FOURTH DIVISION
September 26, 2019

No. 1-18-1575

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANDERSEN LAW LLC and BARBARA ANDERSEN, as assignees of Debra Seger,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 09 CH 9759
3 BUILD CONSTRUCTION, LLC; TRIANON DEVELOPMENT, LLC; MOMENT'S NOTICE SERVICES, LLC; JODY LIBMAN, personally; and STEVE HARAMARAS, personally,	)	Honorable Alexander White, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE BURKE delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiffs' claims in counts I and V occurring prior to March 25, 2011, are barred by the statute of limitations. As to the surviving claims under counts I and V and the remaining claims in counts II, III, and IV, plaintiffs failed to adequately state a cause of action and complaint was properly dismissed pursuant to 735 ILCS 5/2-615 (West 2014).

¶ 2 Plaintiffs appeal the circuit court's dismissal of their amended complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure 735 ILCS 5/2-615 (West 2014) on grounds that they failed to adequately state a claim and their fraudulent conveyance claims were time-barred. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff Barbara Andersen represented Debra Seger in her lawsuit to recover wages and benefits arising out of an employment contract with defendants and judgment debtors, 3 Build Construction, LLC (3 Build) and Trianon Development, LLC (Trianon) (together, "judgment debtors"), in which Seger was to act as a general contractor for various construction projects. Seger's two-count complaint alleged breach of contract and foreclosure of a mechanic's lien against the judgment debtors, defendant Steve Haramaras, and other parties not relevant to this appeal. Following the trial, the trial court entered a judgment on January 4, 2012, finding in favor of Seger on the breach of contract claim in the amount of $218,299.62, but against Seger on the mechanic's lien claim, and also declined to find Steve Haramaras personally liable to Seger.

¶ 5 Andersen represented Seger under a contingency fee contract. Following entry of the judgment, Andersen left employment with her previous law firm. Andersen became the assignee of her former law firm's rights in the retention agreement. Andersen started her own law firm, Andersen Law (hereafter referred to jointly as plaintiffs) and continued representing Seger in post-judgment proceedings.[1] Plaintiffs filed citations to discover assets, which defendants disputed and litigated.

¶ 6 However, soon after initiating post-judgment proceedings, plaintiffs withdrew as counsel. In May 2012, plaintiffs filed a motion to withdraw as counsel for Seger and to intervene in the citation proceedings with respect to attorney fees related to the contingency fee representation of

[1] On April 17, 2012, Andersen Law filed a petition for adjudication and enforcement of its attorney lien pursuant to the Attorney Lien Act (770 ILCS 5/1 (West 2012)). Andersen Law asserted that it notified all defendants of the lien pursuant to the Act. Andersen Law argued that it was entitled to 33 1/3% of the judgment—$72,766.54—in addition to costs of litigation and further amounts related to post-judgment proceedings to collect from defendants. Andersen Law attached letters that were sent to Seger and defendants' counsel regarding her attorney lien.

Seger. The judgment debtors opposed plaintiffs' motion on grounds that plaintiffs had an attorney's lien for representation of Seger at trial, but no sums had been collected on the judgment and plaintiffs had no cognizable interest in the supplemental proceedings of examination of the judgment debtors because Seger's judgment was against defendants, not plaintiffs.

¶ 7 The trial court granted plaintiffs' motion to withdraw and to intervene. On June 26, 2012, the trial court also granted plaintiffs a judicial lien "on future litigation brought by Debra Seger."

¶ 8 In addition, plaintiffs moved for turnover of the judgment, requesting that the trial court order Seger to turn over the judgment to plaintiffs so that they could pursue collection efforts, arguing that Seger and her replacement counsel failed to pursue such efforts at all or with competence and in good faith. Plaintiffs also moved for assignment of Seger's rights to a prospective fraudulent conveyance action against defendants, arguing that defendants had dissipated assets. In response, Seger asserted that plaintiffs lacked standing as they failed to demonstrate that they had any right to be assigned Seger's rights in a potential fraudulent conveyance action or that they had any real interest at stake in the action or outcome. In reply, plaintiffs argued that the court had already acknowledged they had an attorney lien related to attorney fees and they were granted a judicial lien relative to future litigation.

¶ 9 Over the course of several years after the judgment was entered in 2012 against the judgment debtors, post-judgment proceedings continued in the form of various motions. For example, Seger filed a motion to vacate the order granting plaintiffs a judicial lien; Seger filed a malpractice action against plaintiffs, which was later bifurcated; and plaintiffs filed several motions to disqualify defendants' law firm. The case was continued numerous times and Seger changed counsel on several occasions. Additionally, the trial court granted another law firm and former counsel to Seger a turnover and assignment of Seger's judgment, and that law firm retained plaintiffs to represent them in the proceedings.[2] Plaintiffs continued issuing citations to discover assets against defendants and third parties, to which defendants filed objections and motions to quash.

¶ 10 However, upon renewed motion by plaintiffs, the trial court entered an order on March 16, 2015, again granting plaintiffs an assignment and turnover of the interest in the judgment obtained for Seger and also granted plaintiffs leave to file a fraudulent conveyance action.[3]

¶ 11 On March 24, 2015, plaintiffs, as assignees of Seger, filed a post-judgment complaint for fraudulent conveyance under the Illinois Uniform Fraudulent Transfer Act (740 ILCS 160/1, *et seq.* (West 2014)) against 3 Build, Trianon, Moment's Notice Services, LLC, (Moment's Notice), Jody Libman, Steve Haramaras, Kristin Haramaras (Steve Haramaras's wife), Gus Haramaras (Steve Haramaras's brother), 2724 Mildred LLC, 3741 Lakewood LLC, 3500 Lincoln LLC, and 1770 Wilson LLC (collectively, the real estate companies). Plaintiffs sought recovery of one-third of the $218,299.62, judgment that Seger obtained against 3 Build and Trianon. Plaintiffs alleged that Steve Haramaras and Jody Libman used the judgment debtors to provide contracting services without compensation, used their bank accounts for personal matters and to fund the real estate companies, and engaged in "insider" transfers of the real estate owned by the real estate companies to avoid paying the judgment. Plaintiffs alleged that Steven Haramaras and Jody Libman formed Moment's Notice after Seger's judgment was obtained to replace 3 Build and divert business to it and to avoid paying the judgment.

---

[2] It appears that law firm which was granted the assignment and turnover settled with Seger regarding the amount it was owed in attorney fees or otherwise satisfied its claim outside of these proceedings.

[3] We observe that after Seger's substituted counsel withdrew, Seger failed to file a *pro se* appearance by the deadline set by the trial court. Seger was stricken from service list after plaintiffs filed the amended complaint and defendants filed the amended motion to dismiss because she failed to join the supplemental counts or participate in the litigation after withdrawal of her counsel.

¶ 12 Defendants (3 Build, Trianon, Steve and Kristen Haramaras, Libman, Moment's Notice, and the real estate companies) filed a motion to dismiss pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2014)). Defendants asserted that plaintiffs' claims were barred by the four-year statute of limitations applicable to fraudulent transfer actions (740 ILCS 160/10 (West 2012)), and because the supplemental complaint failed to state a claim.[4]

¶ 13 Plaintiffs filed a response to the motion to dismiss and also filed a motion to strike the motion to dismiss for failure to comply with section 2-619.1 and a motion to strike the motion to dismiss for want of an affidavit relating to section 2-619 arguments. Plaintiffs asserted that defendants combined their legal analysis and arguments for sections 2-615 and 2-619 and failed to file a verified motion or provide an affidavit to support the motion to dismiss.

¶ 14 The trial court issued a written opinion granting plaintiffs' motions to strike on grounds that defendants failed to comply with section 2-619.1 in their analysis and for lack of affidavit.

Plaintiffs filed a motion for clarification of the trial court's order and to amend their fraudulent conveyance complaint. Plaintiffs also filed a motion for assignment of any fraudulent conveyance actions that the judgment debtors may possess against other defendants or third parties. Additionally, plaintiffs filed a motion to disqualify defendants' law firm, which the trial court denied. The trial court also denied plaintiffs' motion for an assignment of the judgment debtors' potential causes of action against other defendants or third parties because section 2-1402(c)(1) (735 ILCS 5/2-1402 (West 2014)) did not allow in supplemental proceedings the assignment to creditors of putative choses in action that the debtor/defendant may have against other parties. The court also granted plaintiffs leave to file an amended complaint.

---

[4] We note that Gus Haramaras also filed a motion to dismiss and plaintiffs' claim against him was later bifurcated and transferred to the municipal division.

¶ 15 Plaintiffs filed a first amended verified post-judgment complaint for fraudulent conveyance, this time against the judgment debtors (Trianon and 3 Build), Moment's Notice, and Jody Libman and Steve Haramaras, personally. As before, plaintiffs alleged that the trial court granted plaintiffs a judicial lien and an assignment and turnover of Seger's interest in and right to file these supplementary proceedings. Plaintiffs alleged that Seger's judgment, with interest, totaled $332,644.96, and the judgment debtors were indebted to plaintiffs in the amount of $110,881.65 for attorney fees. Plaintiffs alleged that Steve Haramaras was a manager and a member of 3 Build and Trianon, and Jody Libman was a member of Trianon. Plaintiffs alleged that judgment debtors' counsel assisted Steve Haramaras and Jody Libman in transferring assets from the judgment debtors in an effort to defraud their creditors. Specifically, in count I of the amended complaint, plaintiffs asserted a claim of fraud in the law against Jody Libman and Steve Haramaras, personally, with respect to Trianon's bank accounts pursuant to section 5(a)(2) of the Illinois Fraudulent Transfer Act (740 ILCS 160/5(a)(2) (West 2014)). Plaintiffs cited 12 transactions totaling $46,285.06, that occurred between February 2008 and August 2011 that plaintiffs claimed were fraudulent because Trianon failed to keep sufficient funds in its bank accounts to meet their contractual obligations to Seger, the transactions lacked adequate consideration, and the transfers were made when the judgment debt was due and owing.

¶ 16 In count II, plaintiffs alleged fraudulent conveyance under section 6(a) of the Act (740 ILCS 160/6(a) (West 2014)) against Moment's Notice. Plaintiffs alleged that Trianon and 3 Build were insolvent at the time of Seger's judgment and Moment's Notice was formed in order to defraud creditors by diverting post-judgment business opportunities away from the judgment debtors. Relatedly, in count III, plaintiffs brought a claim of civil conspiracy of fraudulent conveyance against Steve Haramaras and Jody Libman, personally, in that they created

Moment's Notice and used it to defraud Seger and plaintiffs by diverting money and construction services to it. In count IV, plaintiffs asserted a claim of successor liability against Moment's Notice as successor to the judgment debtors.

¶ 17 Finally, in count V of the amended complaint, plaintiffs alleged fraud under section 5(a)(1) of the Act (740 ILCS 160/5(a)(1) (West 2014)) against Steve Haramaras and Jody Libman, personally, with respect to 3 Build's bank accounts. Plaintiffs alleged that Steve Haramaras and Jody Libman dissipated 3 Build's bank account leading up to and after the judgment in an effort to avoid paying Seger's judgment. Plaintiffs alleged that multiple transfers occurred with the intent to defraud that had no relationship to 3 Build, such as usage of 3 Build's account by other companies, payments to or on behalf of Jody Libman, and suspected personal withdrawals. Plaintiffs set forth a three-page list of suspect transactions ranging in date from August 2010 to January 2012 for items such as insurance, auto expenses, payroll, unnamed debts and transfers, car loan from Gus Haramaras, utility payments, and insurance and credit card payments for Jody Libman.

¶ 18 On February 13, 2018, the judgment debtors, Steve Haramaras, Jody Libman, and Moment's Notice filed a motion to dismiss and then an amended motion to dismiss the first amended complaint pursuant to 2-615 of the Code. 735 ILCS 5/2-615 (West 2016). Defendants asserted that count I failed to state a cause of action because most of the transfers occurred more than four years before plaintiffs filed the initial complaint (March 25, 2015) and thus were barred by the statute of limitations (740 ILCS 160/10(b) (West 2016)), leaving only three transfers: a May 2011 transfer to Cole Taylor Bank for $629.32; a May 2011 transfer to Nicholas Kotos for $1,687.50; and an August 2011 transfer to Steve Haramaras for $1,556.99. Further, defendants asserted that count I failed to state a cause of action under the Act because Steve Haramaras and

Jody Libman and other third parties involved in the alleged fraudulent transfers were not the actual judgment debtors under the judgment obtained by Seger. As to count II, defendants argued that Moment's Notice was not a judgment debtor of Seger's judgment and thus the money it received for services performed did not constitute assets of the judgment debtors. Defendants asserted that count III similarly failed to state a cause of action because it was premised on count II and because the Act does not impose personal liability on an individual for corporate actions. Defendants argued count IV failed to state a cause of action because plaintiffs failed to allege any facts showing Moment's Notice was a successor to the judgment debtors, *i.e.*, that Moment's Notice purchased Trianon's or 3 Build's assets or stock, assumed their liabilities, or was a continuation of their corporate entities. Lastly, defendants asserted the claims in count V were barred by the statute of limitations as in count I, and that plaintiffs failed to state a cause of action because plaintiffs sought to hold Jody Libman and Steve Haramaras personally liable, but they are not judgment debtors of Seger's judgment and the Act only encompasses transfers from judgment debtors to third parties and authorizes recovery of the asset from the first recipient of the transfer.

¶ 19 Plaintiffs responded that a statute of limitations argument must be raised in a section 2-619 motion supported by affidavit. Plaintiffs further asserted that the claims were not time-barred because, due to defendants' delay in tendering bank account records, the claims were saved by the discovery rule and the doctrine of fraudulent concealment, which presented questions of fact that required an evidentiary hearing. Plaintiffs argued that as to count II, the assets transferred to Moment's Notice were future corporate opportunities of the judgment debtors. Plaintiffs asserted that their claims were sufficiently pleaded because it was obvious that the principals of the judgment debtors—Jody Libman and Steve Haramaras—emptied the banks accounts of the judgment debtors for personal payments or payments to other parties and incorporated a new company, Moment's Notice, to replace the judgment debtors for purposes of conducting the same business.

¶ 20 Defendants replied that their statute of limitations arguments were properly raised under section 2-615 and no affidavit was required because it was apparent from the face of the amended complaint itself that the claims were time-barred. Defendants argued that the discovery rule did not apply to the "fraud in the law" claims and plaintiffs' complaint failed to adequately plead any affirmative acts to show fraudulent concealment. Defendants argued that count I and V should be dismissed because plaintiffs improperly sought to impose personal liability on non-judgment debtors Jody Libman and Steve Haramaras for transfers to third parties, but not from those third-party transferees themselves. Defendants argued that all claims should be dismissed in counts I and V, other than those challenging transfers directly to Jody Libman and Steve Haramaras that were not barred by the statute of limitations. As to count II, defendants argued that future prospective corporate opportunities cannot constitute an asset, and thus both count II and III must fail. Defendants also asserted that plaintiffs failed to state a claim of successor liability in count IV.

¶ 21 In an extensive written order, the trial court granted defendants' section 2-615 motion to dismiss on June 27, 2018. Andersen filed a timely notice of appeal.

¶ 22 II. ANALYSIS

¶ 23 A. Attorneys Lien

¶ 24 Before addressing plaintiffs' contentions on appeal regarding the motion to dismiss, defendants raise a new issue, namely, that plaintiffs lack authority to file a fraudulent conveyance action against them. Defendants argue that plaintiffs are not a "creditor" under the

Act because they do not possess a claim against defendants, plaintiffs never perfected an attorney fees lien and the lien cannot attach until some recovery is made, the trial court's grant of a judicial lien on future litigation by Seger was erroneous and insufficient to give plaintiffs authority to pursue the action, and an attorney cannot compel the continuation of litigation merely to protect attorney fee lien rights.

¶ 25 Plaintiffs respond that defendants failed to raise this argument in the lower court and cannot raise it for the first time on appeal.

¶ 26 We agree with plaintiffs. In their motion to dismiss in the trial court, defendants challenged plaintiffs' complaint based on statute of limitations and failure to state a claim, but defendants did not present this new challenge which essentially asserts that plaintiffs lack standing to bring the fraudulent conveyance claim. As a result, they have forfeited these issues on appeal. *Countrywide Home Loans Servicing, LP v. Clark*, 2015 IL App (1st) 133149, ¶ 38. "Questions not raised at trial are deemed waived and may not be raised for the first time on appeal." *Achs v. Maddox*, 175 Ill. App. 3d 989, 994 (1988). "[L]ack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court." *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508-09 (1988) (observing that "the rule that an appellee may defend a judgment on review by raising an issue not previously ruled upon by the trial court if the necessary factual basis for the determination of such a point is contained in the record" was inapplicable to the appellee's standing argument raised for the first time on appeal).

¶ 27 Regardless of waiver, we observe that the record does not support defendants' claim raised for the first time on appeal that plaintiffs failed to file the proper notifications regarding the attorney fees lien. The record reveals that in plaintiffs' petition for adjudication and enforcement of the attorney fees lien, plaintiffs attached the notification letters that they sent to Seger and defendants' counsel regarding the attorney fees lien. See 770 ILCS 5/1 (West 2014).

¶ 28 Moreover, the case cited by defendants in support of their argument that plaintiffs may not continue litigation to protect attorney fee lien rights involved circumstances where the plaintiff voluntarily dismissed the complaint before a judgment was rendered and the attorney attempted to continue litigating in order to protect the attorney's lien rights under the contingency fee agreement. *Feiertag v. Reichmann*, 21 Ill. App. 2d 215, 220 (1959). In contrast, here, Seger's claim had already proceeded to judgment—Andersen obtained a favorable judgment for Seger at trial. The other case cited by defendants presented the issue of whether the tort of retaliatory discharge may be applied to the attorney/client relationship, and is thus inapplicable. *Herbster v. Northern American Company for Life and Health Insurance*, 150 Ill. App. 3d 21, 28 (1986).

¶ 29 The Attorney's Lien Act creates "a lien in favor of the lawyer on the proceeds of the litigation or its settlement." *Anastos v. O'Brien*, 3 Ill. App. 3d 1015, 1020 (1972). "Attorneys at law shall have a lien upon all claims, demands and causes of action, *** which may be placed in their hands by their clients for suit or collection, or upon which suit or action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients[.]" 770 ILCS 5/1 (West 2014). Our courts recognize that "[a] contingent fee agreement *** is not an assignment to the lawyer of any interest in the subject matter of the litigation" and thus a plaintiff can dismiss his lawsuit "and the attorney has no cause of action against the defendant absent proof of settlement with the client." *Anastos v. O'Brien*, 3 Ill. App. 3d 1015, 1020-21 (1972). A lawyer cannot compel continuation of litigation on the basis of his lien rights where his client desires to settle. *Id.* In *Anastos*, the contingency fee agreement vested the attorney with the right to be paid "from the proceeds of the litigation" and for this he "had to look to" the defendant or to his former clients. *Id.* at 1021. See *Achs v. Maddox*, 175 Ill. App. 3d 989 (1988) (the language of the contingency fee agreement gave the attorneys an interest in the proceeds of the litigation as it stated that the fee was payable as a percentage of "whatever may be recovered"). Here, in contrast, Seger's claim proceeded to judgment and she was not attempting to settle.

¶ 30 Moreover, we also note that the trial court in the present case granted plaintiffs a judicial lien "on future litigation brought by Debra Seger" and a turnover of Seger's interest in the judgment and an assignment of Seger's rights to a prospective fraudulent conveyance action against defendants.[5] In plaintiffs' complaint, they alleged that the trial court granted plaintiffs a judicial lien and an assignment and turnover of Seger's interest in and right to file the fraudulent conveyance supplementary proceedings.

¶ 31 B. Motion to Dismiss

¶ 32 On appeal, plaintiffs contend that the trial court erred in granting the motion to dismiss because plaintiffs' claims were not time-barred and they were sufficiently pleaded.

¶ 33 This court reviews motions to dismiss under section 2-615 of the Code *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). The question presented by a section 2-615 motion is "whether the allegations of the complaint, when taken as true and viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009). The court may consider only the allegations of the complaint and any exhibits attached thereto. *Lissner v.*

[5] We observe that no appeal was taken from the trial court's order granting plaintiffs a judicial lien "on future litigation" by Seger, or from the trial court's subsequent orders granting plaintiffs' motions for turnover and assignment of Seger's rights to a fraudulent conveyance action.

Michael Reese Hospital & Medical Center, 182 Ill. App. 3d 196, 206 (1989). "[F]actual assertions contained in the exhibits which are inconsistent with the allegations of the complaint negate such allegations." *Id.* "Illinois is a fact-pleading jurisdiction. A plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted." *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997). "Mere conclusions of law or facts unsupported by specific factual allegations in a complaint are insufficient to withstand a section 2-615 motion to dismiss." *Ranjha v. BJBP Properties, Inc.*, 2013 IL App (1st) 122155, ¶ 9. However, "[a] cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover." *Vernon*, 179 Ill. 2d at 344.

¶ 34 On appeal, "this court reviews the judgment, not the reasoning, of the trial court, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24.

¶ 35 Plaintiffs' fraudulent transfer complaint was filed during supplementary proceedings to collect on Seger's judgment. "Supplementary proceedings may only be initiated after a judgment has been entered. Governed by section 2-1402 of the Illinois Code of Civil Procedure, they are designed to assist a judgment creditor to discover assets of the judgment debtor in order to satisfy that judgment." *Pyshos v. Heart-Land Development Co.*, 258 Ill. App. 3d 618, 622-23 (1994). Section 2-1402 "allows a judgment creditor to conduct an examination of a judgment debtor or any third party who might hold the assets of the judgment debtor." *Id.* To proceed against a third party, there must be some evidence that "the third party possessed assets of the judgment debtor." *Id.* If so, the trial court may order that the third party deliver those assets to satisfy the judgment. *Id.*

¶ 36 "The purpose of the Uniform Fraudulent Transfer Act is to prevent fraudulent transfers of property by a debtor who intends to defraud creditors by placing assets beyond their reach." (Internal quotation marks omitted.) *Zurich American Insurance Co. v. Personnel Staffing Group, LLC*, 2018 IL App (1st) 172281, ¶ 18.

¶ 37 1. Statute of Limitations

¶ 38 Plaintiffs contend that a section 2-615 motion to dismiss may not be granted on statute of limitations grounds because it involves issues of fact requiring an evidentiary hearing or trial. Plaintiffs argue that, in ruling on the motion to dismiss that is the subject of this appeal, the trial court disregarded its prior ruling on defendants' first motion to dismiss plaintiffs' original complaint. Plaintiffs assert that the trial court previously held that plaintiffs' claims were not time-barred and that defendants' arguments should be presented in a verified fashion and required presentment in a proper section 2-619.1 hybrid motion.

¶ 39 We disagree with plaintiffs' characterization of the trial court's ruling on the defendants' first motion to dismiss. The trial court simply granted plaintiffs' motion to strike defendants' first motion to dismiss on grounds that the motion was an improper hybrid motion and required an affidavit; the court did not hold that plaintiffs' claims were not time-barred.

¶ 40 Further, the statute of limitations is "an affirmative defense appropriate only to motions to dismiss pursuant to section 2-619; however, where it appears from the face of the complaint that the statute of limitations has run, such a defense can also be raised in a section 2-615 motion to dismiss." *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 456 (2006) (citing *Lissner v. Michael Reese Hospital & Medical Center*, 182 Ill. App. 3d 196, 206 (1989)). For example, if a plaintiffs' "complaint essentially conceded that the statutes of limitations and repose had passed, plaintiffs had the burden of pleading fraudulent concealment to overcome those limits." *Id.* at 456. Where a trial court correctly concludes that a claim of fraudulent concealment is not adequately pled, dismissal is "appropriate on the basis of timeliness under either section 2-615 or section 2-619." *Id.*

¶ 41 Consistent with Illinois case law, the trial court here explained in its ruling on defendants' second motion to dismiss that it may grant a section 2-615 motion to dismiss on statute of limitations grounds where it appears from the face of the complaint that the time period has expired. *Cangemi*, 364 Ill. App. 3d at 456; *Lissner*, 182 Ill. App. 3d at 206. We find no error in that regard. Accordingly, while the trial court here had the legal authority to grant the section 2-615 motion to dismiss, we must analyze whether the trial court correctly determined that plaintiffs' claims were time-barred based on the face of the complaint itself.

¶ 42 The statute of limitations provision of the Act provides, in pertinent part, as follows:

> "A cause of action with respect to a fraudulent transfer or obligation under this Act is extinguished unless action is brought:
>
> (a) under paragraph (1) of subsection (a) of Section 5, within 4 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;
>
> (b) under paragraph (2) of subsection (a) of Section 5 or subsection (a) of Section 6, within 4 years after the transfer was made or the obligation was incurred[.]" 740 ILCS 160/10 (West 2014).

¶ 43 It is undisputed that plaintiffs filed their initial complaint on March 25, 2015. Accordingly, any challenged transactions which occurred more than four years prior to that date, or March 25, 2011, are barred by the statute of limitations.

¶ 44 Turning to count I, plaintiffs alleged that Jody Libman and Steve Haramaras, as individuals, committed fraud in the law under section 5(a)(2) of the Act in that they engaged Seger to perform work without adequate funds to pay her and they transferred funds from Trianon's bank account to themselves or third parties for no or inadequate consideration while the judgment debt was due and owing. As such, any alleged fraudulent transfer that was made more than four years before March 25, 2015, is barred by section 10(b) of the Act. 740 ILCS 160/10(b) (West 2014). Plaintiffs specifically cited 12 transactions in their amended complaint. Of these cited transfers, all but three occurred before March 25, 2011: (1) May 2011 transfer to Cole Taylor Bank ($629.32); (2) May 2011 transfer to Nicholas Kotos ($1,687.50); and (3) August 2011 transfer to Steve Haramaras ($1,556.99). It is therefore apparent on the face of the amended complaint that the other transfers occurring before March 25, 2011, are barred by the statute of limitations.

¶ 45 Turning to count V, plaintiffs alleged that under section 5(a)(1) that Jody Libman and Steve Haramaras, personally, committed fraud in fact with respect to 3 Build's bank accounts by making numerous transfers in order to defraud Seger and plaintiffs. Plaintiffs' complaint sets forth a three-page list of allegedly fraudulent transactions dating from August 2010 to January 2012. As with count I, it is apparent from the face of the complaint that, based on the date of these transactions, section 10(a) of the Act applies to bar any fraudulent claims with respect to transfers made before March 25, 2011. However, this nevertheless leaves in place numerous claims on plaintiffs' list in the amended complaint that relate to transfers that occurred after that date. 740 ILCS 160/10(a) (West 2014).

¶ 46 In its final ruling at the end of its written order, the trial court found *all* counts must be dismissed on statute of limitations grounds. This was despite the trial court observing earlier in its written order that "the *majority*" of the alleged fraudulent transfers happened outside the limitations period, and despite the fact that defendants argued that only claims in counts I and V relating to transfers that occurred outside the limitations period were subject to dismissal on statute of limitations grounds. The trial court's ruling was erroneous in that regard because it dismissed claims that were not time-barred by section 10. We note that defendants did not contend that the statute of limitations argument applied to counts II through IV. At any rate, we would reject such a contention because the claims set forth in counts II, III, and IV involve transactions which fell within the four-year period and thus were not barred by the statute of limitations.

¶ 47 In an attempt to salvage the time-barred claims, plaintiffs contend that the statute of limitations should begin to run at the date of Seger's 2012 judgment, and not at the date of the challenged transfers. Plaintiffs cite federal cases to support their assertion, including an unreported case from the United States District Court for the Northern District of Illinois involving claims of fraudulent conveyance against defendants' counsel, and a Seventh Circuit Court of Appeals case. See *EA Group AG v. Flex N Gate Corp.*, 740 F.3d 411, 417 (7 Cir. 2014).

¶ 48 We disagree with plaintiffs' contention in light of the language of section 10 of the Act, which states that a fraudulent transfer action must be brought within 4 years "after the transfer was made." 740 ILCS 160/10(a) (West 2014). Interpreting this provision, our court held that "the clear and unambiguous wording of the Act demonstrates [that] the four-year limitation period begins to run on the date the challenged transfer was made. The explicit language of section 10(a) defeats any construction that the limitation period runs from the entry of judgment." *Levy v. Markal Sales Corp.*, 311 Ill. App. 3d 552, 555 (2000). Similarly, the court in *Salisbury v. Majesky*, 352 Ill. App. 3d 1188, 1191 (2004), approved of the *Levy* court's determination that the clock starts to run on the date of the transfer under section 10(a) of the Act. Considering this Illinois precedent on an Illinois statute, we decline to look to federal jurisdictions for guidance to address plaintiffs' argument regarding the proper interpretation of section 10 and commencement of the limitations period. *Graham v. Commonwealth Edison Co.*, 318 Ill. App. 3d 736, 744 (2000).

¶ 49 Plaintiffs also argue that the trial court erred in dismissing their claims in counts I and V without considering application of the discovery rule. Subsection 10(a) of the Act provides that an otherwise time-barred claim is still viable if it is brought "within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." 740 ILCS 160/10(a) (West 2014). This discovery rule provision only appears in subsection 10(a), which applies only to claims under section 5(a)(1) of the Act. It does not appear in subsection 10(b), which deals with claims under subsections 5(a)(2) and 6(a) of the Act. Accordingly, the discovery rule does not apply to save any of plaintiffs' time-barred "fraud in the law" claims in count I which were brought under subsection 5(a)(2).

¶ 50 Turning to the application of the discovery rule to plaintiffs' time-barred section 5(a)(1) claims in count V, plaintiffs contend that they did not discover improper asset transfers until Seger's judgment was obtained against the judgment debtors in 2012 and that plaintiffs immediately attempted to engage in asset discovery after the judgment was rendered. Plaintiffs contend that they were prevented from discovering fraudulent transactions due to the trial court's rulings on citations, by defendants' objections, and by defense counsel's unethical or criminal conduct in engaging in improper asset protection schemes for themselves and their clients. Plaintiffs assert that they did not receive the judgment debtors' bank account information until December 2012. Plaintiffs further contend that defendants cite to matters outside of the complaint and therefore the court improperly granted the motion to dismiss under section 2-615, as it should have been brought as a hybrid motion under both 2-615 and 2-619 and required an evidentiary hearing.

¶ 51 "[T]he second clause of section 10 operates as the discovery rule does, postponing the start of the limitations period until the injured party knows or should know it has been injured and knows or should know that the injury was wrongly caused, and granting the injured party one year from that time to file its claim." *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶ 55. "It is at that point that the injured person assumes the burden of inquir[ing] further as to the existence of a cause of action and to bring any such actions within the limitations period." (Internal quotation marks omitted). *Id.* ¶ 51. "Discovering whether an injury was 'wrongfully caused' means the injured party must have (1) sufficient information that its injury was caused by the actions of another and (2) sufficient information 'to spark inquiry in a reasonable person as to whether the conduct of the party who caused [the] injury might be legally actionable.' " *Id.* ¶ 52 (quoting *Mitsias v. I-Flow Corp.*, 2011 IL App (1st) 101126, ¶ 22).

¶ 52 As to application of the discovery rule to plaintiffs' claims in count V brought under subsection 5(a)(1), it is plaintiff's burden to plead sufficient facts to support the cause of action asserted (*Vernon*, 179 Ill. 2d at 344), and mere conclusions of law or statements of facts unsupported by specific factual allegations are insufficient to withstand a section 2-615 motion to dismiss (*Ranjha*, 2013 IL App (1st) 122155, ¶ 9). Plaintiffs' complaint on its face contains vague references to unethical conduct by defendants' attorneys, but does not state sufficient specific facts to invoke application of the discovery rule as to their time-barred claims involving the numerous transactions listed in count V. Further, by plaintiffs' own admission, they received bank account records in December 2012 and suspected fraud early on and encouraged Seger to pursue a fraudulent conveyance action, but plaintiffs did not file the action until March 2015.

¶ 53 Considering the three-year delay between the 2012 disclosures and the filing of the 2015 initial complaint for fraudulent conveyance, plaintiffs knew or should have known of a potential cause of action well before the one-year discovery grace period. *Workforce Solutions*, 2012 IL App (1st) 111410, ¶ 55. Plaintiffs "should have reasonably known, at the very least, that a possible cause of action may have existed for fraudulent transfer" and investigated further. (Internal quotation marks omitted.) *Salisbury v. Majesky*, 352 Ill. App. 3d 1188, 1192 (2004) In *Salisbury*, the court found the fraudulent transfer complaint was properly dismissed on statute of limitations grounds where the plaintiff had reason to be "suspicious of the defendants' financial activity and on notice that those suspicions were potentially justified," but waited to file suit until two years after he received a judgment against defendant for battery and three years after deposition in which the defendant testified about transferring money and title to his house around the time of the incident. *Id.* As the *Salisbury* court observed, "[a]lthough noting the possibility of needless litigation, the *Levy* court found that the limitations provision clearly required that in certain situations a creditor must initiate an action *before* procuring a judgment in order to preserve a fraudulent transfer claim. [Citation.] While we are also cognizant of the potential for needless litigation under the statute as written, we find the *Levy* construction to be correct." *Salisbury*, 352 Ill. App. 3d at 1191. See *Zurich American Insurance Co. v. Personnel Staffing Group, LLC*, 2018 IL App (1st) 172281, ¶ 18 ("[a] 'claim' under the Act may be maintained even though 'contingent' and not yet reduced to judgment.").

¶ 54 In a related vein, plaintiffs argue that dismissal was improper under the doctrines of fraudulent concealment and equitable tolling. Plaintiffs contend that they were prevented from promptly filing the fraudulent conveyance complaint because Seger did not obtain her judgment until January 2012 and plaintiffs did not obtain Trianon's bank records until December 2012. Plaintiffs assert that defendants and their counsel engaged in dilatory conduct by raising "objection after objection" to discovery and citations to discover assets, and plaintiffs were forced to follow "time-wasting" briefing schedules regarding the objections. Plaintiffs argue that the trial court's orders prevented them from discovering fraudulent transfers and denied other types of discovery and citations to third parties. Plaintiffs again assert that the trial court should have conducted an evidentiary hearing.

¶ 55 Defendants respond that neither the amended complaint nor the record provides any basis for invoking fraudulent concealment or equitable tolling. Defendants contend that plaintiffs were delayed by their own fights with Seger and Seger's new attorneys and that the delay in filing was due not to lack of knowledge, but to plaintiffs waiting for Seger to conduct discovery citations and file the claim for fraudulent conveyance. Defendants maintain that plaintiffs' knowledge of the claim is evident from their own admissions that plaintiffs possessed bank records prior to plaintiffs' 2012 withdrawal from representation of Seger and plaintiffs advised Seger and her replacement counsel to file a fraudulent conveyance action. Defendants argue that plaintiffs merely make specious attacks on defense counsel, mischaracterize the record, and fail to cite legal authority or the record for support.

¶ 56 Under section 13-215 of the Code, "if a defendant has 'fraudulently concealed' the existence of a cause of action, the injured party has five years within which to bring suit after he discovers the cause of action." *Smith v. Cook County Hospital*, 164 Ill. App. 3d 857, 862 (1987). Fraudulent concealment "must consist of affirmative acts or representations which are calculated to lull or induce a claimant into delaying filing of his claim, or to prevent a claimant from discovering his claim. Mere silence on the part of the defendant and failure by the claimant to learn of the cause of action are not enough." *Id.* Section 13-215 will not toll the statute of limitations period where "the claimant discovers the fraudulent concealment, or should have discovered it through ordinary diligence, and a reasonable time remains within the remaining limitations period." *Smith*, 164 Ill. App. 3d at 862.

¶ 57 Equitable tolling prohibits a defendant from asserting the statute of limitations as a defense if "the plaintiff's failure to act within the statutory period results from reasonable reliance on the defendant's conduct or representations." *Brummel v. Grossman*, 2018 IL App (1st) 162540, ¶ 36. The party claiming estoppel bears the burden of demonstrating that the other party misrepresented/concealed material facts and knew they were untrue, the party claiming estoppel did not know the representations were untrue and reasonably relied upon them, the other party intended or expected the representations to be acted upon, and the party claiming estoppel suffered prejudice as a result. *Id.*

¶ 58 In reviewing the amended complaint, we conclude that plaintiffs have failed to sufficiently plead any affirmative acts or misrepresentations by defendants that were calculated to conceal a claim of fraudulent transfer or induce plaintiffs from filing a claim. As stated, *supra*, "plaintiffs had the burden of pleading fraudulent concealment to overcome those limits." *Cangemi*, 364 Ill. App. 3d at 456. "A plaintiff must plead and prove that the defendant made misrepresentations or performed acts which were known to be false, with the intent to deceive the plaintiff, and upon which the plaintiff detrimentally relied." *Orlak v. Loyola University Health Systems*, 228 Ill. 2d 1, 18 (2007). Accordingly, because the trial court "was correct in finding that fraudulent concealment was not adequately pled," dismissal was appropriate under section 2-615 based on the statute of limitations. *Cangemi*, 364 Ill. App. 3d at 456. For the same reason, we decline to apply equitable tolling, as plaintiffs rely on the same arguments and similarly failed to carry the burden of pleading facts sufficient to support equitable tolling. *Brummel*, 2018 IL App (1st) 162540, ¶ 36. Plaintiffs' allegations did not show that their failure to file the claim within the statutory period was due to reasonable reliance on any conduct or representations by defendants. Indeed, the fact that plaintiffs urged Seger to file a fraudulent concealment action demonstrates that plaintiffs had knowledge of the potential basis for such a claim. Nevertheless, plaintiffs did not file the fraudulent concealment complaint until March 2015, three years after judgment was obtained against the judgment debtors. Plaintiffs point to defendants' objections to citations to discover assets, but plaintiffs have not shown that the objections were in bad faith. Plaintiffs assert that defendants and defense counsel have engaged in dilatory conduct, but plaintiffs' complaint, at most, contains a general statement that defense counsel assisted Jody Libman and Steve Haramaras in transferring assets to defraud creditors and was personally defending fraud claims in an unrelated case.

¶ 59 Moreover, Seger's opposition to plaintiffs' actions and the trial court's rulings and orders regarding discovery, citations, and briefing schedules were not calculated to conceal, nor can they constitute affirmative acts or misrepresentations by *defendants*, and thus cannot form the basis of fraudulent concealment by defendants. "[T]he fraudulent concealment of a cause of action by someone other than the defendant may toll the limitations period only where the person fraudulently concealing the cause of action is in privity with or an agent of the defendant." *Cangemi*, 364 Ill. App. 3d at 459.

¶ 60 Plaintiffs also contend that the trial court prevented or delayed them from discovering assets and filing the complaint under section 13-216 of the Code (735 ILCS 5/13-216 (West

2014))[6] because it sustained defendants' objections to asset discovery and allowed defendants to stall the process. However, plaintiffs similarly failed to plead as much in their amended complaint and, notably, the trial court never stayed commencement of plaintiffs' fraudulent concealment action.

¶ 61 2. Sufficiency of Plaintiffs' Claims

¶ 62 We next address plaintiffs' contention on appeal that the trial court erred in granting the motion to dismiss on grounds that they failed to sufficiently state a claim with regard to all counts.[7]

¶ 63 a. Counts I and V

¶ 64 To state a claim under section 5(a)(1) and (2) of the Act, plaintiffs had to show:

> "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

[6] Section 13-216 provides: "When the commencement of an action is stayed by injunction, order of a court, or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." 735 ILCS 5/13-216 (West 2014).

[7] We observe that while both parties state that the trial court granted the motion to dismiss on two grounds—the statute of limitations and the failure to sufficiently state causes of action as to all counts—the trial court's written opinion is not entirely clear. The trial court recited at length the parties' arguments below and it is difficult to distinguish where the court is merely recapitulating an argument versus agreeing with it and making it a finding in the case. We note that the court's opinion states in the section labeled "Court Decision" that plaintiff "does allege enough facts to make a claim that Libman and Haramaras committed fraud in the law," before continuing on to find all claims barred by the statute of limitations. Regardless, our review of the matter is *de novo*. *Kean*, 235 Ill. 2d at 361.

> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." 740 ILCS 160/5(a)(1)-(2) (West 2014).

¶ 65 In count I, plaintiffs alleged that under section 5(a)(2), Jody Libman and Steve Haramaras, personally, committed fraud in the law with regard to Trianon's bank accounts because when Trianon contracted with Seger in 2009 and around the time of the judgment, Trianon kept insufficient funds in its accounts and Jody Libman and Steve Haramaras, as Trianon's principals, would remove any significant deposits and pay themselves or third parties with no or inadequate consideration. Plaintiffs requested that the trial court enter judgment against Jody Libman and Steve Haramaras "for their conduct relative to the Trianon bank accounts" and asserted they were liable for the listed transfers. At issue here are the three claims that are not barred by the statute of limitations: (1) $629.32 to Cole Taylor Bank in May 2011; (2) $1,687.50 to Nicholas Kotos in May 2011; and (3) $1,556.99 to Steve Haramaras in August 2011.

¶ 66 In count V, plaintiffs alleged that under section 5(a)(1), Jody Libman and Steve Haramaras, personally, dissipated 3 Build's assets because they made multiple transfers in the year leading up to the judgment that were apparently unrelated to 3 Build, including large personal withdrawals. Considering our discussion above, as with count I, we only consider transfers which are not time-barred by the statute of limitations. Among the listed transactions that are not time-barred are transfers for payroll, auto insurance and other auto expenses, life insurance for Libman, payments for loan of a car from Gus Haramaras, and transfers to "cash."

¶ 67 Plaintiffs argue that with regard to counts I and V in their amended complaint, they listed the suspect fraudulent transfers based on bank records, and it was clear that the bank accounts steadily dissipated during the litigation and that funds were being transferred to "cash," other companies, or to personal matters of Jody Libman and Steve Haramaras. Plaintiffs assert that they should not be required to list all the transferees as defendants because Jody Libman and Steve Haramaras indirectly benefited from making payments to their personal creditors. Plaintiffs argue that they also named Jody Libman and Steve Haramaras as indirect beneficiaries/transferees of the challenged payments to third parties, for which the Act provides recovery. Plaintiffs maintain that it was clear defendants' counsel was engaged in fraudulent schemes to hide assets.

¶ 68 Defendants argue that plaintiffs failed to state a claim in counts I and V because a fraudulent transfer requires a debtor/creditor relationship and the Act does not provide for entry of a judgment against third parties or corporate officers for participation in a fraudulent transfer, and Jody Libman and Steve Haramaras are not judgment debtors in this case. Defendants also contend that the Act allows a creditor to avoid a transfer from the first transferee of an asset but plaintiffs failed to name any first transferees as defendants and they seek to hold non-debtor third parties liable.

¶ 69 "[F]or a cause of action to exist, the factual situation must include a *debtor* who is liable on a *claim* to a *creditor*." *A.P. Properties, Inc. v. Goshinsky*, 186 Ill. 2d 524, 528 (1999).

> "The creditor must show that it has 'a right to payment' that it can seek to recover from the debtor. *A.P. Properties, Inc.*, 186 Ill. 2d at 529, citing 740

> ILCS 160/2(c) (West 1996). Under the Uniform Fraudulent Transfer Act, a creditor is 'a person who has a claim' and a debtor is 'a person who is liable on a claim.' 740 ILCS 160/2(d), (f) (West 2000)." *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 186-87 (2010).

¶ 70 Defendants argue that Jody Libman and Steve Haramaras are not "debtors" under the Act. For example, in *APS Sports Collectibles, Inc. v. Sports Time, Inc.*, 299 F.3d 624, 629 (7th Cir. 2002), the Seventh Circuit Court of Appeals held that under Illinois law, the corporate lender/creditor could not hold the individual officers and shareholders of the corporate debtor liable for the debtor's fraudulent conveyance of assets to a third-party corporation because the individuals did not have a debtor/creditor relationship with the lender as they were not parties to the loan transaction. The court rejected the argument that the corporate officers could be held liable as "insiders" of the debtor corporation who approved certain corporate resolutions, because the Act defined the term "insider" in order to establish whether a transaction was fraudulent, but did not provide authority to hold corporate insiders personally liable for the acts of the corporation. *Id.* at 629-30 (citing 740 ILCS 160/2(g)(2) (West 2000)). The court observed that the Act provided a creditor with "various equitable remedies for the acts of 'debtors' and 'transferees' " in section 8 and for a money judgment against the first transferee or "the person for whose benefit the transfer was made" under section 9. *Id.* (citing 740 ILCS 160/8, 9 (West 2000)).

¶ 71 It is true that only Trianon and 3 Build were the judgment debtors in the litigation involving Seger's contract. The trial court entered a judgment against Trianon and 3 Build; it did not enter judgment against Jody Libman and Steve Haramaras. Accordingly, to the extent plaintiffs' complaint seek to impose liability on non-debtors Jody Libman and Steve Haramaras as officers, managers, or directors of the judgment debtors, such is not authorized under the Act here. They were not the judgment debtors against whom the trial court entered judgment following Seger's trial.

¶ 72 While plaintiffs are correct in asserting that the Act provides that a creditor may recover from a debtor or "the first transferee of the asset," we do not find this aids plaintiffs here. Section 9 of the Act provides that

> "The judgment may be entered against
>
> (1) the first transferee of the asset or the person for whose benefit the transfer was made; or
>
> (2) any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee." 740 ILCS 160/9 (West 2014).

¶ 73 Though plaintiffs challenged numerous transfers to non-debtor third parties, plaintiffs did not specifically name Nicholas Kotos or Cole Taylor Bank as defendants in relation to count I, or any of the numerous transferees in count V. Additionally, plaintiffs generally claimed that the alleged fraudulent transfers were made for the benefit of Jody Libman and Steve Haramaras, but plaintiffs failed to plead how the specific transfers to Nicholas Kotos or Cole Taylor Bank, or to any of the transferees in count V, benefited Jody Libman and Steve Haramaras as "the person for whose benefit the transfer was made." 740 ILCS 160/9(1) (West 2014). The complaint contains no factual assertions regarding any connection between the transfer and the alleged personal benefit to Jody Libman and Steve Haramaras or any allegations regarding any personal debts of Jody Libman and Steve Haramaras that were paid off. Plaintiffs instead sought to impose liability on non-debtor third parties Jody Libman and Steve Haramaras for these transfers to other entities, which is not provided for under the Act.

¶ 74 We note that, to the extent that plaintiffs sought in count I to recover from Steve Haramaras as a "first transferee" under section 9 for the one transfer of $1,556.99 that was not barred by the statute of limitations, this would be allowable under the Act. However, with respect to this transfer to Steve Haramaras and the other two non-time-barred transfers to Cole Taylor Bank and Nicholas Kotos, plaintiffs failed to additionally plead that the judgment debtors failed to receive reasonably equivalent value in exchange, or that the transaction to Steve Haramaras rendered the judgment debtors' remaining assets insufficient. 740 ILCS 160/5(a)(2) (West 2014). Plaintiffs were required to plead in their count I claims that Trianon made the transfers "without receiving a reasonably equivalent value in exchange for the transfer or obligation" under section 5(a)(2). 740 ILCS 160/5(a)(2) (West 2014). Constructive fraud or fraud in the law claims under section 5(a)(2) occur when "(1) a voluntary gift is made, (2) there is an existing or contemplated indebtedness against the debtor, and (3) the debtor has failed to retain sufficient property to pay the indebtedness." *Apollo Real Estate Investment,* 403 Ill. App. 3d at 193. Other than bare assertions that the transactions were made with no or inadequate consideration, plaintiffs failed to include any specific factual allegations that the three non-time-barred challenged transfers did not involve reasonably equivalent value or consideration.

¶ 75 Similarly, the claims under section 5(a)(1) are for "fraud in fact" and require that plaintiffs prove that the debtor made the challenged transfers with the "actual intent to hinder, delay, or defraud." *Apollo Real Estate Investment,* 403 Ill. App. 3d at 193; 740 ILCS 160/5(a)(1) (West 2014). In "fraud in fact" cases, actual consideration was given for a transfer and the specific intent to defraud must be proven. *Anderson v. Ferris,* 128 Ill. App. 3d 149, 153 (1984). The Act sets forth 11 factors to consider in determining intent:

> "(1) the transfer or obligation was to an insider; (2) the debtor retained possession or control of the property transferred after the transfer; (3) the transfer or obligation was disclosed or concealed; (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) the transfer was of substantially all the debtor's assets; (6) the debtor absconded; (7) the debtor removed or concealed assets; (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor." *Apollo Real Estate Investment*, 403 Ill. App. 3d at 193 (citing 740 ILCS 160/5(b) (West 2000)).

¶ 76 Here, as to count V, plaintiffs merely alleged that the transfers were fraudulent because they occurred within a year of the judgment and had no relationship to 3 Build, or were personal withdrawals, without alleging any specific facts to support these statements. As such, they cannot withstand a section 2-615 motion to dismiss for failure to state a claim.

¶ 77 b. Count II

¶ 78 Plaintiffs assert that they sufficiently stated a cause of action under count II in that Jody Libman and Steve Haramaras, assisted by their attorneys who have engaged in asset protection schemes in the past, created Moment's Notice when the judgment debtors were insolvent and they diverted business opportunities to it, and these business opportunities constitute "property" under the Act. Plaintiffs further argue that this court should allow plaintiffs to bring a suit for breach of fiduciary duty and unjust enrichment as assignee of these actions held by the judgment debtors.

¶ 79 Defendants respond that count II must fail because a fraudulent conveyance claim under section 6(a) of the Act can only arise from the judgment debtors' transfer of property in which the judgment debtors have an interest. Here, no actual asset was identified in the complaint and mere business opportunities are not enough.

¶ 80 Under section 6(a) of the Act,

> "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." 740 ILCS 160/6(a) (West 2014).

¶ 81 A presumption of fraud in the law arises "where there is a voluntary transfer for no consideration and there is an existing or contemplated debt for payment of which the transferor did not retain sufficient assets." *Regan v. Ivanelli*, 246 Ill. App. 3d 798, 804 (1993). Accordingly, to establish fraud in the law with regard to a conveyance, "(1) there must be a transfer made for no or inadequate consideration; (2) there must be existing or contemplated indebtedness against the transferor; and (3) it must appear that the transferor did not retain sufficient property to pay his indebtedness." (Internal quotation marks omitted). *Id.* Fraud is presumed under these circumstances and thus the actual intent of the transferor is irrelevant. *Id.*

¶ 82 As noted, plaintiffs asserted in count II that under section 6(a) of the Act, after the judgment was entered against the judgment debtors, Jody Libman and Steve Haramaras created Moment's Notice with assistance of their attorney and directed post-judgment business opportunities to it and away from the judgment debtors in an effect to avoid, hinder, and defraud plaintiffs.

¶ 83 The problem with plaintiffs' claim is that it does not identify anything that can constitute an "asset" under the Act belonging to the judgment debtors that was transferred. Plaintiffs did not allege that Moment's Notice received payments for work performed by the judgment debtors. Plaintiffs instead asserted that future, prospective business opportunities that should have gone to the judgment debtors were diverted to Moment's Notice, and Moment's Notice was then paid for the work it performed on those opportunities.

¶ 84 As the court in *Regan*, 246 Ill. App. 3d at 804, observed, section 7(d) of the Act provides that "a transfer is not made until the debtor has acquired rights in the asset transferred." 740 ILCS 160/7 (West 2014). Further, the Act defines "asset" as "property of a debtor," and "property" is in turn defined as "anything that may be the subject of ownership." 740 ILCS 160/2(b), (j) (West 2014). Section 2(l) defines "transfer" as "every mode *** of disposing of or parting with an asset or an interest in an asset ***." 740 ILCS 160/2(l) (West 2014). Further, "[c]orporations usually do not have a property interest in mere business opportunities, even though the duty of loyalty may prohibit the corporation's fiduciaries from taking advantage of such opportunities." *Graham v. Mimms*, 111 Ill. App. 3d 751, 763 (1982). "[A]n action brought pursuant to the Fraudulent Transfer Act directly concerns the assets of the judgment debtor and imposes liability based on the value of the transferred assets. [Citation.] Such an action does not concern personal liability; rather, it attempts to avoid the transfer and seeks the actual assets transferred." *Kennedy v. Four Boys Labor Services, Inc.*, 279 Ill. App. 3d 361, 368-69 (1996). Here, the alleged business opportunities diverted from the judgment debtors did not constitute an asset, that is, "property of a debtor" that could be owned by the judgment debtors or transferred to Moment's Notice.

¶ 85 Although plaintiffs cite *In re H. King & Associates*, 295 B.R. 246, 281-90 (Bank. N.D. Ill. 2003), in arguing that a court will allow tort claims against principals of corporations who divert assets from corporate debtors, we find this case inapposite. *King* involved a claim for fraudulent conveyance, but the assets conveyed were monetary funds transferred through checks written by corporate principals to insiders, which is distinguishable from the prospective business opportunities at issue here. Further, although *King* also involved a claim for usurpation of business opportunities, this was not alleged as part of a fraudulent transfer claim under the Act, but rather under the corporate opportunities doctrine prohibiting a corporation's fiduciary from taking advantage of business opportunities belonging to the corporation. *Id.* at 268.

¶ 86 Similarly, plaintiffs argue that *Graham* provides that diverted corporate opportunities can be recovered. *Graham*, 111 Ill. App. 3d at 763. However, as in *King*, the *Graham* case did not involve a claim under the Uniform Fraudulent Transfer Act, but rather a claim of breach of fiduciary duties and misappropriation of corporate assets, which is not at issue here. *Id.* at 754.

¶ 87 Plaintiffs also contend that this court should overturn *Gonzalez v. Profile Sanding Equipment*, 333 Ill. App. 3d 680, 697 (2002), where the court held that the employee was not entitled to a turnover of the manufacturer/employer's potential cause of action for legal malpractice where the employee obtained a default judgment for negligence against the manufacturer/employer. Plaintiffs argue they should be allowed to be assigned the corporate judgment debtors' (Trianon and 3 Build) claims against third parties such as Jody Libman and Steve Haramaras.

¶ 88 To the extent that plaintiffs claim they should be permitted to pursue a claim of piercing the corporate veil or breach of fiduciary duty, we observe that they did not plead as much in the amended complaint, nor is this the proper forum for pursuing this new claim. Moreover, piercing the corporate veil is an equitable remedy and not a cause of action itself, but a means of imposing liability on an underlying cause of action. *Gass v. Anna Hospital Corp.*, 392 Ill. App. 3d 179, 185 (2009). We note that "what must be alleged to pierce the corporate veil does not fall within the scope of what may be heard in supplementary proceedings. This means that a party who has secured a judgment against a corporation may not seek to pierce the corporate veil in supplementary proceedings." *Pyshos*, 258 Ill. App. 3d at 624. "[N]othing in the Code authorizes the entry of a judgment at a supplementary proceeding against a third party who does not possess assets of the judgment debtor." (Internal quotation marks omitted.) *Id.* at 623. We therefore affirm dismissal of count II pursuant to section 2-615.

¶ 89 c. Count III

¶ 90 Plaintiffs next argue that the court should not have dismissed their related claim in count III alleging that Jody Libman and Steve Haramaras engaged in a civil conspiracy by incorporating Moment's Notice and diverting future business opportunities to it instead of to the judgment debtors. Plaintiffs assert that they are entitled to any relief under any legal theory, whether fraudulent transfer, breach of fiduciary duty, or civil conspiracy. Plaintiffs argue that this court should overturn *Gonzalez* and they again point to the federal case in which one of defendants' attorneys was found liable for civil conspiracy for diverting assets.

¶ 91 Because we have concluded that count II against Moment's Notice alleging fraudulent transfer of business opportunities was properly dismissed under section 2-615 for failure to state a claim, we likewise conclude that plaintiffs' claim in count III must fail, as it is based on count II. *Illinois Non-Profit Risk Management Ass'n v. Human Services Center of South Metro-East*, 378 Ill. App. 3d 713, 724 (2008) (holding that the third-party plaintiff's conspiracy allegation was insufficiently pleaded and failed to state a cause of action and that they also failed to "adequately allege the underlying claim of common-law fraud, and thus their conspiracy claim fails as a matter of law.").

¶ 92 d. Count IV

¶ 93 Lastly, as to count IV, plaintiffs assert that Moment's Notice was liable for the judgment entered against Trianon and 3 Build under the theory of successor liability.

¶ 94 Defendants argue that plaintiffs failed to state a cause of action because they failed to allege any facts that could support successor liability under any theory.

¶ 95 "The well-settled general rule is that a corporation that purchases the assets of another corporation is not liable for the debts or liabilities of the transferor corporation." *Vernon*, 179 Ill. 2d at 344-45. To mitigate the potentially harsh impact of this rule, Illinois law recognizes four exceptions to this doctrine:

> "(1) where there is an express or implied agreement of assumption [of liability]; (2) where the transaction amounts to a consolidation or merger of the purchaser or seller corporation; (3) where the purchaser is merely a continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations." (Internal quotation

marks omitted.) *Workforce Solutions v. Urban Services of America, Inc.*, 2012 IL App (1st) 111410, ¶ 86.

¶ 96 Plaintiffs contend that Jody Libman and Steve Haramaras created Moment's Notice to divert business opportunities belonging to 3 Build to Moment's Notice in an attempt to avoid collection of the judgment and that Moment's Notice is merely a continuation of the judgment debtors. Plaintiffs argue that Moment's Notice is liable as a corporate successor for the judgment to the extent it received construction services and payments after the judgment was entered. Plaintiffs contend that Jody Libman and Steve Haramaras were "insiders" of both corporations. These allegations do not involve an agreement to assume the judgment debtors' liabilities, a merger or consolidation, or a transfer of the judgment debtors' corporate entities. As the parties argue, at issue is the third theory of successor liability, that "the purchaser is merely a continuation of the seller." *Id.*

¶ 97 "The continuation exception to the rule of successor corporate nonliability applies when the purchasing corporation is merely a continuation or reincarnation of the selling corporation. [Citation.] In other words, the purchasing corporation maintains the same or similar management and ownership, but merely wears different clothes." (Internal quotation marks omitted.) *Vernon*, 179 Ill. 2d at 346. This exception aims to "to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of the reach of the predecessor's creditors." (Internal quotation marks omitted.) *Id.* The test used to determine whether one corporation is merely a continuation of another is "whether there is a continuation of the *corporate entity of the seller*—not whether there is a continuation of the *seller's business operation*[.]" (Emphasis in original.) *Vernon,* 179 Ill. 2d at 346. Accordingly, in determining whether this exception applies, courts "emphasize a common identity of officers, directors, and stock between the selling and purchasing corporation as the key element of a continuation." (Internal quotation marks omitted.) *Id.* at 346-47.

¶ 98 We conclude that plaintiffs failed to sufficiently state a claim of corporate successor liability. The amended complaint contains no allegations of any *transfer* or *purchase* of any corporation, stock, or corporate assets of the judgment debtors to or by Moment's Notice. The corporate entities of the "sellers" 3 Build and Trianon still exist and were not sold or transferred to Moment's Notice. Plaintiffs have not identified any assets that it claimed were transferred to Moment's Notice from 3 Build or Trianon. Though plaintiffs asserted that Moment's Notice diverted business opportunities, as previously discussed, however, future business opportunities are not corporate assets or property which could be transferred to Moment's Notice.

¶ 99 With respect to a common identity of officers, directors, and stock, the complaint contains no allegation that there is a commonality of stock between the corporations. According to plaintiffs' complaint, Steve Haramaras was a manager and member of 3 Build. Both Jody Libman and Steve Haramaras had an interest in Trianon. Though plaintiffs alleged that Jody Libman and Steve Haramaras created Moment's Notice to take over 3 Build's business, Jody Libman had no interest in 3 Build as officer, director, or stock owner. Although a "complete identity between the shareholders of the former and successor corporations" is not required, "[i]t is well settled that 'identity of ownership' is a key element in establishing the mere continuation exception." *Workforce Solutions*, 2012 IL App (1st) 111410, ¶ 87.

¶ 100 III. CONCLUSION

¶ 101 For the reasons above, we affirm the trial court's order granting defendants' motion to dismiss.

¶ 102 Affirmed.