual was not dependent on the possibility of subsequent equitable tolling. See *Wallace*, 549 U.S. at 397. In fact, the majority explicitly denied the appropriateness of an equitable tolling system as endorsed by the *Wallace* dissent. *Wallace*, 549 U.S. at 396. In other ways, *Wallace* remains similar to the instant case because both cases deal with claims of false arrest and imprisonment and both instances of false imprisonment ended before the plaintiff was convicted of a crime. *Wallace*, 549 U.S. at 386-87.

¶ 66 Based on those similarities and the *Wallace* accrual rule for false imprisonment claims, we find that the *Heck* bar was not applicable to the accrual of plaintiff's cause of action because there was no conviction in place as of February 21, 2013. *Wallace*, 549 U.S. at 393. Therefore, even if the December 5, 2013, events that plaintiff claims occurred were supported by the record, plaintiff's cause of action accrued in February 2013, and his false imprisonment claim was barred by the two-year statute of limitations. Based on the reasons above, we affirm the decision of the trial court.

¶ 67 It is worth noting that even if the *Heck* bar did delay the accrual of plaintiff's false imprisonment cause of action, the bar would still be in place under the facts pled by plaintiff. Plaintiff argues that the accrual date for his false imprisonment claim would be December 5, 2013, when the Association's police report was allegedly shown to be false, but under *Heck* a

[3] We note that, since the instant appeal does not concern plaintiff's criminal conviction, the record on appeal does not contain any transcripts from the criminal proceedings. Our prior appeal, affirming the conviction, does not discuss this sustained objection. See *Bhutani*, 2016 IL App (1st) 140915-U.

delayed cause of action does not accrue until "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. In his complaint, plaintiff concedes that his conviction was affirmed by this court in *Bhutani*, 2016 IL App (1st) 140915-U. He does not plead that his conviction has since been expunged, declared invalid, or called into question. As a result, if the *Heck* doctrine applied, it would continue to bar plaintiff from bringing his false imprisonment cause of action.

¶ 68 IV. Breach of Fiduciary Duty

¶ 69 Plaintiff's next claim is that the trial court should not have dismissed his cause of action for breach of fiduciary duty. In order to succeed on his breach of fiduciary duty claim, plaintiff must show: (1) that a fiduciary duty exists between the parties; (2) the fiduciary duty was breached; and (3) such breach proximately caused injury to the plaintiff. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). That a fiduciary duty existed between plaintiff and defendants is not in dispute. Defendants' fiduciary duty to plaintiff arises from section 18.4 of the Condominium Property Act, which provides that an association owes a fiduciary duty to its unit owners. 765 ILCS 605/18.4 (West 2014). What is in dispute is whether defendants breached this duty. Plaintiff alleges seven factual allegations in support of his claim that defendants breached their duty, each of which we discuss in turn below. The trial court found the allegations barred by collateral estoppel and affirmative defenses raised by defendants. Since all of his factual allegations were barred, plaintiff was unable to establish the second element of breach of fiduciary duty, and count II was subsequently dismissed.

¶ 70 On appeal, defendants argue that most of plaintiff's allegations were previously decided in the forcible detainer action, and were properly barred from being used as underlying factual allegations on the basis of collateral estoppel. The party seeking to invoke the doctrine of collateral estoppel has the burden of meeting three requirements. These requirements are that: (1) the specific issue decided in the prior suit must be identical with the one presented in the current suit; (2) there was a final judgment on the merits in the prior adjudication; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior suit. *Hurlbert v. Charles*, 238 Ill. 2d 248, 255 (2010). We consider each of plaintiff's allegations to determine if they were barred by collateral estoppel.

¶ 71 Plaintiff's first allegation in support of his claim for breach of fiduciary duty is that defendants pursued collection efforts in a fashion that violated the federal Fair Debt Collection Practices Act (FDPCA) (15 U.S.C. §§ 1692-1692p (West 2014)). The trial court found that this allegation was "insufficiently pled." When determining the legal sufficiency of a complaint on a motion to dismiss, all well-pleaded facts are taken as true. *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 289 (1990). However, Illinois is a fact-pleading jurisdiction, and mere conclusions of law or fact unsupported by specific allegations in a complaint are disregarded on a motion to dismiss. *Quake Construction*, 141 Ill. 2d at 289. Additionally, the pleading must contain sufficient facts as will reasonably inform a defendant of what he must defend against. *In re Beatty*, 118 Ill. 2d 489, 499 (1987). In the case at bar, plaintiff's first allegation merely stated that defendants "[pursued] collection efforts in a fashion that violated the Fair Debt Collection Practices Act." The allegation does not specify what conduct defendants engaged in that allegedly violated the FDCPA or when such conduct occurred. It also does not point to any specific provision in the

FDCPA that serves as the basis for the allegation. There is no additional mention of the FDCPA or any collection efforts by defendants elsewhere in the complaint. Ultimately, the allegation is a conclusory statement that does not provide defendants with the information they need to defend against the allegation. Defendants cannot be expected to prepare a defense when they do not know the specific conduct plaintiff is referencing or what part of the FDCPA they allegedly violated. The allegation is therefore insufficiently pled as a matter of law.

¶ 72 While plaintiff's previous complaints contained more detailed information, defendants have no way of knowing whether plaintiff plans to rely on the same allegations made in the previous complaints because they were not reincorporated here. See *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17 (where an amendment does not reincorporate the prior pleading, the prior pleading ceases to be a part of the record for most purposes and is abandoned (citing *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153-54 (1983)). Even if defendants may be able to make an accurate guess, in the interest of efficiency it is important for both the court and defendants to know with certainty what allegations plaintiff plans to pursue in court and they should not have to rely on speculating as to plaintiff's intentions. See *Bonhomme*, 2012 IL 112393, ¶¶ 28-29.

¶ 73 Additionally, in their motion for a section 2-619 dismissal of count II, defendants raised as a defense that plaintiff's first allegation under the FDCPA was barred by the statute of limitations. A statute of limitations issue may be raised as an affirmative defense in a section 2-619 motion to dismiss. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 84 (1995); 735 ILCS 2-619(a)(9) (West 2014). When a defendant raises a statute of limitations defense, the plaintiff must provide sufficient facts to avoid application of the defense.

Hermitage Corp., 166 Ill. 2d at 84. The applicable statute of limitations for a claim under the FDCPA is one year. 15 U.S.C. § 1692k(d) (West 2014). In his complaint, plaintiff provides no date of occurrence for any incident upon which his claim is based. In his brief on appeal, plaintiff claims that defendants' FDCPA violations have continued for the last four years; however, the most recent specific date he alleges that a violation occurred on is February 15, 2013. Plaintiff did not file his complaint until March 6, 2015, more than a year after the most recent alleged violation he addresses. Therefore, his allegation that defendants violated the FDCPA is barred by the statute of limitations, which in turn prevents him from using the alleged violations as support for his claim of breach of fiduciary duty. See *Tregenza v. Lehman Brothers, Inc.*, 287 Ill. App. 3d 108, 110 (1997) (applying the three year statute of limitations under the Securities Law to causes of action that, while not seeking relief under the Securities Law, are reliant upon matters for which relief is granted by the Securities Law). Because the allegation is insufficiently pled and is based on a claim barred by the statute of limitations, the trial court properly found plaintiff could not rely on the allegation as a basis for the breach of a fiduciary duty claim.

¶ 74 Plaintiff's second and fourth allegations both allege that defendants failed to ensure plaintiff was served with the 30-day notice required by the Condominium Property Act (Act) (765 ILCS 605/1 *et seq.* (West 2014)) prior to filing the forcible detainer action against him. However, there is no notice requirement under the Condominium Property Act that is applicable to the prior forcible detainer action. The Act provides a condominium association with various remedies when a unit owner defaults on his obligations. 765 ILCS 605/9.2 (West 2014). Some of the available remedies have procedures that are outlined under the Act, whereas other remedies under the Act have their procedures outlined in separate

statutes. For example, the Act provides that condominium associations may "maintain an action for possession against such defaulting unit owner *** in the manner prescribed by [the Forcible Entry and Detainer Act (735 ILCS 5/9-104.1 (West 2014))]." 765 ILCS 605/9.2(a) (West 2014). This is the remedy defendants chose to pursue against plaintiff, and it defines the notice requirements that defendants needed to fulfill. To the extent that the Condominium Property Act required defendants to ensure plaintiff received notice for an eviction action, it required them to do so in the manner prescribed by the Forcible Entry and Detainer Act.

¶ 75 As a result, by referring to the Condominium Property Act, plaintiff is arguing defendants did not meet the notice requirements of the Forcible Entry and Detainer Act, a question that was already decided by this court in the prior forcible detainer action. *Courts of Northbrook Condominium Ass'n*, 2014 IL App (1st) 130418, ¶¶ 27-28. In that case, we concluded that "[plaintiff] was properly served the 30-day notice as well as the complaint and summons." *Courts of Northbrook Condominium Ass'n*, 2014 IL App (1st) 130417, ¶ 48. Plaintiff's second and fourth allegations stating otherwise are therefore barred by collateral estoppel. *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77 (2001) (collateral estoppel prevents the relitigation of issues that have already been resolved in earlier actions).

¶ 76 In his third allegation, plaintiff asserts that defendants were required to provide "an accurate account of his account with the Association" prior to filing the complaint in the forcible detainer action. He has not provided a basis for this allegation. Plaintiff's motion for a stay in the forcible detainer action claimed that defendants' bylaws require providing the unit owner with account information before bringing an action for eviction, but it is unclear if that is what he is referring to in his complaint in the instant case, as he has provided this court

with no additional information on where the alleged requirement originates or appended any applicable bylaws. It is also possible plaintiff is referring to section 9-104.1(a) of the Forcible Entry and Detainer Act, which provides that a condominium association's 30-day notice must include the amount claimed which must be paid. 735 ILCS 5/9-104.1(a) (West 2014). In either case, it appears plaintiff is arguing that defendants did not follow proper procedures before filing the complaint in the forcible detainer action. To the extent that this is considered a jurisdictional issue, plaintiff did not raise the alleged jurisdictional requirement, or defendants' failure to satisfy it, to this court when it previously considered whether subject matter jurisdiction was properly exercised in the forcible detainer action pursuant to section 9-104.1(a), and we concluded jurisdiction was proper. *Courts of Northbrook Condominium Ass'n*, 2014 IL App (1st) 130417, ¶ 28; 735 ILCS 5/9-104.1(a) (West 2014). Thus, it is barred by both *res judicata* and collateral estoppel. *Village of Bartonville v. Lopez*, 2017 IL 120643, ¶ 49 ("*Res judicata* embraces all grounds of recovery and defenses involved and which might have been raised in the first action."); *Du Page Forklift Service*, 195 Ill. 2d at 77 (collateral estoppel prevents the relitigation of issues that have already been resolved in earlier actions).

¶ 77 Plaintiff's fifth allegation alleges that defendants "violated the terms of the Appellate Court Order of March 5, 2014[,] which granted a stay of the proceedings." This is identical to an issue he presented to this court in his appeal of the forcible detainer action. There, we held that defendants did not violate the stay order because they had evicted plaintiff before this court granted the motion to stay. *Courts of Northbrook Condominium Ass'n*, 2014 IL App (1st) 130417, ¶ 46. Plaintiff therefore is collaterally estopped from relying on an allegation in

his breach of fiduciary duty claim that has already been decided against him. *Du Page Forklift Service*, 195 Ill. 2d at 77.

¶ 78 The sixth allegation alleges that defendants filed a false police report that plaintiff was trespassing "on his own property." In order for this claim to succeed, it would require a trial court finding that plaintiff was not trespassing on the property and that he was entitled to possession at that time. Both of these questions have already been decided against him in prior appellate decisions. As noted, plaintiff was convicted of trespass in the criminal action brought against him for the incident, and we upheld the conviction on appeal, finding that "[plaintiff] was without lawful authority to enter the townhouse." *Bhutani*, 2016 IL App (1st) 140915-U, ¶ 22. Furthermore, as noted above, we decided in the forcible detainer action that defendants had lawfully evicted plaintiff from the townhouse and that plaintiff no longer had a right to its possession. *Courts of Northbrook Condominium Ass'n*, 2014 IL App (1st) 130417, ¶ 46. The eviction occurred on February 13, 2013, and the alleged false report did not occur until February 20, 2013. Plaintiff's sixth allegation is therefore also barred by collateral estoppel, because both issues have already been adjudicated in prior actions. *Du Page Forklift Service*, 195 Ill. 2d at 77.

¶ 79 Lastly, in his seventh allegation, plaintiff alleges defendants took possession of his personal property without reasonable or just authority. Plaintiff argues in his brief that these allegations are not barred by *res judicata* and collateral estoppel because they occurred after the eviction proceeding, and therefore his allegations should not be dismissed. However, the trial court did not dismiss this last allegation based on these doctrines, but rather based on affirmative defenses raised in support of defendants' motion to dismiss. As we explain in greater detail in the sections below, we agree with the trial court that plaintiff's last claim

was barred by defendants' affirmative defenses. Therefore, it was properly dismissed by the trial court.

¶ 80 Plaintiff also argues that none of his allegations should be barred on the basis of collateral estoppel because in our prior decision, we noted that breach of fiduciary duty was beyond the scope of the forcible entry and detainer action and therefore could not be decided in that case. While it is true that the breach of fiduciary duty claim itself was not adjudicated in the prior case, many of the underlying factual allegations plaintiff alleges in support of his breach of fiduciary duty claim were adjudicated in the forcible detainer action and trespass cases. Consequently, those factual allegations cannot serve as the bases for plaintiff's claim in this case where those factual allegations were decided against him.

¶ 81 Since the allegations barred by collateral estoppel have already been decided against plaintiff, they cannot serve as breaches establishing the second element of breach of fiduciary duty. Additionally, since none of the underlying factual allegations pleaded can serve as bases to prove defendants breached their fiduciary duty, plaintiff's complaint does not allege facts establishing the second element of breach of fiduciary duty. As a result, plaintiff's claim for breach of fiduciary duty was properly dismissed.

¶ 82 V. Conversion

¶ 83 Plaintiff next argues the trial court erred in dismissing his claim of conversion pursuant to section 2-619 of the Code. 735 ILCS 5/2-619 (West 2014). The trial court dismissed plaintiff's claim of conversion, in which he alleges conversion for defendants' failure to permit him access to retrieve his personal property and unauthorized removal of it from his prior address to "Got Junk," on the basis of abandonment.

¶ 84 A. Consideration of Documents

¶ 85 As an initial matter, plaintiff contends that the trial court improperly considered the affidavits attached to defendants' motion to dismiss when determining whether to grant the motion to dismiss, and asks this court not to take them into consideration on review. He further claims that he was not required to submit any affidavits in response to defendants' affidavits because the affidavits serve only to contradict the factual allegations in plaintiff's complaint, and courts must take as true all facts alleged in a plaintiff's complaint when considering a section 2-619 motion to dismiss.

¶ 86 Plaintiff is correct that all facts alleged in a complaint must be taken as true in considering the motion. *Ryan v. Fox Television Stations, Inc.*, 2012 IL App (1st) 120005, ¶ 11 (citing *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55). However, his reliance on this is not persuasive because defendants' affidavits assert affirmative matter. Section 2-619(a)(9) permits dismissal where the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619(a)(9) (West 2014). Affirmative matter is not a mere refutation of the plaintiff's allegations, but rather is "a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusion of material fact unsupported by allegations of specific fact contained or inferred from the complaint." *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120-21 (2008) (citing Illinois Practice § 41.7 at 332 (1989)). However, when the grounds for affirmative matter are unclear from the face of the complaint, defendants must support the motion with an affidavit. 735 ILCS 5/2-619 (West 2014). Once the defendant has presented affidavits supporting its motion to dismiss, the defendant has satisfied the burden of showing the claim should be dismissed and the burden shifts to the plaintiff to show otherwise.

Hodge, 156 Ill. 2d at 116. In order to meet this burden, the plaintiff must establish through affidavit or other proof that the asserted affirmative matter is "unfounded or requires the resolution of an essential element of material facts." *Hodge*, 156 Ill. 2d at 116. If the plaintiff fails to supply an affidavit or other proof, then the facts in the defendant's affidavits will be deemed admitted. *Hodge*, 156 Ill. 2d at 116.

¶ 87 In the case at bar, defendants' motion to dismiss asserted that plaintiff abandoned his personal property. Abandonment of property is a complete defense to an action for conversion, and must be taken into account when determining the liability of an owner of real estate for the conversion of personal property. See *Bell Leasing Brokerage, LLC v. Roger Auto Service, Inc.*, 372 Ill. App. 3d 461, 467 (2007); see also 18 Am. Jur. 2d. Conversion § 102. Defendants' defense of abandonment is thus a complete defense to plaintiff's conversion claim, and raises affirmative matter that can be the basis for dismissal under section 2-619. 735 ILCS 5/2-619(a)(9) (West 2014). Defendants therefore properly offered affidavits in support of their assertion of abandonment, satisfying their burden of showing the claim should be dismissed. Since plaintiff failed to submit any counteraffidavits or proof as to why defendants' affidavits should not be considered, the trial court did not err in taking the affidavits into consideration. For these reasons, we also consider them in our review of the motion to dismiss.

¶ 88 Plaintiff also contends that he submitted an affidavit refuting defendants' affidavits before the trial court issued its final decision, and that his affidavit should have been taken into consideration. However, the affidavit he references was filed on May 31, 2016, in response to "Got Junk's" motion to dismiss, which was after defendants' motion to dismiss had already been granted. It is within the trial court's discretion whether to consider

additional documents after it has made a decision on a motion to dismiss, and the trial court therefore did not err in refusing to consider plaintiff's affidavit. See *Hall v. DeFalco*, 178 Ill. App. 3d 408, 411 (1988) (finding it is not an abuse of discretion for a trial court to refuse to allow a plaintiff to file additional affidavits after the court has ruled on the motion to dismiss, where plaintiff had been given ample opportunity to do so). If plaintiff wished to contest the affidavits and have his affidavit taken into consideration, he should have filed it in response to defendants' motion to dismiss, not in a totally unrelated matter.

¶ 89 B. Abandonment

¶ 90 Turning to the merits of plaintiff's argument, plaintiff argues that the section 2-619 dismissal was improper because he did not abandon his personal property. The elements for a cause of action for conversion are that: (1) the plaintiff has a right to the property at issue; (2) the plaintiff has an absolute and unconditional right to the immediate possession of the property; (3) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property; and (4) the plaintiff made a demand for the return of the property. *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114 (1998); *Kovits Shifrin Nesbit, P.C. v. Rossiello*, 392 Ill. App. 3d 1059, 1063-64 (2009); *Chicago District Council of Carpenters Welfare Fund v. Gleason & Fritzshall*, 295 Ill. App. 3d 719, 722 (1998). Abandonment of property is a complete defense to an action for conversion. See *Bell Leasing Brokerage*, 372 Ill. App. 3d at 467; see also 18 Am. Jur. 2d. Conversion § 102.

¶ 91 Plaintiff first points to the September 4, 2013, order indicating that he have access to his personal property as evidence that he did not abandon that personal property. We do not find this order pertinent in our determination of whether or not there is a genuine issue of material

fact of plaintiff's abandonment of his property because plaintiff offers no evidence that the property was not abandoned.

¶ 92 Furthermore, plaintiff had ample time and opportunity to remove his personal belongings but chose not to and that is evidence of abandonment. Plaintiff was evicted in February 2013 and his personal property was not removed until April 2014. More than a year passed between plaintiff's eviction and the removal of his personal property, during which defendants' affidavits establish plaintiff was repeatedly told to remove his personal belongings and that if he did not do so the belongings would be considered abandoned. Yet, plaintiff failed to remove most of the belongings. Additionally, Jennifer O'Reilly, an attorney for defendants, averred in her affidavit that she provided plaintiff with access to the property on numerous occasions during the spring of 2013, during which plaintiff removed only a few personal items. It is clear from the affidavits that he was given access to the property and utilized those opportunities to take only a few personal items, while leaving the rest.

¶ 93 Plaintiff argues these affidavits should not be relied on because they do not specify the dates defendants allowed plaintiff access to his personal property. This argument is not persuasive. An affidavit provided by defendants' attorney, Howard Dakoff, averred that Jennifer O'Reilly contacted plaintiff immediately following the February 2013 eviction to inform him he needed to retrieve his property or it would be considered abandoned. O'Reilly's affidavit further establishes that she provided plaintiff with access to the property on multiple occasions after this correspondence, and he chose to retrieve some but not all of his property on those occasions. Even without specific dates, the affidavits establish plaintiff knew he needed to retrieve his property yet chose not to take all of it when he was given the opportunity.

¶ 94 Plaintiff also now claims he replied to a letter dated March 29, 2014, and that he twice wrote to O'Reilly asking for access to the property. However, he did not file these documents with the trial court in response to defendants' motion to dismiss, and has offered no proof or affidavits in support of these assertions. Based on the documents before us, there appears to be no genuine issue of material fact with regards to the defendants' assertion of abandonment. Defendants' uncontradicted affidavits show that plaintiff had ample time and opportunity to retrieve his personal property, but chose not to do so. We cannot say that the trial court committed error to grant the motion to dismiss based on what had been presented.

¶ 95 VI. Replevin

¶ 96 Finally, plaintiff claims that the trial court erred in granting a section 2-619 dismissal for his claim of replevin. In support of this claim, he again argues that the trial court improperly considered defendants' affidavits in making its decision to grant the dismissal and that this court should not consider the affidavits on review. However, the same analysis as above applies.

¶ 97 An action of replevin may be brought for recovery of personal property that has been wrongfully detained. 735 ILCS 5/19-101 (West 2014). The primary purpose of replevin is to test the right of possession of the property, and place the successful party in possession of the property. *S.T. Enterprises, Inc. v. Brunswick Corp.*, 57 Ill. 2d 461, 469 (1974). Replevin does not lie against one not in possession at the time the action is brought. *Huber Pontiac, Inc. v. Wells*, 59 Ill. App. 3d 14, 19 (1978) (replevin could not lie against defendant for a vehicle that he had sold and no longer had possession of); see also *Carroll v. Curry*, 392 Ill. App. 3d 511, 515 (2009) (the defendant "made no affirmative allegation that someone else possessed the ring at the commencement of the instant action"). Such a defense therefore raises

affirmative matter that can be the basis for dismissal under section 2-619. 735 ILCS 5.2-619(a)(9) (West 2014).

¶ 98 In support of their section 2-619 motion to dismiss, defendants offered an affidavit from Casey Dugan, the operation manager of "Got Junk." In the affidavit, Dugan averred that he removed plaintiff's personal property from the Avon Road address to "Got Junk's" office on March 29, 2014. Plaintiff's own complaint supports this statement. In his complaint, plaintiff alleges that defendants hired "Got Junk" and had the company confiscate his personal property. The evidence is uncontroverted that defendants had already transferred possession of plaintiff's property to "Got Junk" and no longer had possession of the property at the time plaintiff filed his complaint. Furthermore, the affidavits show plaintiff was in possession of his personal property at the time he filed his complaint. Dugan averred in his affidavit that "shortly after" he removed certain items from plaintiff's prior address, he observed plaintiff remove those same items from "Got Junk's" office.

¶ 99 Plaintiff did not file his complaint against defendants until March 6, 2015, a date at which defendants' affidavits establish defendants were no longer in possession of plaintiff's property. Based on this uncontradicted evidence, there is no genuine issue of material fact as to whether defendants were still in possession of plaintiff's personal property at the time plaintiff filed his complaint. We therefore find that the dismissal of plaintiff's action for replevin was proper.

¶ 100 VII. Return of Condominium Unit

¶ 101 As a final matter, we note that plaintiff argues in his brief that he is entitled to the return of the condominium unit subject to the prior forcible detainer action because he has since paid defendants the assessments that formed the basis of the forcible detainer action. There is

nothing in plaintiff's complaint concerning this matter. Since it was not raised in the complaint or before the trial court, we cannot consider it. See *Fischetti v. Village of Schaumburg*, 2012 IL App (1st) 111008, ¶ 11 (declining to address a theory that had not been pleaded in either the original or amended complaints); *Johnson Press of America, Inc. v. Northern Insurance Co. of New York*, 339 Ill. App. 3d 864, 874 (2003) (" 'An argument not raised in the trial court and presented for the first time on appeal is waived ***.' " (quoting *Softa Group, Inc. v. Scarsdale Development*, 260 Ill. App. 3d 450, 452 (1993)); *Kincaid v. Ames Department Stores, Inc.*, 283 Ill. App. 3d 555, 568 (1996) ("A plaintiff fixes the issues in controversy and the theories upon which recovery is sought by the allegations in her complaint.").

¶ 102 CONCLUSION

¶ 103 For the foregoing reasons, we affirm. First, that plaintiff's claim of false imprisonment was barred by the statute of limitations. Second, that plaintiff's claim of breach of fiduciary duty was barred by the doctrines of *res judicata* and collateral estoppel. Third, that the Association and Lieberman did not commit conversion by failing to return possession of the personal property to plaintiff because the property was abandoned as a matter of law. Finally, replevin may not be sought against the Association and Lieberman because the personal property is no longer in their possession. We do not have jurisdiction over the dismissal of plaintiff's claims against "Got Junk" and therefore cannot consider those claims within this appeal.

¶ 104 Affirmed.