2011 IL App (2d) 100828-U
No. 2-10-0828
Order filed July 12, 2011
Modified upon denial of rehearing September 30, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KRUMPHOLZ PROPERTIES, LLC,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 08-L-267
	)	
FLOREINE KRUMPHOLZ, NANCY FULLER, WILLIAM JOHNSON, THE FLOREINE KRUMPHOLZ IRREVOCABLE TRUST, and WAYNE ERICKSON, individually and as Trustee of the FLOREINE KRUMPHOLZ IRREVOCABLE TRUST,	)	
	)	Honorable
	)	Robert B. Spence
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Bowman and Hutchinson concurred in the judgment.

ORDER

Held: (1) As to counts I, II, and III, the trial court erred in applying the three-year limitations period for conversion of a negotiable instrument where plaintiff pleaded only ordinary conversion, which has a five-year limitations period. Those counts were not barred by the statute of limitations; (2) as to counts IV and V, the trial court correctly found those counts to be barred by the statute of limitations as the funds at issue were withdrawn more than five years prior to the filing of the original complaint; (3) the trial court correctly dismissed the remaining counts for failure to plead a cause of action.

¶ 1 Plaintiff, Krumpholz Properties, LLC, (the company), appeals the trial court's section 2-619 and section 2-615 dismissals of its nine-count complaint against defendants, Floreine Krumpholz, the Floreine Krumpholz 2006 Irrevocable Trust, Floreine's children (Nancy Fuller and William Johnson), and Floreine's attorney (Wayne Erickson), individually and as trustee of the 2006 Trust. For the reasons that follow, we reverse the court's section 2-619 dismissal of counts I, II, and III. We affirm the trial court's dismissal of the remaining counts.

¶ 2 I. BACKGROUND

¶ 3 The instant case involves a family real estate business, incorporated in the late 1990's by the family patriarch, Robert Krumpholz (deceased December 7, 2007), who was then in his eighties. Robert Krumpholz gifted large portions (then valued at approximately $1,000,000) of his ownership interest in the company to his daughter, Donna Beeken, and his granddaughter, Jennifer Foster, leaving approximately a 10 percent ownership interest for himself.

¶ 4 Thereafter, in approximately 2000, Robert married Floreine (Guisti) Krumpholz, who was also in her eighties. Floreine had two grown children, Nancy Fuller and William Johnson. Floreine never became a member of the company. On April 22, 2005, a probate court in Michigan declared Robert incompetent and appointed Floreine as guardian and conservator of Robert's person and estate.

¶ 5 By this point, tensions had already arisen between Robert's first and second families, as evidenced by a series of lawsuits filed as early as 2003 (an action for accounting) in multiple states where the parties owned property (Michigan, Wisconsin, and Illinois). One of these *earlier* suits, Kane County (Illinois) case No. 05-MRK-458, filed October 26, 2005, bares strongly on the instant case.

¶ 6 In case No. 05-MRK-458, the company, owned entirely by Robert's first family (except for a small share still retained by Robert himself, held by his trusts), sued Robert, Floreine, and two trusts owned by Robert (the 1990 and 1997 Trusts). The company alleged in part that, in the late 1990's, Robert transferred Oppenheimer stock from his personal trusts to the company. Then, in *2001*, Robert transferred what was now the company Oppenheimer stock back into his trusts. The company operating agreement prohibited such a transfer because, under it, once a member made a monetary contribution to the company, the member lost all rights to it; it was company property. The company requested that Robert's ownership interest in the company be decreased to reflect the company Oppenheimer stock he had removed and placed back in his personal trusts. Additionally, the company alleged that it had stopped receiving mortgage payments on a property known as the Stone property, and stated that Robert and Floreine "may have diverted the payments and the final payoff, if any of that mortgage from the company to themselves individually." The company also alleged more generally that Robert and Floreine may have diverted other rental income and company assets.

¶ 7 On April 21, 2006, under case No. 05-MRK-458, the company filed a petition to obtain access to its prior LLC offices, in hopes of discovering evidence of diverted funds. The trial court granted the petition.

¶ 8 Shortly thereafter, on May 25, 2006, the parties entered into a settlement agreement in case No. 05-MRK-458. The settlement agreement stated that the parties settled "some but not all" of the allegations set forth in the 05-MRK-548 complaint. The settlement agreement specified that it *did* bar claims "as to the determination and valuation of the membership interests of the Members of Krumpholz Properties, LLC (paragraph 5)." The settlement agreement provided that, based on earlier withdrawals and gifts (*i.e.*, including the 2001 withdrawals of the Oppenheimer account),

Robert personally had zero ownership interest remaining in the company and his trusts collectively had $225,000 worth of interest remaining in the company (approximately an 8.48 percent share). The settlement agreement further provided that the company would then buy out the trusts' ownership interest and the trusts would then assign all its interest in the company to the company. The record indicates that the appropriate transactions and assignments were completed. This left Robert with zero or negligible ownership interest in the company, as compensation to the company for Robert's withdrawal of company funds. Finally, as pertains to the instant suit, the settlement agreement preserved a right to pursue claims against Floreine in the future:

> "This is a limited release and is specifically intended to exclude any and all claims that Krumpholz Properties, LLC[,] or any of [its] Members may have against Floreine Krumpholz and any defenses to such claims."

¶ 9 At some point prior to December 2007, the company and Donna Beeken personally moved in Michigan state probate court for Floreine's removal as guardian based on allegations that she misappropriated various funds. However, the Michigan probate case was dismissed for lack of jurisdiction when Robert passed away (December 7, 2007). On February 19, 2007, Floreine was removed as the conservator of Robert's trust, because, according to her attorney, she "began to suffer the consequences of advanced age." On July 21, 2009, the court declared Floreine incompetent and appointed a guardian for her (who would act in her stead as a defendant in the instant suit).

¶ 10 Meanwhile, on May 15, 2008, the company filed a nine-count complaint for recovery of assets and property, the May 27, 2009, amended version of which is the subject of the instant appeal. We summarize the nine count complaint as follows.

¶ 11 A. Counts I, II, and III: Conversion of Funds from Three Properties

(Against Floreine)

¶ 12 In counts I, II, and III, the company alleged conversion of funds from three of its properties: the Stone mortgage payment (count I); the Elburn construction escrow (count II); and the Kuipers' rental payments (count III).

¶ 13 The company pleaded the following as to the Stone mortgage (count I). In July 1997, Robert personally owned a note secured by a $45,000 mortgage on a Florida property executed by Darlene Stone. Several months later, in December 1997, Robert conveyed his rights, powers, and beneficial interest in the Stone mortgage to the company. Thereafter, "from time to time," Stone paid monthly mortgage payments to the company. In 2004, Stone sold the property. At that time, $35,795 remained on the mortgage. Floreine then allegedly "intercepted" a letter concerning the mortgage payoff and instructed the title company that was handling the sale transaction to make the payoff check to "Robert E. Krumpholz and Floreine E. Krumpholz." Floreine then deposited the funds into her personal checking account. In support of its allegations concerning the Stone mortgage, the company attached: a copy of the mortgage, a copy of the written assignment, a copy of the payoff letter, and a copy of the payoff check (made out to Robert and Floreine personally, and endorsed by both Robert and Floreine personally).

¶ 14 The company pleaded the following as to the Elburn construction escrow (count II). At all times relevant hereto, the company owned a parcel of commercial real property improved with a commercial building. This property was located in Elburn. The Village of Elburn required the company to post a $23,967.70 security deposit to ensure the completion of landscaping and the construction of a retaining wall (in a manner that complied with its village code). In 2004, Floreine, without authority from the company, allegedly requested and received from the Village of Elburn a refund of the security deposit. The check was made payable to "Krumpholz Property." Floreine

deposited the check into her personal checking account. In May 2006, the company conducted an investigation to discover the status of the escrow. In 2007, it discovered that Floreine had deposited the refund in her own account when Floreine's bank responded to a subpoena for Floreine's bank records. In support of its allegations concerning the Elburn construction escrow, the company attached a copy of the refund check along with its deposit record. The check was not endorsed, but in handwriting stated on the back, "for deposit only."

¶ 15 Finally, the company pleaded the following as to the Kuipers' rental payments. At all times relevant hereto, the company owned a residential property in Elburn, which was occupied by Dale and Beverly Kuipers under the terms of a written lease. Between August 31, 2004, and July 2005, Floreine allegedly deposited at least $13,300 of rental payments from the Kuipers into her personal checking account. The payments were made to Floreine personally.

¶ 16 B. Count IV: The Oppenheimer Stock Account: Conversion (Against Floreine) and Conspiracy (Against Floreine and Attorney Erickson)

¶ 17 Regarding the alleged conversion of funds from a company Oppenheimer stock account (as referenced in the earlier case No. 05-MRK-458), plaintiff acknowledges that Robert's signature alone enabled the funds to leave the company account in 2001 and go into his and Floreine's personal account. However, the company makes the overarching allegation that, one year into the marriage and four years before Robert was declared incompetent, Floreine exerted undue influence over Robert. The company asserts that Robert, who was officially declared incompetent in 2005, was suffering from Alzheimer's disease much earlier than that. As an alternative to its allegation of undue influence, the company alleges that Floreine "unlawfully us[ed] the name of Robert Krumpholz," to accomplish the transfer of funds from the company account.

¶ 18 The company described the nature of the Oppenheimer stock account as follows. In 1997, Robert established an Oppenheimer stock account in the name of the company. At that same time, the Robert E. Krumpholz 1990 Trust, for which Robert was the trustee, also held an Oppenheimer stock account. In early 1999, Robert executed a document entitled "Corporate Client Agreement & Resolution," which expressly provided that only the company would hold an interest in the *company* account. *Thereafter*, on March 23, 1999, Robert transferred a portion of the Oppenheimer stock from his 1990 Trust to the company account.

¶ 19 Beginning in February 2000, purportedly acting against the "Corporate Client Agreement & Resolution," Robert began transferring "large sums of money" from the company account *back* to the 1990 Trust's account. By March 7, 2001, the amount transferred and earned thereon totaled $433,296.[1] By March 23, 2001, "[all] the remaining securities" were transferred from the company account *back* to the 1990 Trust's account.

¶ 20 The company claims that Floreine then somehow facilitated (either by unduly influencing Robert or by "unlawfully using his name") at least two dishonest uses of the funds once the funds

---

[1]The company is somewhat unclear in its allegation as to the amount transferred. It also alleges that, as March 2001, Robert had transferred $1,390,583.17 (not the $433,296 alleged in an earlier paragraph of the complaint) from the company account to the 1990 Trust account. However, a comprehensive reading of the entire complaint indicates that the larger amount was the *total* value of the 1990 Trust account (the majority of which, plaintiff would have to concede, it had no claim to). This view is supported by the fact that the company alleges in a later paragraph that, as of June 2006, the total value of the funds taken from the 1990 Trust and put into Floreine's trust was $1,742,000.

were back in the 1990 Trust. First, Floreine allegedly used the funds to purchase real property in Marinette, Wisconsin. Between September and December 2001, approximately $230,000 "was withdrawn" from the 1990 Trust (the company does not specify who withdrew these funds). Some or all of these funds were used to purchase a parcel of real property in Marinette, Wisconsin, which was jointly titled in the names of Robert and Floreine Krumpholz.

¶ 21 Second, Floreine allegedly proceeded in a course of action that ultimately led to her complete control of the company Oppenheimer funds. In October 2002, Robert and Floreine set up a *third* Oppenheimer account (*i.e.*, in addition to the company account and the 1990 Trust account), jointly held in the names of Robert and Floreine Krumpholz. The company did not allege that this in and of itself was not an act against it. However, in November 2002, Robert "supposedly" signed a letter directing that Floreine's name be put on the account held in the 1990 Trust. Thereafter, funds from the 1990 Trust were transferred, in a series of transactions, into the third account personally and jointly held by Robert and Floreine.

¶ 22 The company further alleged that Floreine's attorney, Wayne Erickson, then assisted Floreine in transferring the Oppenheimer funds held in the third account into the "Floreine Krumpholz Irrevocable Trust (dated March 13, 2006)." Floreine's 2006 Trust then held $1,742,000, presumably the total amount that had been transferred from the 1990 Trust. The company alleged that attorney Erikson knew that Floreine had exercised undue influence over Robert when he initially transferred the funds from the company account back to the 1990 Trust and again from the 1990 Trust to the third account held by Robert and Floreine jointly, thereby aiding Floreine in her course of action to gain control over the company's Oppenheimer funds.

¶ 23 C. Count V: The Oppenheimer Stock Account: Tortious Interference (Against Floreine)

¶ 24 In count V, the company alleged that Floreine "intentionally induced" Robert to violate

Article VIII, Section 6 of its "Operating Agreement" when he withdrew the Oppenheimer stock from the company account in 2001 and transferred it back to his 1990 Trust. Article VIII, Section 6 provides: "No member shall be entitled to interest on his capital contributions or to return of his capital contributions." The company repeated its allegation from count IV that Floreine took advantage of Robert, who had Alzheimer's disease. The company further alleged that Floreine knew of the terms of the "Operating Agreement" when she "intentionally induced" Robert to violate the agreement. In support of its allegation of tortious interference, the company attached a copy of the "Operating Agreement."

¶ 25 D. Count VI: Conspiracy
(Against Floreine's Children, Nancy Fuller and William Johnson)

¶ 26 In count VI, the company alleged that Floreine's children, Nancy Fuller and William Johnson, conspired to accomplish the conversion of property described in counts I through V (*i.e.*, the Stone mortgage payment (count I); the Elburn construction escrow (count II); the Kuipers' rental payments (count III); and the company's Oppenheimer stock account (counts IV and V)). As to William only, the company alleged that he is a joint account holder for Floreine's personal checking account in which she received funds from the allegedly converted property set forth in counts I through V. As to Nancy only, the company alleged that she "acted as a recipient of funds taken from the [company] by taking title to real estate" in Marinette, Wisconsin (the same property that was, for a time, titled in the name of Robert and Floreine, as set forth in count IV), and that she did so for the purpose of concealing some of the funds initially taken from the company Oppenheimer account. Additionally, Nancy "assisted in bringing items of personal property belonging to Robert Krumpholz to an auction house for sale." As to *both* William and Nancy, the company alleged that they "actively participated in disposing of may items of personal property belonging to [Robert], the 1990

Trust, the 1997 Trust, and destroyed or attempted to destroy documents belonging to [the company] that evidenced its ownership of its assets" for the purpose of "inhibit[ing] plaintiff from discovering the wrongful acts of Floreine."

¶ 27 E. Count VII: The Oppenheimer Stock: Conversion (Against Nancy Fuller)

¶ 28 In count VII, the company again alleged that Nancy acted as a recipient to the funds taken from the company Oppenheimer account by taking title to the Marinette property (in October 2006, *i.e.*, after Robert's death). Additionally, the company asserted that Nancy accepted $73,062.70 from Floreine's personal checking account. The company does not assert the specific source of these funds; however the amount of the Stone mortgage ($35,795), plus the Elburn escrow ($23,967.70), plus the Kuipers' rental payments ($13,300), does equal $73,062.70.

¶ 29 F. Count VIII: Breach of Fiduciary Duty (Against Floreine)

¶ 30 In count VIII, the company alleged that Floreine assumed a fiduciary duty to it by "writing checks and taking control of accounts" with "respect to the monies mentioned in counts [I, II, and III]." It further alleged that Floreine then violated her fiduciary duties by diverting monies belonging to the company as described in counts I, II, and III (*i.e.*, the Stone mortgage, the Elburn escrow, and the Kuiper's rental payments), to herself.

¶ 31 G. Count IX: Injunction (Against All Defendants)

¶ 32 Finally, in count IX, the company alleged that defendants are each holding parts of various assets described in counts I, II, III, IV, and V (*i.e.*, the Stone mortgage, the Elburn escrow, the Kuiper's rental payments and the company's Oppenheimer stock), and sought an injunction to prevent them from further disposing of the assets *(i.e.*, essentially freezing all accounts allegedly tainted by the improper transfer of funds from the company). As to attorney Erickson, the company alleged that, as trustee of Floreine's 2006 Trust, is holding part or all of the aforementioned assets.

As to Floreine and William, the company alleged that they remained in control of some of the funds that were placed in Floreine's personal checking account. As to Nancy, the company alleged that she remained in possession of the Marinette property. The company stated that it was likely to succeed on the merits of its claims and that it would be irreparably harmed if an injunction were not granted. It further stated that it lacked an adequate remedy at law, "as even a money judgment would be inadequate to secure the plaintiff's rights to its assets."

¶ 33 On July 14, 2009, Floreine and attorney Erickson filed a motion to dismiss. As to counts I, II, and III, involving conversion of the Stone mortgage, Elburn escrow, and Kuipers' rental payments, Floreine petitioned pursuant to section 2-619 only, arguing that a three-year statute of limitations for conversion of a negotiable instrument applied. As to the remaining counts, which involved the Oppenheimer funds allegedly taken from the company in 2001, Floreine petitioned pursuant to section 2-619, arguing that the applicable five-year statute of limitations had elapsed, and attorney Erickson petitioned under section 2-615, arguing that the company could not plead damages because it had already been compensated for the loss of the Oppenheimer funds. Nancy and William, represented by different attorneys, filed a joint section 2-615, 2-619 motion to dismiss as to the counts alleged against them.

¶ 34 On February 3, 2010, the trial court ruled. As to counts I, II, and III, it agreed with Floreine that a three-year statute of limitations applied, and it granted her section 2-619 motion to dismiss.[2]

[2]The trial court characterized its dismissal of counts I, II, and III, as based on both section 2-615 and 2–619, but this appears to be a misstatement. Floreine only filed a section 2-619 motion to dismiss those counts, and the trial court cited only the statute of limitations as its basis for dismissal.

As to the remaining counts, it granted the parties' joint section 2-615, 2-619 motions to dismiss. That same day, the company filed a motion to reconsider, which essentially asked the court to consider "new" evidence, *i.e.*, an affidavit by Donna Beeken, making allegations similar to those set forth in the Michigan probate case, which, if true, tended to support that Floreine had unduly influenced Robert. The trial court denied the motion. This appeal followed.

¶ 35 II. ANALYSIS

¶ 36 In an effort to streamline the 11 issues the company raises on appeal, we are mindful that there are only four assets at issue: (1) the company Oppenheimer funds; (2) the Stone mortgage; (3) the Elburn escrow; and (4) the Kuipers' rental payments. Likewise, although the company names four people as defendants, they can be thought of in two categories: (1) Floreine; and (2) those who allegedly conspired with her to facilitate wrongdoing.

¶ 37 In part one of our analysis, we will focus on counts that were dismissed based on the statute of limitations (counts I, II, and III). 735 ILCS 5/2-619 (West 2008). For these counts, we need only focus on one defendant (Floreine) and on three assets: the Stone mortgage, Elburn escrow, and Kuipers' rental payments.

¶ 38 In part two of our analysis, we will focus on the counts that were dismissed based on joint 2-615 and 2-619 motions. 735 ILCS 5/2-615, 619 (West 2008). We will first address claims relating to the company Oppenheimer funds, and we find that, because the wrongful transfer took place in 2001, the claims are barred by the five-year statute of limitations for conversion. 735 ILCS 5/13-205 (West 2008). As such, we rather quickly dispose of any argument that the trial court erred in dismissing count IV (conversion of the company Oppenheimer funds) and count V (tortious interference with the company operating agreement due to the withdrawal of the company Oppenheimer funds). Likewise, we discard any allegations of conspiracy on the part of attorney

Erickson, Nancy, or William to facilitate Floreine's wrongdoing as to the Oppenheimer funds. Next, we will address plaintiff's remaining conspiracy counts against Nancy and William, and find that plaintiff failed to plead facts that would support a claim of conspiracy. Finally, we will affirm the trial court's dismissal of the count alleging Floreine's breach of fiduciary duty.

¶ 39 In part three of our analysis, we summarily affirm the trial court's denial of the company's request for an injunction and its denial of the company's motion to reconsider.

¶ 40 A. Part I: Section 2-619(a)(5) Dismissal

¶ 41 The trial court dismissed counts I, II, and III, regarding Floreine's alleged conversion of the Stone mortgage, Elburn escrow, and Kuipers' rental payments, finding that a three-year statute of limitations applied and had passed. 735 ILCS 5/2-619(a)(5) (West 2008). The company challenges the trial court's section 2-619 dismissal. A section 2-619 motion to dismiss for certain defects and defenses admits the legal sufficiency of the complaint and raises defects, defenses or other affirmative matters, such as the untimeliness of the complaint. *Lipinski v. Martin J. Kelly Oldsmobile, Inc.*, 325 Ill. App. 3d 1139, 1144 (2001). The standard of review is *de novo*. *Id.*

¶ 42 The trial court erred in applying a three-year statute of limitations to the Stone mortgage, Elburn escrow, and Kuipers' rental payments (counts I, II, and III). In applying a three-year statute of limitations, the trial court relied on section 118(g) of the Uniform Commercial Code, which pertains to conversion of a negotiable instrument. That section states:

> "Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of *an instrument*, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this Article and not governed by this Section must be commenced within 3

years after the cause of action accrues." (Emphasis added.) 810 ILCS 5/3-118(g) (West 2008).

¶ 43 However, the company's claims regarding conversion of the Stone mortgage, Elburn escrow, and Kuipers' rental payments do not allege conversion of a *negotiable instrument*. Section 420 of article 3, entitled, "Conversion of [I]nstrument," sets forth the offense of conversion of a negotiable instrument:

> "The law applicable to the conversion of personal property applies to instruments. An instrument is also converted *if it is taken by transfer*, other than a negotiation, *from a person not entitled to enforce the instrument* or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action of conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or [e]ndorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee." (Emphasis added.) 810 ILCS 5/3-420(a) (West 2008).

As stated in case law, the elements of conversion of a negotiable instrument are: (1) plaintiff's ownership of, interest in, or right to possession of the check; (2) plaintiff's forged or unauthorized endorsement on the check; and (3) the defendant bank's unauthorized cashing of the check. *Continental Casualty v. American National Bank & Trust*, 329 Ill. App. 3d 686, 697 (2002).

¶ 44 We note that Floreine did not respond in her brief or at oral argument to the company's argument that, as to counts I, II, and III, the company did not plead conversion of a *negotiable instrument*. The company pleaded that the Stone mortgage check was made out personally to "Robert E. Krumpholz and Floreine E. Krumpholz." Robert and Floreine each personally endorsed the check. Similarly, the Kuipers' rental checks were made out to Floreine. Therefore, Floreine did

not forge the company's endorsement (as the check was never made out to the company to begin with) and the bank did not act outside its authority in negotiating the checks. Even as to the Elburn escrow, the claim did not involve a defendant bank that "[took] by transfer *** *from* a person not entitled to enforce the instrument." 810 ILCS 5/3-420 (West 2008). (Emphasis added.) Here, Floreine did not take [or process an instrument] *from* a person not entitled to enforce the instrument; she *is* the person not entitled to enforce the instrument. This is not a case where the company seeks relief from an institution following the institution's processing of a stolen check, the funds associated with which are now in the "thief's" possession (*i.e.*, long gone). See *Lurz v. Panek*, 172 Ill. App. 3d 915, 929-930 (1988) (incidentally, individual defendant who forged plaintiff's signature was guilty of ordinary conversion, and institution defendant that processed the check was guilty of statutory conversion). The company did not plead that Floreine converted the negotiable instruments; it pleaded that Floreine converted the funds represented in the negotiable instruments. In other words, the actual funds, not the instruments, were at issue.

¶ 45 As such, the company pleaded an ordinary claim of conversion as to counts I, II, and III. The elements of *ordinary conversion* are: (1) the defendant's unauthorized and wrongful assumption of control, dominion, or ownership over the plaintiff's personal property; (2) the plaintiff's right in the property; (3) the plaintiff's right to immediate possession of the property; and (4) the plaintiff's demand for possession of the property. *Bill Marek's The Competitive Edge v. Mickelson Group*, 346 Ill. App. 3d 996, 1003 (2004). Indeed, the company pleaded the four elements of ordinary conversion: (1) Floreine wrongfully assumed control of the funds at issue by telling the respective third parties to mail a check to her (rather than the company); (2) and (3) the company was the rightful recipient of the respective funds and had a right to the immediate possession of the funds; and (4) the company demanded that Floreine return the funds due.

¶ 46 The statute of limitations for ordinary conversion is five years, as set forth in section 13-205 of the Code of Civil Procedure. 735 ILCS 5/13-205 (West 2008). That section states:

> "[A]ctions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued." (Emphasis added.) 735 ILCS 5/13-205 (West 2008).

¶ 47 Less than five years elapsed from the date of each alleged conversion (June 2004 for the Stone mortgage, 2004 for the Elburn escrow, and July 2005 for the Kuipers' rental payments) to the date the company filed its original complaint (May 15, 2008). Therefore, as to counts I and III, the court erred in granting Floreine's section 2-619 motion to dismiss on the basis that the statute of limitations had expired.

¶ 48 B: Part Two: Joint Section 2-615 and 2-619 Dismissals

¶ 49 i. Oppenheimer funds

¶ 50 We next review the trial court's ruling that any claim concerning the withdrawal of the company Oppenheimer funds is barred by the five-year statute of limitations. 735 ILCS 5/2-619 (West 2008); 735 ILCS 5/13-205 (West 2008). The company challenges this aspect of the court's ruling by arguing that: (1) the statute of limitations did not begin to run until 2006, when the funds were placed into Floreine's 2006 Trust; (2) the statute was tolled under the discovery rule; and (3) the statute was tolled under the Illinois savings statute (735 ILCS 5/13-217 (West 2008)). We reject each of these arguments.

¶ 51 In support of its first argument, the company notes that the statute of limitations does not start to run if the wrong is "ongoing and continuous." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278-

79 (2003). The company asserts that, because Floreine, through Robert and Wayne, continued to transfer the funds to and from various personal accounts from 2001 to 2006, the wrong was "continuous" such that the limitations period did not begin run until the last transfer was made. We disagree. The conversion was complete once the funds were withdrawn from the company in March 2001. That the funds were moved from one personal account to the next did not further injure the company. See *Id*. (the limitations period begins to run on the date of the *last* injury).[3]

¶ 52 In support of its second argument (the discovery rule), the company states that a cause of action accrues when a plaintiff knows or reasonably should know that it has been injured and that the injury was wrongfully caused. *Rozny v. Marnul*, 43 Ill. 2d 54, 72-73 (1969). At that point, the plaintiff is under an obligation to inquire further to determine whether an actionable wrong was committed. *Price v. Morris*, Inc., 219 Ill. 2d 182, 213-14 (2005). The company asserts that, although it filed a lawsuit in 2005 against Robert for the withdrawal of the Oppenheimer funds, it did not realize until 2007 that Floreine had "engineered" those withdrawals. We disagree with the company's position that the discovery rule applies. As demonstrated by its 2005 complaint, the company knew at least by that date that its Oppenheimer funds had been wrongfully withdrawn. In fact, the 2005 complaint even alleged in a general sense that Floreine had been unduly influencing Robert to wrong the company. The idea that the company had no cause to suspect Floreine's

[3]Even if we look to November 2002, when Floreine allegedly influenced Robert to transfer the money from the 1990 Trust to an account owned by Robert and Floreine personally, the five years would have passed prior to the 2008 filing of the original complaint. The point is that once Floreine allegedly had personal control of the money, transferring the money from one personal account to another did not further injure the company.

involvement until 2007 is belied by the company's prior lawsuits. Likewise, we reject the company's argument that, because it filed a complaint for accounting in 2003 that did not mention the Oppenheimer funds, it affirmatively established that it had not discovered the removal of the Oppenheimer funds as of that date. The company claims that its manager, Donna Beeken, was denied access to the accounts since before the 2001 removal. The company does not explain why it could not have filed a complaint for accounting in 2001. If it had done so, it could have been made aware of the removal of the Oppenheimer funds. In other words, the company has not affirmatively established that it could not reasonably have known of its cause of action at a date prior to 2003.

¶ 53 Finally, the company argues that the Illinois savings statute applies because it had previously brought a case in Michigan in connection with Robert's guardianship proceedings, and that case involved similar claims. The case was dismissed for lack of jurisdiction when Robert died.

¶ 54 The Illinois savings statute is set forth in section 13-217 of the Code of Civil Procedure, and it states in pertinent part:

> "In actions where *** the time for commencing an action is limited, if *** the action is dismissed *by a United States District Court* for lack of jurisdiction *** or improper venue, then, whether or not the time limitation for bringing such an action expires during the pendency of such action, the plaintiff *** may commence a new action within one year or within the remaining period of limitation, whichever is greater, after such judgment is *** dismissed by a United States District Court for lack of jurisdiction *** or improper venue." (Emphasis added.) 735 ILCS 5/13-217 (West 2008).

¶ 55 Setting aside the problem that the dismissal in the Michigan case was not a dismissal from a United States District court, we reject the company's argument that the savings statute applies

because the Michigan case was not for "the identical claim and cause of action averred in the [case at issue.]" See *Winger v. Franciscan Medical Center*, 299 Ill. App. 3d 364, 368-69 (1998); *Don Saffold Enterprises v. Concept I, Inc.*, 316 Ill. App. 3d 993 (2000) (complaint that named a new, corporate defendant rather than the individual named in the earlier suit was not subject to the savings statute). To determine if the refiled case is the "same cause of action" so as to implicate the savings statute, one uses the same principles that define the "same cause of action" in a *res judicata* case. *D'Last Corp. v. Ugent*, 288 Ill. App. 3d 216, 220 (1997).

¶ 55 In *Winger*, each suit involved the same cause of action (wrongful death) against the same defendant (hospital) arising out of the same set of facts and circumstances. *Winger*, 299 Ill. App. 3d at 368-69. Here, in contrast, the first case and the instant case cannot be considered identical claims and causes of action. The first case was brought in probate court by the company *and* Donna Beeken personally, who sought an accounting of Robert's trusts and Floreine's removal as executor. Some of the allegations, such as allegations that Floreine unduly influenced Robert to withdraw the Oppenheimer funds, are made in each of lawsuits. However, a common thread of an allegation does not make the lawsuits identical. The suits are brought by different plaintiffs (the first includes Donna Beeken personally), seek different remedies (accounting and removal of guardianship as opposed to money damages), and are brought in different court-room divisions (probate as opposed to civil), once again highlighting the different relief sought. The savings statute does not apply, and we affirm the trial court's ruling that the company's claims concerning the Oppenheimer funds were barred by the statute of limitations.

¶ 56 Although the parties argued it, the trial court did not reach the issue of whether the company pleaded a cause of action as to the Oppenheimer funds. Similarly, we do not *need* to reach the issue. However, in large part because the parties discussed the issue at length in their briefs and at oral

argument, we address whether the company pleaded a cause of action as to the Oppenheimer funds, with particular attention to the element of damages.

¶ 57 A section 2-615 motion to dismiss tests the legal sufficiency of the complaint. *Storm & Associates v. Cuculich*, 298 Ill. App. 3d 1040, 1047 (1998). All facts alleged in the complaint and reasonable inferences therefrom must be taken as true. *Id*. A motion to dismiss based on the pleadings may be granted only if, viewing the allegations in the light most favorable to the plaintiff, it is clear that no set of facts can be proved that would entitle the plaintiff to relief. *Hynes v. Snyder*, 355 Ill. App. 3d 394, __ (2005). The standard of review is *de novo*. *Id*.

¶ 58 The company argues that it properly stated a cause of action against Floreine for conversion of company Oppenheimer funds (count IV) and tortious interference with the company's operating agreement in "unduly influencing" Robert to withdraw company Oppenheimer funds (count V). The elements of conversion are: (1) the defendant's unauthorized and wrongful assumption of control, dominion, or ownership over the plaintiff's personal property; (2) *the plaintiff's right in the property*; (3) the plaintiff's right to immediate possession of the property; and (4) the plaintiff's demand for possession of the property. *Mickelson Group*, 346 Ill. App. 3d at 1003. The elements of tortious interference with a contract are: (1) the existence of a valid and enforceable contract; (2) the defendant's awareness of the contractual relationship; (3) the defendant's intentional and unjustifiable inducement of a breach of contract; (4) a breach of contract caused by the defendant's wrongful acts; and (5) *damage to the plaintiff*. *Fieldcrest Builders v. Antonucci*, 311 Ill. App. 3d 597, 611 (1999).

¶ 59 Floreine responds that the May 25, 2006, settlement agreement in case No. 05-MRK-548 prevents the company from pleading that it has "a right in the property"or has suffered damages as to the withdrawal of the company Oppenheimer funds. In case No. 05-MRK-548, the company

made allegations, which were nearly identical to those made in the amended complaint at issue here, regarding the 2001 withdrawal of the company Oppenheimer funds. The company asserted that Robert's 2001 withdrawals from the company Oppenheimer funds should have resulted in a corresponding decrease in his ownership of capital in the company and requested that the court enter an order adjusting the ownership interests to reflect the withdrawal of the Oppenheimer funds.

¶ 60 The May 25, 2006, settlement agreement stated that the parties settled "some but not all" of the allegations set forth in the 05-MRK-548 complaint. However, the settlement agreement specified that it *did* bar claims "as to the determination and valuation of the membership interests of the Members of Krumpholz Properties, LLC (paragraph 5)." The settlement agreement provided that, based on earlier withdrawals and gifts (*i.e.*, including the 2001 withdrawals of the Oppenheimer account), Robert personally had zero ownership interest remaining in the company and his 1990 and 1997 trusts collectively had $225,000 worth of interest remaining in the company (approximately an 8.48 percent share). The settlement agreement further provided that the company would then buy out the trusts' ownership interest and the trusts would then assign all its interest in the company to the company. The record indicates that the appropriate transactions and assignments were completed.

¶ 61 Although the 2006 settlement agreement compensated the company to *some* degree for the 2001 withdrawal of the Oppenheimer funds, we disagree that the company has been *made whole* for the 2001 withdrawal of the company Oppenheimer funds. The company pleaded that, as of March 23, 2001, the date that all the remaining company funds were transferred back into Robert's 1990 trust, the value of the company funds that had been removed from the company was approximately $433,000. The settlement agreement released only Robert from further liability for his withdrawal of the company Oppenheimer funds and compensated the company for the loss of those funds in the

amount of Robert's trusts' interest in the company at that time (*i.e.*, approximately $225,000).[4] Therefore, taking as true the facts alleged in the pleadings, and, as $433,000 is greater than $225,000, the company has *not* been made whole from the withdrawal of the Oppenheimer funds. Had the statute of limitations not passed as to the wrongful withdrawal of the company Oppenheimer funds, the company would not have been entirely precluded from pleading the element of damages.[5]

---

[4]We reject the company's argument that, because the settlement agreement did not expressly mention the Oppenheimer funds, the company was not compensated *at all* for the 2001 withdrawal of the funds. The 2005 complaint to which the settlement agreement related *did* allege the wrongful 2001 withdrawal of the Oppenheimer funds; in fact, the complaint focused on that wrong. When the settlement agreement is read in conjunction with the relevant complaint, its general wording clearly encompasses the Oppenheimer funds.

[5]We decline to address whether the company properly pleaded the other elements, such as defendant's wrongful assumption of control of plaintiff's property (conversion) or defendant's intentional and unjustifiable inducement of a breach (tortious interference). The company's allegations as to these elements, if not conclusory, come as close to that line without crossing it as any hypothetical we could set forth. For example, the company acknowledges that Robert's signature alone enabled the Oppenheimer funds to leave the company account. However, it generally alleged that, one year into the marriage and four years before Robert was declared incompetent, Floreine "exerted undue influence" over Robert by isolating him from his family while he functioned at a decreased capacity; "intentionally induced" him to remove the funds; and "unlawfully used his name." Aside from the allegation that Floreine isolated Robert from his family while he functioned at a decreased capacity (itself an allegation without specific examples), these

¶ 62 Finally, we summarily affirm the trial court's dismissal of the conspiracy claims against attorney Erickson and Nancy for concealment of the Oppenheimer funds. The funds were withdrawn in 2001, and the company suffered its damages at that point. The company pleaded no facts that, if true, would establish that either attorney Erickson or Nancy conspired to remove the funds from the company in 2001. Additionally, we affirm the dismissal of any conversion action against Erickson as to the Oppenheimer funds.

¶ 63 ii. Remaining Conspiracy Claims Against Nancy and William

¶ 64 The company also fails to plead a claim of conspiracy against either Nancy or William as to conversion of the remaining assets. Regarding the company's claim that Nancy conspired to convert the Stone mortgage payoff, the Elburn construction escrow, and the Kuipers' rental payments, the company pleaded only that "some or all of the $73,062 placed in the Nicolet Bank account by Floreine was delivered to [Nancy] by Floreine." The company did not plead the element of knowledge that the property was unlawfully taken. Moreover, it completely fails its burden to plead facts with specificity. It does not plead *when* Floreine delivered funds to Nancy or even in what *amount*, stating simply that "some or all" of the funds were delivered. See also *Sutherland v. O'Malley*, 882 F. 2d 1196, 1200 (7th Cir. 1989) (a conversion action cannot be maintained based on an indeterminate sum of money), citing *Mid-America Fire and Marine Insurance v. Middleton*, 127 Ill. App. 3d 887, 892 (1984).

---

statements merely name a cause of action; they do not allege specific facts to support it. We prefer not to have our analysis ride such a fine line, and we stress that we are affirm the trial court's dismissal of the Oppenheimer claims based on the statute of limitations.

¶ 65 Regarding Nancy's alleged destruction of evidence that would have supported the above-referenced conversions, the company pleaded only that:

> "[I]n late 2006 or early 2007, [Nancy and William] came to *** property owned by [the company] in Geneva ***. [They] actively participated in disposing of many items of personal property belonging to [Robert], the 1990 Trust, and the 1997 Trust, and additionally destroyed or attempted to destroy documents belonging to the plaintiff that evidenced ownership of its assets. The purpose of those actions were to inhibit the plaintiff from discovering the wrongful acts of [Floreine] *** and preventing its redress in court."

This claim also must fail. Its statement that Nancy acted with the purpose of inhibiting the company from discovering the wrongful acts of Floreine was at best conclusory. See, *e.g.*, *Douglass v. Wones*, 120 Ill. App. 3d 36, 44 (1983) (a "bare assertion" of an agreement to conspire is insufficient to state a colorable claim for conspiracy).

¶ 66 Finally, turning to the conspiracy claim against William, the company alleged that William participated in a conspiracy with Floreine to: (1) convert the Stone mortgage payoff, the Elburn construction escrow, and the Kuipers' rental payments; and (2) destroy any evidence of the above-referenced conversions. We dispose of the company's second allegation against William for the same reasons, set forth above, that we disposed of the identical allegation against Nancy.

As to its first allegation against William, the company pleaded that:

> "[William] was made a joint account holder of the Nicolet bank account, [which was] formed not for any lawful purpose, but for the purpose of receiving assets wrongfully taken from the plaintiff in this cause and concealing their theft from the plaintiff."

This claim too must fail. The sole fact that William was a joint account holder with Floreine, his elderly mother, does not create an inference that he did so to receive unlawfully acquired funds. To allege such a purpose is conclusory.

¶ 67 For all of the aforementioned reasons, we affirm the trial court's dismissal of plaintiff's various conspiracy counts for failure to state a cause of action.

¶ 68 iii. Breach of Fiduciary Duty

¶ 69 The company argues that Floreine, *who is not a member of the company*, had a fiduciary duty to the company, which she breached when she converted funds owed to it. Specifically, the company pleaded that Floreine:

> "held herself out to the world as an agent of [the company], [and] had her name placed on the accounts of the [company] with signing authority and informed persons dealing with the [company], including Darlene Stone, the Village of Elburn, and [the] Kuipers, *** [thereby] assum[ing] a fiduciary duty to the [company] to manage such accounts in good faith and not to divert monies belonging to the [company] to herself."

¶ 70 We summarily affirm the trial court's dismissal of this count. The company's citation to cases that discuss an "agency-principle" relationship are inapposite. See, *e.g.*, *Alpha School Bus Co. V. Wagner*, 391 Ill. App. 3d 722, 747 (2009) (corporate officers owe fiduciary duties to the company); *Amigo's Inn v. License Appeal Commission*, 354 Ill. App. 3d 959, 965 (2004) (an agency-principle relationship is formed when the principle has a right to control the manner in which the agent performs her work); and *State Ins. Co. v. F.B. Hall & Co.*, 258 Ill. App. 3d 588 (1994) (an agency relationship creates a fiduciary duty). Similarly, the company's citation to *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 490 (2009), is inapplicable. Covinsky states that "persons who *come into control* of corporations are charged with fiduciary duties to their

employers." *Id*. The fiduciary at issue in *Covinsky* was a CEO of a corporation. Here, there is no employer/employee relationship or agency relationship. More critically, Floreine "came into control" of the funds at issue because she (allegedly) *stole* them; she was not *entrusted* with them due to her relationship with the company. It is illogical to find that the act of stealing funds invokes a fiduciary duty over those same funds. The offense is conversion, not breach of fiduciary duty.

¶ 71 C: Part Three: Injunction

¶ 72 Finally, the company challenges the trial court's denial of its request for an injunction. To obtain a preliminary injunction, a party must show: (1) a clear right or interest needing protection; (2) no adequate remedy at law; (3) irreparable harm; and (4) a reasonable likelihood of success on the merits. *Bollweg v. Richard Marker Associates*, 353 Ill. App. 3d 560, 575 (2004).

¶ 73 Again, we summarily affirm the trial court's denial. As set forth above, the company has *no* likelihood of success as to any of the claims involving the Oppenheimer funds. Additionally, even if the company pursues the reinstated claims of conversion in counts I, II, and III, it has an adequate remedy at law, *i.e.*, a monetary award of the amount converted, plus interest. The record indicates that Floreine's 2006 Trust has copious funds and, as Floreine has been declared incompetent and her trust is being managed by a fiduciary, there is little to no risk that the funds would be depleted to the point where the company would have no remedy for the wrongs alleged in the remaining counts.

¶ 74 III. CONCLUSION

¶ 75 For the reasons set forth above, we reverse the trial court's section 2-619 dismissal of counts I, II, and III, and we affirm the trial court's dismissal of all other counts.

¶ 76 Affirmed in part and reversed in part.