2019 IL App (2d) 180621-U
No. 2-18-0621
Order filed June 12, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TERESA JAGIELLO and KATARZYNA JAGIELLO, Plaintiffs-Appellees and Cross-Appellants, v. BEVERLY GLEN HOMEOWNERS' ASSOCIATION, Defendant-Appellant and Cross-Appellee.	)	Appeal from the Circuit Court of Du Page County. No. 17-SR-1066 Honorable Peter W. Ostling Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting judgment to Teresa on her claim under the Common Interest Community Association Act, and it did not abuse its discretion in the amount of attorney fees it awarded under that claim. The trial court did not err in granting defendant's motion to dismiss Teresa's claim of breach of the declaration as time-barred. However, it should have also granted defendant's motion to dismiss Teresa's claim of breach of fiduciary duty. The trial court acted within its discretion in denying defendant's request for sanctions against Katarzyna and her attorney. Teresa's claims were moot that the trial court erred in (1) ruling that the award in small claims cases was limited to $10,000, and (2) denying attorney fees for the breach of fiduciary duty claim. Therefore, we affirmed in part and reversed in part.

¶ 2 Plaintiffs, Teresa Jagiello and her daughter, Katarzyna Jagiello, brought a three-count complaint against defendant, the Beverly Glen Homeowners' Association, alleging breach of the Common Interest Community Association Act (Association Act) (765 ILCS 160/1-1 *et seq.* (West 2016)), breach of defendant's declaration of covenants, and constructive fraud. The first count alleged that defendant failed to provide requested documents, and the latter counts alleged that defendant failed to resolve flooding issues in the garage of plaintiffs' townhome. The trial court dismissed count II and ruled against Katarzyna on the remaining counts, but it ruled in Teresa's favor on counts I and III, and it further granted Teresa attorney fees on her claim under the Association Act.

¶ 3 On appeal, defendant argues that the trial court erred in ruling in favor of Teresa and that the trial court should have granted defendant's request for sanctions against Katarzyna and her attorney under Illinois Supreme Court Rule 137 (eff. Jan. 1, 2018). In her cross-appeal, Teresa argues that the trial court erred in its attorney fee award and in dismissing count II. We affirm the trial court's ruling in Teresa's favor on count I, and its attorney fee award on that count. We also affirm its dismissal of count II. However, we reverse its denial of defendant's motion to dismiss count III, and we vacate the corresponding damage award.

¶ 4 I. BACKGROUND

¶ 5 A. Complaint

¶ 6 Plaintiffs filed their small claims complaint on July 25, 2017, alleging as follows. They were the legal owners of a townhome in Downers Grove that was part of defendant. In 2008 to 2009, large volumes of water accumulated in their garage, damaging their garage and personal property stored there. They alerted defendant, and defendant agreed to remedy the problem. Defendant replaced the front stoop and installed a sump pump in the garage. However, these

actions did not resolve the issue. In 2011, defendant attempted to repair a leak in the garage, and it installed a threshold alongside the garage, but plaintiffs continued to experience water damage. They also continued to ask defendant to investigate and remedy the problem. On March 12, 2015, plaintiffs sent a letter to defendant stating that water was entering their unit from the outside. They said that gutters defendant had replaced were improperly installed and causing excess water to flow towards their unit. At the July 2015 board meeting, defendant authorized plaintiffs to look for a private contractor and provide defendant with estimates and contact information. Plaintiffs sent all of the requested information to the board's president and secretary.

¶ 7 Plaintiffs alleged that on October 21, 2015, defendant sent a letter to plaintiffs saying that the long-term flooding may have been plaintiffs' fault. Defendant forbade plaintiffs from placing any plants, structures, or debris in the common area around their unit. Defendant felt that those might hinder the water flow and cause flooding. Defendant also asked plaintiffs to keep the sump pump in working condition. Defendant nevertheless authorized work on the property, but defendant required that plaintiffs sign the contractor's work invoice before work began. Because plaintiffs were frustrated with defendant's lack of action and constant delay, they hired their own contractor who corrected the issue on October 31, 2015.

¶ 8 Plaintiffs alleged that they requested that defendant inspect the damage to their unit and the repairs made, but defendant refused while work was in progress. Defendant sent a letter to plaintiffs on November 20, 2015, acknowledging plaintiffs' numerous requests. However, defendant also stated that it had " 'great reservations' " and was " 'unclear' " as to plaintiffs' intention and motives. It accused plaintiffs of failing to continuously operate the sump pump and of erecting tarps that blocked the flow of the water. Plaintiffs responded in a letter on December

1, 2015, stating that the sump pump was operating at all times. On December 7, 2015, defendant sent plaintiffs a letter stating that they had failed to provide requested documents, and that all documents should now be sent to its attorney rather than board members. On March 23, 2016, defendant offered to cover only $2,000 of the $4,700 plaintiffs paid the contractor to remedy the problem; defendant did not explain its basis for partial reimbursement.

¶ 9 Plaintiffs further alleged that on October 20, 2016, they and other unit owners mailed a request to defendant for documents under the Association Act. However, defendant sent threatening communications to everyone who signed the request, causing many of them to withdraw their signatures. Several months later, defendant produced some but not all of the requested documents, and it nevertheless charged plaintiffs $250 to produce the documents.

¶ 10 In count I, plaintiffs alleged that defendant violated the Association Act by producing only some of the documents they requested, and for charging plaintiffs $250 for them. In count II, plaintiffs alleged that defendant breached the declaration of covenants by failing to provide exterior maintenance. In count III, plaintiffs alleged constructive fraud by defendant's alleged breach of its fiduciary duty to plaintiffs in failing to remedy the flooding issue.

¶ 11 On December 12, 2017, defendant filed a motion to dismiss count II under section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2016)), alleging that the claim was not commenced within the time limited by law. Defendant argued that plaintiffs alleged that the water issue began around 2008 to 2009, and that defendant agreed to fix the problem in 2009, but section 13-205 of the Code (735 ILCS 5/13-205 (West 2016)) required that actions to recover damages for injury to property be commenced within five years after the cause of action accrued. Defendant argued that the complaint alleged that both parties

were aware of the problem no later than 2009, meaning that plaintiffs should have filed suit by 2014.

¶ 12 The trial court granted defendant's motion to dismiss on February 9, 2018, stating as follows. Plaintiffs alleged that around 2008 to 2009 they started to experience a large volume of water accumulation in their garage, which caused damage to their unit and personal property stored in the garage. They alleged that defendant failed to take the necessary steps to determine or repair the source of the problem and protect plaintiffs' property, and thereby breached the declaration of covenants. Therefore, the injury alleged was to property, making the five-year limitations period applicable. The injury occurred, and plaintiff knew of the injury, in 2009, so the limitations period expired in 2014, whereas plaintiffs filed their suit in 2017. Additionally, based on the pleadings, defendant did not make any new promises or agreements to cover costs in 2015, but rather authorized plaintiffs to look for a contractor and provide estimates.

¶ 13 B. Trial

¶ 14 The trial began on March 1, 2018, and the following evidence was adduced. Teresa testified through an interpreter that she had been residing at the home for 20 years and lived with her husband, daughter, and son. She had water in her garage as early as 2007. That year, defendant installed a trench and drain tile. In 2009, defendant conducted waterproofing work, installed a sump pump in the garage, and replaced her driveway.

¶ 15 Katarzyna testified that the problems began in 2009 but that water began accumulating in larger quantities in 2013. She testified that they learned of potential foundation issues in March 2015 and that they had standing water in the garage daily from July to October 2015.

¶ 16 On March 12, 2015, Teresa sent defendant's management company a letter stating that her garage had again been flooded from water entering from the outside. She stated that

defendant improperly installed gutters and downspouts that were causing water to flow towards her unit, and that she had provided photographs. Teresa said that defendant had failed to remedy the situation, and that if the matter was not resolved, she would either hire a company to make necessary repairs or seek a court order. Teresa received an e-mail from the management company on March 13, 2015, stating that foundation issues were the homeowner's responsibility.

¶ 17 Kenneth DucDuong testified that he had been defendant's attorney since May or June 2015. Around the same time, defendant's management company terminated its contract, and defendant was thereafter self-managed. The management company turned over boxes of documents to defendant, which DucDuong had in his office. However, the documents were incomplete, and the management company refused to turn over missing documents.

¶ 18 Kathy Perry testified that defendant consisted of 42 unit owners. Perry joined the board in July 2015 as its secretary. There were five board members, including Carl Sarokta, who was the president, and Georgia Kaemph,[1] who was a director. The board was aware of the water problem in plaintiff's garage at that time. At the July 11, 2015, board meeting, Sarokta said that no one should have the problem plaintiffs were having; that Teresa could bring bids to defendant; and that the sooner defendant had the information, the sooner it could schedule the work. Perry testified that defendant wanted to get three quotes. Teresa submitted a piece of paper with a cost, but it was not a proposal.

¶ 19 Teresa testified that Sarokta and another individual came to look at her garage in July 2015. They said to move items away from the garage wall so that it could be examined, and Teresa did so later that day. In fall 2015, Teresa hired a contractor to open the wall of the garage, which revealed a seven-inch crack in the foundation. Teresa advised defendant of the crack, but

[1] The name is also spelled "Kaempf" in portions of the report of proceedings.

no one remedied the problem. Water continued to enter the garage, and she tried to constantly clean it so that everything inside would not get damaged. The water ended up damaging kitchen cabinets and various other items that she was storing in the garage.

¶ 20 Kaemph testified that she joined the board in July 2015. That month, she called the village to ask if someone could come out, because the village dealt with creeks and flood issues. The village said that it had been out there before and could only provide references on whom to call. She also called Perma-Seal, which had installed the sump pump.

¶ 21 Perry testified that on September 2, 2015, defendant had a landscaper dig a trench to divert water away from plaintiffs' foundation. Perry later understood that it did not resolve the water problem. However, although the landscaper had said not to restrict the water flow, Teresa had "put up a fence with some hard plastic that was stopping the water from" running freely away from the unit, into the trench. On September 15, 2015, defendant sent plaintiffs an e-mail stating that it had called the contractor that they had recommended, but he had not returned the call. Defendant stated that it needed a detailed quote from the contractor as soon as possible to consider the proposal. The contractor, First Class Builders and Remodeling, Inc. (First Class Builders), sent a quote to defendant on September 23, 2015, for $7,800. On October 14, 2015, plaintiffs sent defendant an e-mail asking when someone would start working on the garage.

¶ 22 Defendant obtained a bid from U.S. Waterproofing dated October 17, 2015, for $2,686. Kaemph testified that defendant ordered the bid on September 23, 2015, and that U.S. Waterproofing would provide a lifetime warranty. Perry testified that U.S. Waterproofing had many positive reviews, whereas First Class Builders was a dissolved corporation. Perry testified that defendant wanted to save money because the prior management company had left it with unpaid bills, and defendant had a fiduciary duty to be fiscally responsible. Perry testified that at

the October 8, 2015, board meeting, defendant wanted to "go with U.S. Waterproofing" based on comparing the quotes. She testified that although it had not yet received the formal quote from U.S. Waterproofing at that time, it was aware of the quote amount. There was conflicting testimony on whether defendant or Teresa insisted on three quotes. Perry testified that Teresa required that contractors come out after 5 p.m. or on a Saturday, which made it difficult to schedule, so the earliest defendant could arrange for a third contractor to come was on November 4, 2015. Perry testified that Teresa stated that defendant had until the end of October, or she would sue. Perry admitted that plaintiffs did not file suit until July 2017.

¶ 23 On October 21, 2015, defendant sent plaintiffs a letter outlining what work had already been undertaken over the years to try to alleviate the flooding. It stated that some of the flooding issues may have been the result of plaintiffs' own actions, but defendant had nevertheless authorized necessary repairs. It stated that Teresa was required to sign a work invoice, which would be mailed to her, before work could begin. The letter stated that plaintiffs were prohibited from placing anything around their property that could hinder the water flow, and that they must keep the sump pump in working order.

¶ 24 Perry testified that by the October 26, 2015, board meeting, she understood that water was leaking through the foundation of plaintiffs' garage. Sarokta stated that the problem should be fixed before the cold weather set in. Another board member said that it was an external problem that was defendant's responsibility because the crack was in an exterior foundation.

¶ 25 On October 29, 2015, defendant sent Teresa an e-mail asking if she would be available between 5 and 6 p.m. on November 4, 2015, to get the third estimate. Teresa replied the same day stating that she had decided to get her garage fixed because she was "tired of waiting/ and being lied to" and would send an invoice to defendants. Teresa testified that defendant was

taking too long and that she was tired of constantly cleaning the water out of her garage. Defendant responded the same day stating that if Teresa hired her own contractor, defendant would not reimburse her. It stated that it had addressed some of her drainage issues and had not ignored or lied to her. Defendant stated that it wanted to get one more proposal from a company that specialized in flooding issues, and the representative could come out on November 4, 2015.

¶ 26 On October 30, 2015, defendant sent Teresa a letter stating that First Class Builders was a dissolved corporation. Defendant stated that it had scheduled a contractor to provide an estimate on November 4, 2015, but Teresa had refused to even respond to defendant's request to make her property available for inspection. It continued that defendant had not authorized any work by the contractor she had hired, and that if she decided to go ahead with the repair, defendant may not reimburse her.

¶ 27 Teresa testified that she asked defendant to come and inspect the issue, but no one came on October 29 or 30, 2015. She allowed her contractor to repair the crack on October 31, 2015. That morning, a board member said that she was not allowed to repair it, but Teresa said that she was not going to continue living with a wet garage. Since the repair, there had been no water in her garage. Teresa had paid the contractor $4,700 total.

¶ 28 DucDuong wrote a letter to Teresa dated November 20, 2015, that stated that defendant had paid for a sump pump at her property in 2010, and that she had failed to maintain it and had even turned it off. The letter also stated that she had unlawfully put tarps around her property that blocked the downward flow of water, causing it to flow into her garage. DucDuong testified that he obtained this information from board members.

¶ 29 Teresa sent a letter in response dated December 1, 2015, and we summarize her statements. Defendant's efforts to solve the water issue had failed, despite the fact that the sump

pump was always plugged in. At the July and October 2015 board meetings, of which she had recordings, defendant stated that her garage needed to be fixed. At the July 2015 meeting, defendant stated that she was allowed to look for a contractor. She had sent estimates to Sarokta and Perry around mid-September 2015. On October 30, 2015, she was informed by Sarokta that defendant would send different contractors to look at her garage, and that they might fix the problem, but no one came. Teresa waited until October 31, 2015, but did not hear from anyone. She did not want to wait any longer because she was not getting answers, had more water in her garage, and winter was approaching. She went ahead and authorized her contractor to begin that day. Once the wall inside the garage was opened, Katarzyna called Sarokta and invited him to see the damage, but he declined. Katarzyna also asked another board member to view the damage, but she said that Sarokta requested that she not talk to plaintiffs or go inside the garage. Sarokta said that someone would come for an inspection on November 4, 2015, but no one showed up. Since the work was complete, Teresa no longer had water in her garage. She had already paid $3,000 for the work and still had to pay $1,700 more after the work was completed.

¶ 30 On January 11, 2016, DucDuong sent Teresa a letter stating that he had received pictures and videos from Katarzyna by e-mail, but they were "undated and unauthenticated" and without explanation. He said that despite repeated requests, Teresa had not provided copies of any other documents, and therefore defendant could not consider her request for reimbursement at the time. DucDuong further stated that earlier that month, defendant had requested that she remove personal belongings that may have blocked access to the common areas and the flow of water of which she was now complaining. He stated that defendant had spent inordinate amounts of time and resources addressing Teresa's complaints, some of which were due to her own actions, and that the expenses may be added to her regular monthly assessments.

¶ 31 Separately, in a request dated October 9, 2016, Teresa asked for documents for the prior three years under the Association Act, specifically annual reports, expenditures and contracts, and board meeting minutes. Other homeowners also signed the petition. The request asked that the documents be sent to Teresa's attorney. A postal service tracking statement stated that the letter was delivered to a board member's house on October 22, 2016. Perry testified that when she saw the request, she consulted the other board members and then sent the information to DucDuong. She thereafter communicated with DucDuong but did not send Teresa any documents. Perry testified that defendant generally disclosed its annual budget.

¶ 32 Kaemph testified that she wanted to distribute the records but was told by the board's treasurer, who was her mother, that they were not allowed to hand out records absent a specific reason for the request. Kaemph testified that she and Perry then decided to send the request to DucDuong, and then they e-mailed the signatories.

¶ 33 The e-mail stated that defendant had forwarded the request to its attorney, and once the attorney was involved, "the burden of payment to the attorney falls back on the seven people who signed the request." DucDuong was aware of the e-mails but testified that he did not "participate" in them. He admitted that the homeowners were thereafter directed to him to remove their names; all did so with the exception of Teresa. DucDuong also admitted that there would not be litigation fees associated with the request, and that even one signatory could be sufficient to trigger the duty under the Association Act to retrieve and produce documents. Perry testified that DucDuong instructed the board to send the e-mail but did not say what language to use.

¶ 34 DucDuong testified that in the latter half of November 2016, Perry asked him to retrieve responsive documents. DucDuong initially testified that the first response he made to the request

was on January 27, 2017. However, during defendant's case in chief, DucDuong testified that he sent Teresa and her attorney a four-page letter dated November 21, 2016; the letter was admitted into evidence over plaintiffs' objection. The letter stated that the request was "highly suspect, if not fraudulent" for various reasons, including that one signatory was a renter rather than a unit owner, and that many signatories later stated that they felt pressured and misled by plaintiffs. The letter also stated that the petition did not state a proper purpose. The letter stated that if Teresa still wished to obtain the documents, she needed to provide a valid request. DucDuong testified that although Teresa never did so, he turned over about 200 pages of documents to plaintiffs' attorney on January 27, 2017, based on the papers he had in his possession. Defendant sent an invoice to Teresa for $250; DucDuong did not prepare the invoice.

¶ 35 During trial, after plaintiffs rested their case in chief, defendant made an oral motion for a directed finding against Katarzyna, arguing that she was not a record title owner of the unit during the pendency of suit. It also filed a written motion to dismiss count III under section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2016)) as time-barred. The trial court denied the motions on March 2, 2018. Regarding count III, the trial court stated that "the evidence presented to date that the Plaintiffs discovered what they believe to be the breach of fiduciary duty sometime in October of 2015, that would put as the evidence exists at this point in time in the proceedings within the required statute of limitations." Also on March 2, 2018, the trial court granted Teresa's motion to conform the pleadings to the proofs presented at trial, specifically to allege in count III that the breach of fiduciary duty was discovered on or about October 29, 2015.

¶ 36 On May 14, 2018, defendant filed a motion that for a second time sought a directed finding against Katarzyna. The motion also sought to dismiss Katarzyna as a plaintiff on all

counts and obtain Rule 137 sanctions against her and her attorney. The same day, plaintiffs filed a motion to conform the pleadings to the proofs to allege that Katarzyna's personal property was damaged; plaintiffs attached a proposed amended complaint.

¶ 37 In plaintiffs' reply to defendant's motion, they argued that defendant had forfeited the affirmative defense of Katarzyna's lack of standing. They also argued that the property was originally purchased in 1999 in the name of Katarzyna and both of her parents; that the property was refinanced in 2001 and a quitclaim deed was prepared wherein title was issued to just the parents; that plaintiffs did not understand the effect of the quitclaim deed; that at all relevant times, Katarzyna was viewed and treated as a member of defendant, and allowed to serve on the board; and that on April 12, 2018, a quitclaim deed was prepared adding Katarzyna back on the title.

¶ 38 The trial court denied defendant's second motion for a directed finding on June 28, 2018, but noted that defendant could still argue the issue of Katarzyna's standing in closing argument. It denied the motion to dismiss Katarzyna as a plaintiff on the basis that the motion was untimely and filed without leave of court. On the issue of sanctions, the trial court stated that there was an arguable basis for Katarzyna to be included as a plaintiff under count III because her testimony suggested that some of the damaged personal property belonged to her. The trial court also noted that DucDuong's November 2016 letter stated that Katarzyna was not a title holder, showing that defendant possessed this knowledge before the suit was even filed, but defendant chose to wait until the close of plaintiff's case in chief to raise the issue for the first time. Plaintiffs then withdrew their May 14, 2018, motion to conform the pleadings to the proof.

¶ 39 C. Trial Court's Ruling

¶ 40 The trial court thereafter pronounced its ruling, stating as follows. Regarding count I, Teresa was a unit owner of defendant at all relevant times, whereas Katarzyna was not. Therefore, Katarzyna had not met her burden of proof for count I. As to Teresa, defendant had a statutory duty to maintain and make its records available. Teresa made a written request for records and served it on an agent of defendant. Defendant "failed to respond within 30 days of said written request and further failed to provide all of the requested records within said 30-day period." Defendant was therefore deemed to have denied the request. It later tendered some of the requested records, but there was no credible evidence that all of the documents requested were provided to Teresa. Defendant thereby breached its statutory duty. DucDuong's November 21, 2016, letter questioned the " 'real purpose of [Teresa's] request and [her] own secret agenda,' " but Teresa's purpose in making the request was not relevant under the statute. The letter itself was not an appropriate response because Teresa's request was valid under the statute; Teresa was not required to provide a written statement of a proper purpose to support her request. Teresa had met her burden of proof under count I, and defendant was ordered to provide the documents to her counsel by July 31, 2018. The trial court also ordered defendant to vacate the $250 document production fee. Teresa was further entitled to an award of reasonable attorney fees and costs under the Association Act, which would be determined at a future date.

¶ 41 Regarding count III, defendant had certain fiduciary duties by statute and pursuant to the declaration of covenants. Included in these was defendant's fiduciary duty to repair the crack in Teresa's exterior garage foundation wall through which she was suffering water and flooding damage. Defendant acknowledged this specific duty at its October 26, 2015, board meeting. Teresa's testimony was credible regarding the existence of the crack, the crack being the source of the flooding, and the crack being discovered around October 2015. Defendant breached its

fiduciary duty by its delay and ultimate failure to repair the foundation crack as described and supported by plaintiffs' credible testimony, in that defendant had a reasonable time to repair the crack but did not do so. As such, it was reasonable for Teresa to hire her own contractor to repair the crack, which resolved the flooding issue. The repairs cost $4,700, which Teresa had paid in full. The paid bill corroborated plaintiffs' belief and the trial court's finding that the repair was reasonable and necessary. Accordingly, the trial court entered judgment in favor of Teresa on count III as it related to the foundation repair, for $4,700. However, it found that plaintiffs had not met their burden of proof regarding damage to personal property in the garage, because their testimony was not credible or persuasive as to the value of the items on the date they were damaged by flooding.

¶ 42 The trial court further stated that while there was constructive fraud in the case based on defendant's breach of its fiduciary duty, there was no basis upon which it could find gross negligence. That is, notwithstanding defendant's unreasonable delays over an extended period of time, Perry testified that it was her and defendant's desire to help plaintiffs, and there was testimony that fixing the issue was discussed at the July 11 and October 26, 2015, board meetings. The court also noted that plaintiffs did not request punitive damages in the complaint.

¶ 43 On July 13, 2018, Teresa filed a petition seeking $28,719 in attorney fees, $271.82 in court costs, and $285.31 in other costs.

¶ 44 The trial court held a hearing on attorney fees on July 31, 2018, and stated as follows. In awarding attorney fees, it was to consider a variety of factors including the nature of the case, the case's novelty and difficulty, the attorney's skill and standing, the degree of responsibility required, the usual and customary charges for similar work, and the connection between the litigation and fees charged. Because it awarded attorney fees only pursuant to count I, it would

consider just the fees attributed to prosecuting that count. The case's procedural history included various motions by the parties, and the trial progressed beyond a customary small claims case. Therefore, plaintiffs' attorney's charges of $300 per hour were reasonable. The trial court listed the various court dates and pleadings and stated how many hours of work it approved for each, arriving at a total of $7,980.

¶ 45 The trial court further noted that the fees plus the $4,700 awarded pursuant to count III totaled $12,680. It then stated:

> "In this regard, the Court notes Supreme Court Rule 281 which sets the jurisdictional limit of the small claim court room at, quote, $10,000 exclusive of interest and costs, end quote. It does not say exclusive of interest, costs and attorneys' fees.
>
> Thus, the Court finds the remaining jurisdictional balance left available having considered the award of $4,700 under count III is $5,300. Therefore, in addition to the $4,700 judgment previously awarded under Count III, attorneys' fees are awarded under Count I in the amount of $5,300."

The trial court also awarded costs of $418.83.

¶ 46 The trial court acknowledged defendant's argument that any attorney fees should be further reduced because Katarzyna lost at trial, and for alleged improprieties by plaintiffs and/or their counsel during litigation. The trial court disagreed with defendant's position, stating that Teresa still prevailed under count I and that the same time would have been expended without Katarzyna as a co-plaintiff. It again noted that defendant knew as far back as November 2016 that Katarzyna was not a title owner of the property, yet defendant did not seek to dismiss her as a plaintiff until the close of plaintiffs' case.

¶ 47 Defendant timely filed a notice of appeal, and Teresa timely filed a notice of cross-appeal.

¶ 48 II. ANALYSIS

¶ 49 A. Association Act

¶ 50 Defendants first argue that the trial court erred in granting judgment to Teresa on count I, because the trial court incorrectly determined that the Association Act did not require Teresa to state a "proper purpose" for her request for records.

¶ 51 On the subject of records requests, the Association Act provides:

> (1) The board shall maintain the following records of the association and make them available for examination and copying at convenient hours of weekdays by any member or unit owner in a common interest community subject to the authority of the board, their mortgagees, and their duly authorized agents or attorneys:
>
> (i) Copies of the recorded declaration, other community instruments, other duly recorded covenants and bylaws and any amendments, articles of incorporation, articles of organization, annual reports, and any rules and regulations adopted by the board shall be available. Prior to the organization of the board, the developer shall maintain and make available the records set forth in this paragraph (i) for examination and copying.
>
> (ii) Detailed and accurate records in chronological order of the receipts and expenditures affecting the common areas, specifying and itemizing the maintenance and repair expenses of the common areas and any other expenses incurred, and copies of all contracts, leases, or other agreements entered into by the board shall be maintained.

(iii) The minutes of all meetings of the board which shall be maintained for not less than 7 years.

(iv) *With a written statement of a proper purpose*, ballots and proxies related thereto, if any, for any election held for the board and for any other matters voted on by the members, which shall be maintained for not less than one year.

(v) *With a written statement of a proper purpose*, such other records of the board as are available for inspection by members of a not-for-profit corporation pursuant to Section 107.75 of the General Not For Profit Corporation Act of 1986 shall be maintained.

(vi) ***

(2) Where a request for records under this subsection is made in writing to the board or its agent, failure to provide the requested record or to respond within 30 days shall be deemed a denial by the board.

(3) A reasonable fee may be charged by the board for the cost of retrieving and copying records properly requested.

(4) If the board fails to provide records properly requested under paragraph (1) of this subsection (i) within the time period provided in that paragraph (1), the member may seek appropriate relief and shall be entitled to an award of reasonable attorney's fees and costs if the member prevails and the court finds that such failure is due to the acts or omissions of the board of managers or the board of directors." (Emphases added.) 765 ILCS 160/1-30(i) (West 2016).

¶ 52 Defendant points out that a "proper purpose" is required to obtain records under the General Not For Profit Corporation Act of 1986 (Not For Profit Act) (805 ILCS 105/107.75(a) (West 2016) ("Any voting member shall have the right to examine, in person or by agent, at any reasonable time or times, the corporation's books and records of account and minutes, and to make extracts therefrom, but only for a proper purpose")) and the Condominium Property Act (765 ILCS 605/19(e) (West 2016) (association members may inspect and make copies of records "at any reasonable time or times but only for a proper purpose"[2]). Defendant cites *Taghert v. Wesley*, 343 Ill. App. 3d 1140, 1146 (2003), where the court stated: "A proper purpose is shown when a shareholder has an honest motive, is acting in good faith, and is not proceeding for vexatious or speculative reasons."

¶ 53 Defendant argues that the Association Act has been in effect only since 2010, so there is a dearth of case law interpreting the "proper purpose" requirement of section 1-30(i)(1)(v). It argues that because the language is substantially similar to the cited statutes, as well as a Chicago municipal ordinance, case law provides substantial guidance and requires a proper purpose.

¶ 54 In construing a statute, our primary objective is to ascertain and give effect to the legislature's intent, which is best indicated by the statute's language, when given its plain and ordinary meaning. *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, ¶ 24. "If the language of a statute is clear and unambiguous, we will apply it as written, without resort to other aids of statutory construction." *Cassidy v. China Vitamins, LLC*, 2018 IL 122873, ¶ 58. The construction of a statute presents a question of law that we review *de novo*. *Sperl v. Henry*, 2018 IL 123132, ¶ 23.

[2] This statute has since been amended and no longer includes the "proper purpose" language. See 765 ILCS 605/19(e) (West Supp. 2017) (eff. Jan. 1, 2018).

¶ 55 Based on these standards, defendant's argument is not persuasive. The way the statute in question is structured, a proper purpose is explicitly required for documents requested under subsections (iv) and (v), but it is not required for documents requested under subsections (i), (ii), and (iii), which cover all of the documents that Teresa requested. See 765 ILCS 160/1-30(i)(1)(i), (ii), (iii) (West 2016)). To require a proper purpose for documents under the first three subsections, where none is explicitly required, would violate the rule of statutory construction that we may not depart from an unambiguous statute's plain language by reading into it exceptions, limitations, or conditions that the legislature did not express, nor add provisions not found in the law. See *Rosenbach*, 2019 IL 123186 ¶ 24. Similarly, because the statute is unambiguous, there is no need to look to other statutes to determine its plain meaning. See *Cassidy*, 2018 IL 122873, ¶ 58. We therefore agree with the trial court that Teresa was not required to state a "proper purpose" in her document request.

¶ 56 Defendant also argues that the trial court erred in stating that defendant was not formed under the Not For Profit Act and therefore not subject to its provisions. However, defendant has not developed this argument or cited any authority, thereby forfeiting the issue for review. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017).

¶ 57 Defendant argues that even if Teresa was not required to state a proper purpose, defendant complied with the Association Act, in that section 1-30(i)(2) provides that the "failure to *provide the requested record or to respond* within 30 days shall be deemed a denial by the board" (emphasis added). 765 ILCS 160/1-30(i) (West 2016). Defendant maintains that the use of the disjunctive "or" shows that defendant needed to do either one of two options. According to defendant, it did both by responding in the letter dated November 21, 2016, and then

subsequently turning over documents. Defendant argues that Teresa produced no evidence at trial that the document production was not responsive to her request.

¶ 58 Defendant additionally argues that the trial court erred in voiding its invoice of $250 for the production of documents. Defendant points out that section 1-30(i)(3) specifically provides that an association may charge a reasonable fee for retrieval and copying of records, in response to a member's request. 765 ILCS 160/1-30(i)(3) (West 2016). Defendant argues that it produced over 200 pages of documents, so the trial court should not have voided its fee.

¶ 59 Teresa argues that there was no credible evidence that defendant sent the November 21, 2016, letter. She contends that even if it did, the trial court properly found that the letter was not a "response" under the statute, as it simply questioned the purpose of Teresa's request, which the trial court determined was valid. Teresa argues that defendant's position, that any type of letter should qualify as a valid response to the request, could frustrate the purpose and intent of the legislature to have an association's records available to its members. See *In re D.F.*, 208 Ill. 2d 223, 230 (2003) ("A court *** is not bound by the literal language of a statute that produces a result inconsistent with clearly expressed legislative intent, or that yields absurd or unjust consequences not contemplated by the legislature"). Teresa also cites a letter admitted into evidence from her attorney to defendant, dated May 19, 2017, stating what documents were received and what documents were still missing. Last, Teresa argues that the trial court did not err in vacating the $250 fee, because although the Association Act allows for a reasonable fee for retrieving and copying requested documents (765 ILCS 160/1-30(i)(3) (West 2016)), DucDuong testified that he sent the documents but did not prepare the non-itemized invoice.

¶ 60 In addition to applying the standard of review for statutory construction, this issue requires us to review the trial court's factual findings, its ultimate ruling, and its decision to

vacate the $250 fee. We will not reverse a trial court's ruling made after a bench trial unless it is against the manifest weight of the evidence. *Crest Hill Land Development, LLC v. Conrad*, 2019 IL App (3d) 180213, ¶ 34. The same standard applies to a trial court's factual findings in a bench trial (*JJR, LLC v. Turner*, 2016 IL App (1st) 143051, ¶ 51) and its award of damages (*1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13). A ruling is against the manifest weight of the evidence if the opposite conclusion is clearly apparent from the record, or the ruling is unreasonable, arbitrary, or not based upon the evidence presented. *Crest Hill Land Development, LLC*, 2019 IL App (3d) 180213, ¶ 34

¶ 61 We agree with defendant that the Association Act requires that the association either provide the requested records or respond within 30 days, or the failure to do so will be considered a denial. 765 ILCS 160/1-30(i) (West 2016). Further, by allowing the November 2016 letter into evidence over objection and referencing its contents in its ruling, the trial court implicitly found that defendant sent the letter; this finding is not against the manifest weight of the evidence. However, even though defendant responded to Teresa's document request within 30 days, its letter was an explicit denial of Teresa's request based on a failure to include a "proper purpose," which we have determined was not needed. Defendant did not turn over any documents until January 2017. As such, it was not against the manifest weight of the evidence for the trial court to conclude that defendant failed to provide records properly requested within the statutory time frame. Given this failure, it was also not against the manifest weight of the evidence for the trial court to void the $250 invoice, especially considering that there was no apparent connection between the amount of the fee and the documents sent.

¶ 62 B. Breach of Fiduciary Duty

¶ 63 Defendant next argues that the trial court erred in not dismissing Teresa's breach of fiduciary duty claim in count III as time-barred. Defendant points out that the five-year statute of limitations for "all civil actions not otherwise provided for" (735 ILCS 5/13-205 (West 2016)) applies to claims of breach of fiduciary duty. *Armstrong v. Guigler*, 174 Ill. 2d 281, 296-97 (1996); *Hassebrock v. Ceja Corp.*, 2015 IL App (5th) 140037, ¶ 28. Defendant cites *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 618 (2007), where the court stated that "under the discovery rule, which is applicable to breach of fiduciary duty claims, the cause of action accrues and the limitations period commences when the plaintiff knew or reasonably should have known of the injury and that it was wrongfully caused."

¶ 64 Defendant further argues that the allegations of plaintiffs' complaint are judicial admissions that could not be controverted at trial. See *Calloway v. Allstate Insurance Co.*, 138 Ill. App. 3d 545, 549 (1985) ("Allegations contained in a complaint are judicial admissions and are conclusive against the pleader."); *State Security Insurance Co. v. Linton*, 67 Ill. App. 3d 480, 484 (1978) ("When the admission is made in an unverified pleading signed by an attorney, it is binding on his client.")

¶ 65 Defendant notes that plaintiffs alleged that they started to experience water accumulation in "large volume" in their garage around 2008 to 2009, causing damage to their unit and personal property stored in the garage, and that from 2009 to 2011, defendant attempted various remedies that failed to correct the problem. Defendant argues that the allegations were deliberate, clear, and unequivocal statements regarding concrete facts that were uniquely within plaintiffs' direct and personal knowledge. Defendant maintains that plaintiffs voluntarily withdrew their proposed amended complaint, leaving the original complaint as the only operative pleading. Defendant argues that, based on the allegations, the statute of limitations began to run

as early as 2008 to 2009, or as late as 2011, meaning that plaintiffs should have filed suit in 2013 or 2014, or at the latest by 2016.

¶ 66 Defendant continues that during the proceedings and at trial, plaintiffs made no claim that their judicial admissions were the result of mistake or confusion. Defendant argues that, to the contrary, plaintiffs affirmatively testified that they knew of the water issues in their garage as early as 2008 or 2009. Defendant points to Katarzyna's testimony in which she agreed with the statement that there was ongoing water damage that "went on continuously and repetitively from 2009 up until the work was done by [the] contactor at the end of October that fixed the problem."

¶ 67 Teresa does not dispute that the five-year statute of limitations applies. However, she responds that the first accumulation of water in 2008 to 2009 did not trigger the running of the statute of limitations for constructive fraud, because the limitations period is measured from the accrual of the cause of action, and the presumption of constructive fraud arises "[w]here there is a breach of a legal or equitable duty arising out of a fiduciary relationship." *LaSalle National Trust, N.A. v. Board of Directions of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d 449, 455 (1997). Teresa argues that she testified that the breach of fiduciary duty occurred on October 29, 2015, in that she testified that she was frustrated with defendant's lack of action and constant delay, and authorized her contractor to perform the work that day. Teresa argues that Katarzyna's testimony corroborated this information.

¶ 68 Teresa additionally argues that she did not file a verified complaint, and admissions in unverified pleadings are considered admissions against interest, which are not conclusive against the pleader and may be explained or contradicted. *Bartsch v. Gordon N. Plumb, Inc.*, 138 Ill. App. 3d 188, 197 (1985). Teresa also points out that at the close of trial, the trial court granted

her motion to conform her pleadings to the proofs presented at trial, specifically that the breach of fiduciary duty was discovered on or about October 29, 2015.

¶ 69 We need not resolve the issue regarding the question of judicial admissions in an unverified complaint, as Teresa does not dispute the allegations and her testimony that water began coming into her garage in 2008 or 2009. Rather, she argues that the breach of fiduciary duty occurred on about October 29, 2015, which would result in her complaint being timely-filed. The trial court granted plaintiffs oral motion to amend the complaint to include this allegation. Plaintiffs subsequently filed a written motion to file an amended complaint to include allegations regarding damage to Katarzyna's personal property, but they later chose to withdraw this motion. However, the withdrawal of the motion did not affect the allegation regarding the October 29, 2015, breach.

¶ 70 We note that there is a procedural anomaly with defendant bringing its section 2-619(a)(5) motion at the close of plaintiffs' case in chief. Section 2-619 of the Code states that the motion may be brought "within the time for pleading" (735 ILCS 5/2-619 (West 2016)), which would have ended before the trial began. However, the trial court addressed the merits of the motion, effectively giving defendant leave to file the motion late. See *Long v. Elborno*, 376 Ill. App. 3d 970 (2007) (trial court has the discretion to allow a late filing of a motion to dismiss); see also Ill. S. Ct. R. 286 (eff. Aug. 1, 1992) (trial court may relax the rules of procedure in small claims cases). A trial court does not abuse its discretion by allowing a tardy pleading unless it can be demonstrated that the opposing party was prejudiced by the late filing of the motion to dismiss. *People v. Cortez*, 338 Ill. App. 3d 122, 128 (2003). Here, plaintiffs never argued at trial or on appeal that the motion was untimely, much less that they were prejudiced by its late filing. According, they have forfeited any arguments relating to the timing of the motion. See *In re*

M.K., 284 Ill. App. 3d 449, 455 (1996) (the petitioners forfeited their argument that a section 2-619 motion to dismiss was untimely, because they did not raise the argument in the trial court).

¶ 71 A denial of a section 2-619 motion to dismiss merges with the final judgment from which an appeal was taken. *In re Marriage of Sorokin*, 2017 IL App (2d) 160885, ¶ 22. Accordingly, we consider the statute of limitations argument in the context of the case as a whole, including the trial. Plaintiffs alleged breach of fiduciary duty in count III. To prove such a claim, a plaintiff must show that a fiduciary duty existed, that the defendant breached its fiduciary duty, and that the breach proximately caused the plaintiff's injury. *Pippen v. Pedersen & Houpt*, 2013 IL App (1st) 111371, ¶ 21. Section 13-205, which applies to such claims (*Armstrong*, 174 Ill. 2d at 296-97) provides that the cause of action shall be commenced within five years "after the cause of action accrued" (735 ILCS 5/13-205 (West 2016)). A cause of action accrues under the statute when the plaintiff " 'knew or reasonably should have known that it was injured and that the injury was wrongfully caused.' " *Lubin v. Jewish Children's Bureau of Chicago*, 328 Ill. App. 3d 169, 172 (2002) (quoting *Superior Bank FSB v. Golding*, 152 Ill. 2d 480, 488 (1992)). A plaintiff reasonably should know that an injury is wrongfully caused when he has enough information about the injury to alert a reasonable person about the need for additional inquiry to determine if the cause of the injury is legally actionable. *Id.* The limitation period begins when the plaintiff is injured, not when the plaintiff realizes the consequences of the injury or the full extent of the injury. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 45. "That damages are not immediately ascertainable does not postpone the accrual of a claim." *Indiana Insurance Co. v. Machon & Machon, Inc.*, 324 Ill. App. 3d 200, 304 (2001). The point at which the limitations period began to run is generally a question of fact, but it becomes a question of law where the undisputed facts

show that only one conclusion can be drawn. *Diotallevi v. Diotallevi*, 2013 IL App (2d) 111297, ¶ 28.

¶ 72 We agree with defendant that the trial court erred in denying its motion to dismiss count III as time-barred. We reach this conclusion based on the undisputed facts. Plaintiffs' complaint and the evidence presented at trial clearly showed water first began coming into plaintiff's garage as early as 2007 and as late as 2009. Defendant tried various remedies from 2009 to 2011 to resolve the issue, all of which plaintiffs claimed were ineffectual. For example, Teresa admitted at trial that, as a result of the water issue, defendant installed a trench and drain tile in 2007; did seal waterproofing work, installed a sump pump, and replaced her driveway in 2009; and repaired a leak in 2011. Further, Teresa wrote in her December 1, 2015, letter to defendant that defendant had "spent approximately $2000 for a sump pump, approximately $500 for wall protection and approximately $400 for the metal track by the garage door. *** The work was done but this didn't solve the problem. The water continued to collect inside the garage." The evidence showed that the referenced work was completed by 2011. As defendant highlights, Katarzyna similarly agreed with the statement that the water issue "went on continuously and repetitively from 2009 up until the work was done by [the] contactor at the end of October that fixed the problem." Accordingly, by 2011 at the latest, Teresa should have known of the injury, being the water problem in her garage, and that it was wrongfully caused, in that defendant had allegedly breached its fiduciary duty by failing to remedy it. That the problem became worse in 2015 does not reset the limitations clock. As such, Teresa's 2017 complaint was untimely. We note that the trial court applied very similar logic in dismissing count II of the complaint. See *supra* ¶ 12. Accordingly, we reverse the denial of defendant's motion to dismiss count III, and we vacate the judgment in favor of Teresa on this count.

¶ 73 Based on our resolution of this issue, we do not address defendant's alternative arguments that: (1) defendant was prejudiced by plaintiffs improperly shifting their claims at trial to the existence of a foundation crack, which was never alleged in their complaint; (2) the declaration did not require defendant to maintain or repair plaintiffs' foundation; (3) defendant was protected by the business judgment rule; and (4) the trial court erred in ruling in Teresa's favor when the evidence showed that defendant was ready to hire U.S. Waterproofing, which would perform the work at one-third the cost of Teresa's contractor and provide a lifetime warranty that her contractor did not.

¶ 74 C. Rule 137 Sanctions

¶ 75 Last, defendant argues that the trial court erred in denying its motion for Rule 137 sanctions against Katarzyna and her attorney. Rule 137 allows a court to sanction a party or attorney who has filed a pleading that is either not well-grounded in fact or law, or that is interposed for an improper purpose. Ill. S. Ct. R. 137 (eff. Jan. 1, 2018); *Enbridge Pipeline (Illinois), LLC v. Hoke*, 2019 IL App (4th) 150544-B, ¶ 48. We construe Rule 137 strictly because it is penal is nature. *Id.* The rule is intended to prevent the filing of false and frivolous lawsuits, as opposed to penalizing litigants just because they were unsuccessful. *Clark v. Gannett Co.*, 2018 IL App (1st) 172041, ¶ 66. The party seeking sanctions bears the burden of proof to show that the other party made untrue and false allegations without reasonable cause. *Id*. Whether to grant sanctions under Rule 137 is within the trial court's discretion. *Enbridge Pipeline (Illinois), LLC*, 2019 IL App (4th) 150544-B, ¶ 48. A trial court abuses its discretion where no reasonable person would agree with its decision. *Id.*

¶ 76 Defendant notes that the trial court denied sanctions on the basis that defendant had known of Katarzyna's lack of ownership in November 2016 but did not seek to dismiss her until

the close of plaintiffs' case, which the trial court stated was untimely. The trial court also stated that Katarzyna testified that various items of personal property that were damaged by the flooding were jointly owned by her and Teresa.

¶ 77 Defendant argues that nothing in the Illinois Supreme Court Rules required it to move to dismiss the count under section 2-619 prior to trial, and that Illinois Supreme Court Rule 287 (eff. Aug. 1, 1992) allows a defendant to file such a motion without leave of court. Defendant additionally points out that on the day the trial began, it informed the trial court and plaintiffs' counsel of Katarzyna's lack of standing. Defendant maintains that plaintiffs should have immediately removed Katarzyna as a plaintiff at that time. According to defendant, Katarzyna's lack of a signature on the records request shows that she knew that she was not a member of defendant. Defendant additionally argues that the trial court improperly shifted the burden of complying with Rule 137 to defendant based on defendant's prior knowledge of Katarzyna's lack of ownership. Defendant maintains that the mere fact that Katarzyna lived with Teresa and asserted that their joint possessions were damaged did not make Katarzyna a record title owner or member of defendant that would allow her to sue defendant in the first place.

¶ 78 Teresa restates the alleged circumstances related to Katarzyna's name being removed from the title (see *supra* ¶ 37), and she argues that Katarzyna did not sign the records request because members were entitled to only one vote per household. Teresa maintains that at no point during the proceedings did defendant raise any concerns or objections about Katarzyna's standing. Teresa also argues that Katarzyna was a proper plaintiff because she was an intended beneficiary under the declaration, and that Katarzyna suffered personal property damage due to defendant's failure to remedy the foundation crack. Last, she asserts that defendant suffered no

prejudice because the trial would have proceeded the same regardless of whether Katarzyna was a named plaintiff or simply a witness.

¶ 79 Defendant responds that Teresa's arguments on this subject must be stricken because Katarzyna never filed an appearance in this appeal. Defendant alternatively argues that Teresa forfeited the arguments by not raising them in the trial court; that counsel previously represented plaintiffs in a 2014 forcible detainer action and would have known at that time that Katarzyna was not a record title owner; and that the focus of Rule 137 is the objective determination of the conduct of the litigant or her attorney, and not prejudice to the other party.

¶ 80 We decline to strike Teresa's arguments on this subject, as sanctions were sought against her attorney on appeal, in addition to Katarzyna. We ultimately conclude that the trial court acted within its discretion in denying defendant's request for Rule 137 sanctions. As the trial court pointed out, the November 2016 letter showed that defendant knew, before the suit was even filed, that Katarzyna was not a title holder. In its answer to plaintiffs' complaint, defendant denied that she was a legal owner of the unit. Further, on the morning of trial, defendant's attorney stated that there was a quitclaim deed signed resulting in Katarzyna no longer being an owner of the property, meaning that she lacked standing. The trial court replied that she was a named plaintiff and that there was no motion to dismiss her as a plaintiff. Defendant's attorney replied, "Good enough," thereby conceding to her remaining a plaintiff until it filed a motion to dismiss. Still, defendant did not bring the motion to dismiss until the end of plaintiff's case in chief. Rule 287 does not assist defendant, as it states that no motion shall be filed in small claims cases without prior leave of court "[e]xcept as provided in sections 2-619 and 2-1001 of the Code of Civil Procedure." Ill. S. Ct. R. 287 (eff. Aug. 1, 1992). As stated, section 2-619 of the Code

states that the motion may be brought "within the time for pleading." 735 ILCS 5/2-619 (West 2016). Accordingly, defendant's motion to dismiss Katarzyna was untimely.

¶ 81 We also agree with Teresa's argument that the trial would have proceeded the same whether Katarzyna was a named plaintiff or a witness; the lack of prejudice to a party can be considered in determining whether Rule 137 sanctions are appropriate. See *In re Y.A.*, 383 Ill. App. 3d 311, 316 (2008). Moreover, the purpose of Rule 137 is to prevent abuse of the judicial process by sanctioning parties who file vexatious and harassing actions based on unsupported allegations of fact or law (*Clark*, 2018 IL App (1st) 172041, ¶ 66), and the fact that Teresa prevailed on two counts in the trial court shows that the complaint as a whole was not a frivolous action. Finally, as the trial court pointed out, regardless of whether Katarzyna was a title holder, a good-faith argument could have been made that she had standing based on damage to her personal property.

¶ 82 D. Rule 281

¶ 83 Turning to the cross-appeal, Teresa first argues that the trial court erred in ruling that Rule 281 limited the entire award in a small claims case to $10,000. Teresa argues that the limit applies only to the underlying claim itself and not to attorney fees.

¶ 84 The trial court awarded Teresa $7,980 in attorney fees count I and $4,700 in damages on count III, thereby raising the question of the $10,000 limit in Rule 281. See *supra* ¶ 45. However, based on our determination that the trial court erred in denying defendant's motion to dismiss count III, which results in the vacation of the $4,700 of damages to Teresa on that count, only the $7,980 in attorney fees and $418.83 in costs for count I remains, which totals $8,398.83. The question of the $10,000 limit is therefore moot, and we do not address it. See *In re K.C.*,

2019 Ill. App (4th) 180693, ¶ 20 (an issue on appeal that no longer presents an actual controversy is moot).

¶ 85 E. Attorney Fees for Count I

¶ 86 Teresa next argues that the trial court erred in not awarding all reasonably-incurred legal fees connected to the litigation of count I. She maintains that her attorney filed a detailed invoice describing the legal work performed, in six-minute increments, but the trial court simply omitted some of the charges in its fee award, without explanation. Teresa argues that the trial court failed to award any fees for communicating with her or opposing counsel, for time spent during court-ordered recesses and in meetings with her on trial days, for travel time, and for various other charges.

¶ 87 The trial court awarded Teresa attorney fees for count I under the portion of the Association Act that provides that if the association fails to provide records properly requested, the member may seek appropriate relief and "shall be entitled to an award of reasonable attorney's fees and costs if the member prevails and the court finds that such failure is due to the acts or omissions of the board of managers or the board of directors." 765 ILCS 160/1-30(i)(4) (West 2016). When determining the reasonableness of attorney fees, the trial court should consider a variety of factors, including the nature of the case; the case's novelty and difficulty level; the attorney's skill and standing; the degree of responsibility required; the usual and customary charges for similar work; and the connection between the litigation and the fees charged. *Northbrook Bank & Trust Co. v. Abbas*, 2018 Ill. App. (1st) 162972, ¶ 73. The party seeking fees has the burden of presenting sufficient evidence as to their reasonableness. *U.S. Bank National Ass'n v. Randhurst Crossing LLC*, 2018 IL App (1st) 170348, ¶ 78. The trial court has broad discretion in awarding fees, and we will not reverse its award absent an abuse of that

discretion. *Id.* Further, " '[t]he trial court's determination as to an appropriate award of attorney fees must be considered in light of the principle that the trial judge is permitted to use his own knowledge and experience to assess the time required to complete particular activities, and a court of review may not reverse an award of attorney fees merely because it may have reached a different conclusion.' " *Id.* (quoting *Chicago Title & Trust Co. v. Chicago Title & Trust Co.*, 248 Ill. App. 3d 1065, 1074 (1993)).

¶ 88 Here, the trial court stated that it would be awarding only the attorney fees attributable to count I, whereas many of the charges for which Teresa seeks reimbursement are not specific to that count. Further, the trial court's discussion of the attorney fees encompasses over nine pages of the report of proceedings, wherein it went through the various pleadings and court dates in detail. Based on our review of the record, we cannot say that the trial court's ultimate attorney fee award was an abuse of discretion.

¶ 89 F. Attorney Fees for Count III

¶ 90 Teresa also argues that the trial court erred in denying attorney fees for count III. Given our reversal of the trial court's denial of the defendant's motion to dismiss that count, this issue is moot.

¶ 91 G. Dismissal of Count II

¶ 92 Last, Teresa contends that the trial court erred in dismissing count II by applying the incorrect statute of limitations; the trial court applied the five-year limitations period of section 13-205, whereas Teresa argues that the ten-year limitation period for written contracts under section 13-206 (735 ILCS 5/13-206 (West 2016)) applies. She cites *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2014 IL App (1st) 111290, ¶ 75, where the court stated that a "declaration is the contract between the association and the unit owners governing the operation

of the condominium property and association and sets forth the board's duties related to management of the property and association." Teresa also points out that the rules of contract construction apply to declarations of covenants. *Siena at Old Orchard Condominium Ass'n v. Siena at Old Orchard, L.L.C.*, 2017 IL App (1st) 151846, ¶ 54.

¶ 93 Defendant argues that although declarations may be evaluated using contract principles, declarations are not contracts but rather "covenants running with the land." *Board of Directions of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d at 455. Defendant highlights that we strictly interpret the meaning of a "written" contract, and that a contract is considered written, for statute of limitations purposes, if all essential terms are reduced to writing and can be determined from the instrument. *Armstrong*, 174 Ill. 2d at 288. Defendant further highlights the supreme court's statement that "the fact that the origin of a cause of action may ultimately be traced to a writing has never been sufficient, standing alone, to automatically warrant application of the period of limitations governing written contracts." *Id.* at 290. Defendant maintains that the trial court correctly determined that the declaration imposed certain duties on defendant but was not a contract, and that the nature of Teresa's injury was property damage. Defendant again cites *Armstrong*, where the court stated that the applicable statute of limitations is governed by the type of injury at issue, regardless of the pleader's designation of the action's nature. *Id.* at 286.

¶ 94 The trial court dismissed count II pursuant to defendant's motion under section 2-619(a)(5). A section 2-619 motion admits the legal sufficiency of a complaint but asserts an affirmative matter that defeats the claim. *Smith v. Vanguard Group, Inc.*, 2019 IL 123264, ¶ 9. Section 2-619(a)(5), in particular, allows for the involuntary dismissal of an action that "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2016). When ruling on a section 2-619 motion to dismiss, the court must view all pleadings and supporting

documents in the light most favorable to the nonmoving party. *Paszkowski v. Metropolitan Water Reclamation District of Greater Chicago*, 213 Ill. 2d 1, 5 (2004). We review *de novo* a dismissal under section 2-619. *Smith*, 2019 IL 123264, ¶ 9.

¶ 95 We agree with defendant that the trial court correctly applied the five-year statute of limitations found in section 13-206. As defendant points out, a declaration is a covenant running with the land (*Board of Directions of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d at 455) and is not a contract. Even if a declaration could be considered a contract, it would not qualify as a written contract under section 13-206 because the essential terms of the contract must be ascertainable from the contract itself. See *Crawford v. Belhaven Realty LLC*, 2018 IL App (1st) 170731, ¶ 66. This is clearly not the situation here, as Teresa's identity cannot be determined from the declaration.

¶ 96 Our resolution is supported by *Portfolio Acquisitions, L.L.C. v. Feltman*, 391 Ill. App. 3d 642 (2009), which involved a credit card agreement. The appellate court held that section 13-205's five-year limitations period applied rather than section 13-206's 10-year limitations period for written contracts. *Id.* at 652. The court stated: "[T]here is no dispute that a contract is in existence, only whether a written contract exists." *Id.* The court reasoned that because parol evidence would be required to show all essential terms and conditions of the contract, the relationship between the parties, and the defendant's receipt and acceptance of the essential terms, the contract could not be considered to be a written contract for statute of limitations purposes. *Id.* In the instant case, even if the declaration could be considered a contract in the first place, it would not be a written contract because parol evidence would be required to demonstrate Teresa's identity as a member of the association. As such, the trial court correctly

applied section 13-205's five-year limitations period for "all civil actions not otherwise provided for" (735 ILCS 5/13-205 (West 2016)).

¶ 97 Teresa asserts that if section 13-205's limitations period applies, the trial court still erred in finding that the cause of action accrued in 2009, because she did not discover that defendant breached its duty under the declaration until October 29, 2015. Citing *Schoondyke v. Heil, Heil, Smart & Golee, Inc.*, 89 Ill. App. 3d 640 (1980), Teresa also argues that defendant made new promises in July and October 2015, and it could be sued for breach of covenants if it failed to do as promised. In Teresa's response to defendant's motion to dismiss count II, she stated that defendant "specifically agreed to cover the cost of repairs by a private contractor in July of 2015."

¶ 98 We reject Teresa's argument for the reasons previously set forth, namely that she should have known of her injury, and that it was wrongfully caused, by 2011 at the latest, making her 2017 filing beyond the five-year limitations period. See *supra* ¶ 72. *Schoondyke* does not assist Teresa because, unlike count II, the plaintiff there asserted a tort claim for negligence. *Id.* at 641-42. Moreover, the court held that the association had voluntarily assumed a duty through its declaration (*id.* at 645), which is different than "new promises" outside of the declaration that Teresa now asserts. As the trial court also pointed out, defendant authorized Teresa only to obtain bids from an outside contractor, without promising that it would pay that particular contractor.

¶ 99 As a final note, both parties summarily request attorney fees and costs incurred in the trial court and on appeal. However, because neither party has presented sufficient argument as to why such fees are appropriate, we decline to award such fees. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1,

2017). We further note that although defendant has prevailed on a portion of its appeal, we have affirmed the remainder of the trial court's ruling.

¶ 100 III. CONCLUSION

¶ 101 For the reasons stated, we affirm the trial court's ruling in Teresa's favor on count I, along with the corresponding award of $8,398.83 for attorney fees and costs on that count. We also affirm the trial court's dismissal of count II. We reverse the trial court's denial of defendant's request to dismiss count III as time-barred, and we vacate the damages it awarded to Teresa on that count.

¶ 102 Affirmed in part and reversed in part.