2018 IL App (1st) 172650-U

SIXTH DIVISION
August 31, 2018

No. 1-17-2650

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CATALPA GARDENS CONDOMINIUM ASSOCIATION, an Illinois not-for-profit corporation, by its Board of Managers,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	
BANK OF AMERICA, N.A., a National Banking Association,	)	
Defendant-Appellee,	)	No. 14 L 1409
(Catalpa Partners, LLC, an Illinois Limited Liability Company, American Associates Construction, Inc., an Illinois corporation, S&S Construction, Inc., an Illinois corporation, McCauley Construction Corporation, an Illinois corporation, Charles J. Cornelius, Jr., individually, Eric Christman, individually, William A. Lockhart, individually, and GNP Management Group, LLC, an Illinois Limited Liability Company,	)	Honorable Brigid M. McGrath,
Defendants).	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment

ORDER

¶ 1 ***Held:*** We affirm the dismissal of plaintiff's claims for construction defects and veil-piercing for failure to state claims upon which relieve can be granted. We reverse

> the dismissal of plaintiff's claim for aiding and abetting fraud as time-barred and remand for further proceedings regarding that claim.

¶ 2 Plaintiff Catalpa Gardens Condominium Association (the Association) appeals the circuit court's order dismissing its claims against Bank of America (the Bank) for failure to state a claim upon which relief could be granted and as time-barred. We affirm in part, reverse in part, and remand.

¶ 3 BACKGROUND

¶ 4 This is an action for alleged defects and related fraud in the construction of the Catalpa Gardens condominium. The condominium was developed by defendant Catalpa Partners, LLC with defendant American Associates Construction, Inc. serving as the general contractor. Defendant Charles J. Cornelius, Jr. was the manager of Catalpa Partners and the president of American Associates, handling the day-to-day operations of both entities.

¶ 5 In 2005, a predecessor organization to Bank of America made a construction loan to Catalpa Partners with personal guaranties executed by Cornelius. By June 2008, Catalpa Partners had defaulted on the loan and was insolvent. Rather than foreclose, the Bank induced Catalpa Partners and Cornelius to enter into a Modification and Forbearance Agreement. Among other things, the agreement provided for a forbearance fee from Cornelius to the Bank; the release or discharge of existing mechanics liens and a subordinate loan; additional cash equity to be injected by Cornelius; and for 100% of the net sale proceeds from the remaining condominium units to be paid to the Bank. Over the next three years, Cornelius worked on completing and selling the remaining units without taking a salary. After the last unit was sold, the Bank released Cornelius from his personal guaranties.

¶ 6 The Modification and Forbearance Agreement includes language disclaiming "any agency, fiduciary, partnership, franchise or joint venture relation between or among [the Bank]

and any other Party." Additionally, the agreement specifically "renounce[s] the existence of any form of joint venture or partnership."

¶ 7 In 2009, Catalpa Partners hired defendant GNP Management Group to provide management services for the condominium. According to the fourth amended complaint at issue in this appeal, multiple unit owners complained of water leakage to GNP. Certain repairs were made in 2009 and 2010, but GNP was aware that efforts to remediate the water leakage were inadequate and that they did not address the underlying construction defects.

¶ 8 Plaintiff is a nonprofit condominium association formed in July 2007. Catalpa Partners appointed the initial condominium board and control was transferred to a resident-elected board in August 2010. The next month, the Association received a "Transition Study" from Reserve Advisors, Inc. The Transition Study was based on a visual, noninvasive inspection of the condominium. Reserve Advisors intended the Transition Study to be a budgeting tool to help the Association estimate the cost "to correct the current condition, design or construction defects related to the common elements" of the condominium. The Transition Study estimated that it would cost over $3.8 million to remediate identified defects, including, among other things, problems related to the facade, water infiltration, and the installation of windows and doors. The report "strongly recommend[ed] the Association retain legal counsel to consider and implement any discussion with or legal action involving another third party, i.e., the Developer."

¶ 9 The Transition Study also recommended that the Association engage an engineer to conduct an invasive inspection of the facade, including "a sampling of representative areas, removal of masonry, and windows and doors." The Association hired an engineer for that purpose in the spring of 2011. The engineer's proposal was dated March 2011, but the engineer's report was not issued until July 2013. The engineer conducted an invasive inspection in October

2012 and made multiple exploratory openings of the masonry veneer. Among other things, the engineer identified defects with the masonry, waterproofing, and the installation of windows and doors. The various defects identified by the engineer form the basis of the plaintiff's construction defect claims.

¶ 10 On February 11, 2014, the Association brought this construction defect and fraudulent concealment action against Catalpa Partners, American Associates, the masonry subcontractor, and the initial developer-appointed board. It was not until the summer of 2016 that the Association and its counsel learned of the loan defaults and modification that occurred in 2008. On September 14, 2016, plaintiff added the Bank as a defendant in its fourth amended complaint. The five counts against the Bank are: (XX) liability as a joint venturer with Catalpa Partners and Cornelius; (XXI) liability as successor developer to Catalpa Partners; (XXII) liability as alter ego of Catalpa Partners; (XXIII) breach of the implied warranty of habitability under *Minton v. Richards Group of Chicago Through Mach*, 116 Ill. App. 3d 852 (1983); and (XXIV) aiding and abetting common law fraud.

¶ 11 The Bank moved to dismiss all of the counts against it under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2–619.1 (West 2016)), arguing that the claims were barred by the statute of limitations and also that the claims were not sufficiently pled. The circuit court dismissed counts XX, XXI, and XXIII as time-barred under the four-year statute of limitations for construction related claims (735 ILCS 5/13-214(a) (West 2016)) and for failure to state a claim upon which relief could be granted. The court found that the facts were inadequate as a matter of law to support a claim against the Bank as a developer, whether as a joint venturer with or as a successor to Catalpa Partners.

¶ 12 In finding that those counts were time-barred, the court stated:

> "The complaint itself points to the fact that plaintiff knew the defects at least as early as 2010, when the complex's residents began to complain of leaks on the property and the inadequacy of the repairs to fix them. That's paragraph 190. That same year is when the plaintiff received the reserve adviser's report relied on by [the engineer] detailing deficiencies in the complex's exterior facade. That's Exhibit B. In looking at the allegations and the complaint, March 2011 would be the latest it would know of the defects through [the engineer's] proposal to investigate the complex's interior water leakage. All of these dates fall outside the four-year statute of limitations."

¶ 13 The court also granted the Bank's motion to dismiss count XXII on both section 2-615 and 2-619 grounds. 735 ILCS 5/2-615 (West 2016); 735 ILCS 5/2-619(a)(9) (West 2016). The court found that the loan documents themselves constituted other affirmative matter that precluded a finding that the Bank was an alter ego of Catalpa Partners and that the Association had failed to plead sufficient facts to show that the Bank was an alter ego of Catalpa Partners.

¶ 14 Finally, the court also dismissed count XXIV, aiding and abetting common law fraud, for failure to state a claim upon which relief could be granted. The court granted the Association leave to replead this count to cure any defects.

¶ 15 The parties filed cross-motions to reconsider the rulings on the motion to dismiss. The Association argued that the court erred in dismissing its counts against the Bank and the Bank argued that the court should have dismissed count XXIV as time-barred. After hearing argument on those motions, the court denied the Association's motion and granted the Bank's. The court dismissed count XXIV as time-barred under the general five-year statute of limitations. 735 ILCS 5/13-205 (West 2016). With no remaining claims against the Bank, the court found that

there was no just reason for delaying appeal of its rulings as to those counts. See Ill. S. Ct. R. 304(a) (eff. Mar. 8, 2016). This appeal followed.

¶ 16 ANALYSIS

¶ 17 On appeal, plaintiff argues that the circuit court erred: (1) in dismissing counts XX, XXI, and XXIII of its complaint as time-barred under section 13-214 of the Code of Civil Procedure (735 ILCS 5/13-214(a) (West 2016)); (2) in dismissing count XXIV as time-barred under section 13-215 (735 ILCS 5/13-205 (West 2016)); (3) in dismissing count XXII on 2-619(a)(9) grounds (735 ILCS 5/2-619(a)(9) (West 2016)); and (4) in finding that plaintiff failed to state causes of action on all counts against the Bank.

¶ 18 The Code of Civil Procedure allows a party to combine a section 2-619 motion to dismiss with a section 2-615 motion to dismiss. 735 ILCS 5/2–619.1 (West 2016). A section 2-615 motion to dismiss "tests the legal sufficiency of the complaint" while a section 2-619 motion "admits the legal sufficiency of the complaint, but asserts an affirmative matter outside the complaint that defeats the cause of action." *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Dismissal under either section should not be granted unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006) (section 2–615); *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8 (section 2–619).

¶ 19 When ruling on a section 2-615 motion or a section 2-619 motion, "a court must accept as true all well-pleaded facts, as well as any reasonable inferences that may arise from them." *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Mere conclusions unsupported by specific facts, however, are not accepted as true. *Id.* We review dismissal under either section 2-615 or 2-619 under a *de novo* standard. *Id.*

¶ 20 We begin by examining whether the circuit court properly dismissed plaintiff's claims under section 2-615. A court should grant a motion to dismiss only if it is clear that "the plaintiff can prove no set of facts that would support" its claim. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 188 (1997).

¶ 21 First, the Association contends that the circuit court erred in dismissing its joint venture count (XX). "A joint venture is an association of two or more persons to carry out a single enterprise for profit." *Hiatt v. Western Plastics, Inc.*, 2014 IL App (2d) 140178, ¶ 72. Whether a joint venture is formed is a question of the parties' intent. *Id.*, ¶ 73. To establish such intent, one must show "(1) an express or implied agreement to carry on an enterprise; (2) a demonstration of intent to be joint venturers; (3) a community of interest, as reflected in the contribution of property, money, effort, skill, or knowledge; (4) a measure of joint control and management of the enterprise; and (5) sharing of profits and losses." *Id.*

¶ 22 The Association argues that it pleaded facts sufficient to establish all five elements of intent to form a joint venture. It pleaded that (1) the Bank and Catalpa Partners entered into an agreement to complete the condominium and sell the remaining units; (2) the Bank and Catalpa Partners demonstrated their intent to be joint venturers through their conduct; (3) the Bank and Catalpa Partners had a community of interest, as reflected in Catalpa Partners' contribution of effort and property in the completion and sale of the condominium units and the Bank's contribution of expertise and knowledge in selling distressed property and the release of Cornelius' guaranties; (4) the Bank had joint control over the enterprise in its ability to set minimum prices, direct the proceeds from the sale, approve a new real estate broker, and otherwise approve major decisions; and (5) the Bank and Catalpa Partners shared the profits and losses from the enterprise. The Bank argues, however, that the language of the original loan

documents and the Modification and Forbearance Agreement defeat any claim that there was a joint venture. Additionally, the Bank argues that plaintiff failed to plead that the alleged joint venturers engaged in any sharing of profits or losses. We agree with the Bank.

¶ 23 The intent to form a joint venture can be demonstrated by a formal agreement or can be inferred from the parties' conduct and the facts and circumstances of a given case. *Id.* The Bank argues that the explicit disclaimers in the loan documents and the Modification and Forbearance Agreement establish that there was no intent to form a joint venture. The Association argues, however, that *Hiatt* stands for the proposition that an explicit disclaimer of intent to enter into a joint venture does not control where the parties’ conduct indicates otherwise. This argument relies on language in *Hiatt* indicating that an agency relationship can be found to exist despite a “declaration of the parties” to the contrary. *Id.*, ¶ 80.

¶ 24 In *Hiatt*, the alleged joint venturers signed a written contract explicitly disclaiming any agency relationship between them. *Id.* Because joint venturers are each other’s agents, the party seeking to avoid a finding of a joint venture argued that the disclaimer of agency necessarily acted as a disclaimer of joint venture. *Id.* The court disagreed. *Id.* Because a disclaimer of agency does not control where the parties’ conduct indicates the existence of an agency relationship, the court found that the disclaimer of agency was not necessarily precluded the existence of a joint venture. *Id.* Although the *Hiatt* court did find that a joint venture may exist even if *agency* has been disclaimed by the parties, it did not find that a joint venture may exist if *joint venture* has been disclaimed. In fact, the Hiatt count announced that it was “critical” to its ruling that the contract at issue “[did] not explicitly state that the parties are not engaged in a joint venture.” *Id.*

¶ 25 Here, the Modification and Forbearance Agreement between Bank and Catalpa Partners specifically “renounce[d] the existence of any form of joint venture or partnership.” This fact

distinguishes this case from *Hiatt*, in which the agreement "critically" did *not* disclaim the existence of a joint venture.

¶ 26 The Association persists, arguing that the "off-the-books" agreement between Cornelius and the Bank was totally separate and distinct from the Modification and Forbearance Agreement, and therefore not subject to the agreement's disclaimers. But the control that the Bank had over the alleged joint venture, such as the ability to collect 100% of the net proceeds and to set the minimum sales prices for the remaining units, is derived from the Modification and Forbearance Agreement. The Association conveniently relies on the agreement to establish the Bank's control over Catalpa Partners but simultaneously argues that the language of the agreement is "neither relevant or controlling" in determining whether the parties intended to form a joint venture. The Modification and Forbearance Agreement is, indeed, relevant and it vitiates the Association's argument that the parties demonstrated an intent to form a joint venture.

¶ 27 Additionally, the Association failed to adequately plead a sharing of profits or losses. To be sure, the Association did plead that "Catalpa Partners, Cornelius and [the Bank] shared profits and losses from the enterprise." Mere conclusions unsupported by specific facts are insufficient to meet Illinois's fact pleading standard. *Patrick Engineering*, 2012 IL 113148, ¶ 31. Here, the Association has failed to plead facts to support the claim that the Bank and Catalpa Partners shared profits and losses. Without the sharing of profits and losses, there is no joint venture. *Hiatt*, 2014 IL App (2d) 140178, ¶ 73.

¶ 28 According to the complaint, the Bank was entitled to 100% of the net profits from the sale of the remaining condominiums. But it is clear from the Modification and Forbearance agreement that those sales' proceeds were not "profits" of a joint venture, but the existing

principle and interest owed by Catalpa Partners to the Bank. There is no allegation that the Bank would have taken any share of the sales proceeds over and beyond what it was already owed. The Bank is not alleged to have taken any share in Catalpa Partners' profits, only a right to collect money already owed. See *Savers Federal Savings & Loan Ass'n v. Amberley Huntsville, Ltd.*, 934 F.2d 1201, 1208 (11th Cir. 1991) (applying Alabama law) (holding that no profit sharing, and therefore no joint venture, exists if agreement "did not require appellants to pay any of their operating revenue to the bank beyond the scheduled repayment of principal and interest.") Additionally, there is no allegation that the Bank would have borne a share of any losses of the joint venture aside from the type of "losses" borne by any creditor to an insolvent debtor.

¶ 29 Without allegations of sharing profits and losses or a demonstrated intent to form a joint venture, the Association has failed to state a claim for joint venture liability. See *Hiatt*, 2014 IL App (2d) 140178, ¶ 73 ("In the absence of any one of these elements, no joint venture exists.").

¶ 30 Next, the Association contends that the circuit court erred in dismissing its successor/developer count (XXI). Plaintiff alleges that the Bank became the developer and/or successor developer by taking control of the project, taking all of the net sales proceeds, and succeeding to Catalpa Partners entire remaining interest in the condominium. As *de facto* developer, the Bank allegedly breached its fiduciary duty to the unit owners.

¶ 31 The parties agree that this count hinges on whether the Bank was a "developer" under the Illinois Condominium Property Act (the Act). The Act defines a "developer" as:

> "any person who submits property legally or equitably owned in fee simple by the developer *** to the provisions of this Act, or any person who offers units legally or equitably owned in fee simple by the developer *** for sale in the ordinary

> course of such person's business, including any successor or successors to such developers' entire interest in the property other than the purchaser of an individual unit." 765 ILCS 605/2(q) (West 2016).

The Act will not recognize a successor developer until the successor "(i) obtains the assignment [of the predecessor's entire interest] in writing; and (ii) records the assignment." 765 ILCS 605/9.5 (West 2016).

¶ 32 The Association argues that the Bank meets the definition of developer because it, among other things, offered the condominiums for sale to a bulk purchaser; took control of the project; set the sales price for the remaining units; and received 100% of the net profits from the remaining sales, thereby "succeeding to" Catalpa Partners' remaining interest in the project. Crucially, however, the Association does not allege that the Bank ever "legally or equitably owned [the condominium] in fee simple", as is required under section 2(q) of the Act. Additionally, there is no allegation in the complaint that the Bank ever received a written assignment of Catalpa Partners' entire interest in the property.

¶ 33 "In Illinois, the giving of a mortgage is not a separation of title, for the holder of the mortgage only takes a lien thereunder." *Kling v. Ghilarducci*, 3 Ill. 2d 454, 460 (1954). Consequently, the Bank could not have been a "developer" under the Act while its interest in the property was that of a mortgagee. The plaintiff argues that although the Bank never foreclosed on its mortgage, it became a successor developer by acquiring Catalpa Partners' remaining interest in the condominium. In support of this argument, the Association points to the practice notes to the Act. The notes state that a successor developer may be "a lender who succeeds to a developer's interest either by foreclosure or otherwise." 765 ILCS Ann. 605/2(q) (West 2016), Historical & Practice Notes, at 17 (Smith–Hurd 1993); *Board of Managers of Medinah on Lake*

Homeowners Ass'n v. Bank of Ravenswood, 295 Ill. App. 3d 131, 136-37 (1998). However, the Association has not identified any case where the language "by foreclosure or otherwise" has been stretched to include a situation where the lender never acquired title to the property, either through foreclosure or otherwise, such as through a deed in lieu of foreclosure. Count XXI lacks adequate allegations to state a claim against the Bank as a developer or successor developer under the Act.

¶ 34 Next, the Association contends that the circuit court erred in dismissing its alter ego count (XXII) for failure to state a claim upon which relief could be granted. We note that there appears to be some confusion as to whether the Association is seeking to pierce Catalpa Partners' corporate veil or hold the Bank liable under some other form of alter ego theory. Illinois law does not recognize "any stand-alone cause of action for alter ego liability that is separate or different from the equitable remedy of piercing the corporate veil." *A.L. Dougherty Real Estate Mgmt. Co., LLC v. Su Chin Tsai*, 2017 IL App (1st) 161949, ¶ 26. Accordingly, we presume from the Association's arguments and citations that it is seeking to pierce Catalpa Partners' corporate veil to impose liability on the Bank as Catalpa Partners' equitable owner.

¶ 35 Although courts are reluctant to pierce the corporate veil, a court may disregard a corporate entity and impose liability in cases where (1) a corporation is "merely the alter ego or business conduit of another person or entity" and (2) ignoring the corporate form is necessary to prevent "fraud or injustice perpetrated not on the corporation but on third persons dealing with the corporation." *Peetoom v Swanson*, 334 Ill. App. 3d 523, 527 (2002).

¶ 36 Generally, a court examining whether the first prong has been met analyzes "many factors, such as: inadequate capitalization; failure to issue stock; failure to observe corporate formalities; nonpayment of dividends; insolvency of the debtor corporation; nonfunctioning of

the other officers or directors; absence of corporate records; commingling of funds; diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; failure to maintain arm's length relationships among related entities; and whether, in fact, the corporation is only a mere facade for the operation of the dominant stockholders." *In re Estate of Wallen*, 262 Ill. App. 3d 61, 69 (1994). No single factor is determinative, but the court must look at the totality of the relationship. *Id.*

¶ 37 Because piercing the corporate veil is an equitable remedy, courts look to substance of the relationship rather than the form. *Macaluso v. Jenkins*, 95 Ill. App. 3d 461, 465 (1981). Consequently, the corporate veil can be pierced to reach even a nonshareholder if the nonshareholder exercises such control over the corporation that the separate identities cease to exist and the corporation functions solely as a business conduit of the nonshareholder. *Id.* at 466; *Buckley v. Abuzir*, 2014 IL App (1st) 130469, ¶ 31 ("Making officer, director, or shareholder status a prerequisite to veil-piercing elevates form over substance and is therefore contrary to veil-piercing's equitable nature.").

¶ 38 In support of its alter ego theory, the Association relies primarily on *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491 (2005). In that case, a single shareholder owned a corporate defendant, but her husband actually ran the company. *Id.* at 496. Although the husband was not a shareholder, the trial court pierced the corporate veil to impose liability on him. *Id.* at 493. The appellate court affirmed, stating that the "unity of interest and ownership" element of piercing the corporate veil may be met by showing equitable ownership in the absence of legal ownership. *Id.* at 501.

¶ 39 This case is easily distinguishable from *Fontana*. In that case, the evidence clearly showed that the husband was the true owner of the company despite the wife's nominal

ownership. The wife admitted that she did not handle any of the company finances. *Id.* at 496. It was the husband who controlled the company, including directing the company in such a way that it met most of the traditional factors for veil piercing. *Id.* at 499. The corporation was inadequately capitalized, did not observe corporate formalities, failed to pay dividends, operated without a profit, comingled corporate assets with the owners' personal assets, had a non-functioning officer, was insolvent, and did not keep corporate records. *Id.* Here, the Association seeks to pierce the corporate veil of a closely-held corporation, not to reach the individual owner, but to reach its large, institutional creditor. The Association argues that Bank of America, although not a shareholder of Catalpa Partners, became an equitable owner by dominating Catalpa Partners' business, thus satisfying the common ownership requirement. But the actual allegations of control fall far short of those in *Fontana*, and are insufficient to establish that the Bank became an owner of Catalpa Partners.

¶ 40 In its complaint, the Association alleged that the Bank exercised control and dominion over Catalpa Partners when it: "(1) *** required Catalpa Partners and Cornelius to work for three years without compensation to continue selling units in the Condominium in order for Cornelius to be released from the Cornelius Guaranties and (2) required that contractors could only paid [*sic*] for their work to complete the units out of the sales proceeds, (3) required that 100% of sales proceeds would be disbursed to [the Bank], (4) approved the hiring of the broker for sale of the units, (5) set minimum sales prices for the Condominiums and (6) otherwise dominat[ed] decision making for the completion and sale of the remaining units."

¶ 41 Of the traditional factors for veil-piercing, the only one actually pleaded by the Association is Catalpa Partners' insolvency. To satisfy the first prong of the veil-piercing test, the plaintiff must make "a substantial showing that one corporation is really a dummy or sham

for another." *Wallen*, 262 Ill. App. 3d at 68. This burden must be substantial, otherwise every major creditor to an insolvent firm would be liable as the debtor's alter ego.

¶ 42 The Association argues that banks can be held liable as the alter egos of their debtors. For this proposition, it relies on *Krivo Industrial Supply Co. v. National Distillers and Chemical Corporation*, 483 F.2d 1098 (5th Cir. 1973). In *Krivo*, the Fifth Circuit applied Alabama law and stated that "[i]f a lender becomes so involved with its debtor that it is in fact actively managing the debtor's affairs, then the quantum of control necessary to support liability under the 'instrumentality' theory may be achieved." *Id.* at 1105. Even if we accept that the standards under Alabama law are the same as under Illinois law, that case is not helpful for the Association. According to the *Krivo* court, for a creditor to be liable under a theory of veil piercing, it would have to exercise "actual, operative, total control of the subservient corporation". *Id.* at 1107. In that case, the creditor and debtor agreed for the creditor to install an internal auditor with the power to oversee the debtor's finances, establish control procedures for managing cash and investments, and direct the proceeds or income from the disposal of the debtors assets. *Id.* at 1108. No purchase orders could be sent out without the approval of the creditor's representative and no check could issue from the debtor's accounts without his signature. *Id.* at 1111. Even so, the court found that the debtor was no mere instrumentality of the creditor. *Id.* at 1114. "Although [the creditor's] position as a major creditor undoubtedly vested it with the capacity to exert great pressure and influence, we agree with the District Court that such a power is inherent in any creditor-debtor relationship and that the existence and exercise of such a power, alone, does not constitute control for the purposes of the 'instrumentality' rule." *Id.*

¶ 43 The allegations here are far less compelling than in *Krivo*. There are no factual allegations that could lead to the conclusion that the Bank took "actual, operative, total control"

of Catalpa Partners. Even if the Bank was able to exert tremendous pressure and influence on Cornelius, that sort of power is inherent to the creditor-debtor relationship. This is particularly true in the case of an insolvent debtor. According to the complaint, Cornelius agreed to let the Bank approve the broker and set minimum prices for the sale of the units. He also agreed to only pay the contractors out of sales proceeds and to disburse 100% of the net sales proceeds to the Bank. The Association does not allege, however, that the Bank took actual, participatory control of Catalpa Partners, let alone the sort of total control that would justify a finding that the Bank and Catalpa Partners were no longer separate entities. There are no allegations, for example, that the Bank installed its own agents to run the day-to-day operations. The complaint does allege that the Bank "otherwise dominat[ed] decision making for the completion and sale of the remaining units," but that allegation is a mere conclusion unsupported by facts. See *Saletech, LLC v. East Balt, Inc.*, 2014 IL App (1st) 132639, ¶ 29 (affirming dismissal of veil piercing claim where conclusory allegations were not supported by specific factual allegations.)

¶ 44 We do not conclude that a creditor can never be reached by piercing its debtor's corporate veil. However, the case that would justify such a finding would be exceptional, and this is not that case. Having found that plaintiff failed to satisfy the first prong of the veil-piercing test, we need not address the second prong. See *South Side Bank v. T.S.B. Corp.*, 94 Ill. App. 3d 1006, 1010 (1981).

¶ 45 The Association next argues that the circuit court erred in dismissing its implied warranty of habitability count (XXIV). "The warranty of habitability is a creature of public policy *** that has evolved to protect purchasers of new houses upon discovery of latent defects in their homes." *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 183 (1982). "If construction of a new house is defective, its repair costs should be borne by the responsible builder-vendor who created the latent defect."

Id. To further that public policy, the implied warranty of habitability has been extended to subcontractors whose work is defective in cases where the builder-vendor is insolvent. *Minton,* 116 Ill. App. 3d at 855. However, this court has declined to expand the scope of the warranty of habitability beyond those who participated in the physical construction. See *Board of Managers of Park Point at Wheeling Condominium Ass'n v. Park Point at Wheeling, Inc.*, 2015 IL App (1st) 123452 (affirming dismissal of claims against an architect); *Sienna Court Condominium Ass'n v. Champion Aluminum Corp.*, 2017 IL App (1st) 143364, ¶ 2 (affirming dismissal of claims "against design professionals and material suppliers who otherwise did not actually perform construction work.") We see no reason to depart from these well-reasoned cases.

¶ 46 There are no allegations that the Bank actually performed or supervised any construction at the condominium, let alone the allegedly faulty construction at issue in this case. Therefore, the Association has failed to state a claim for breach of the implied warranty of habitability as extended under *Minton*. Such liability only attaches to those who have helped with the physical construction of the property. *Park Point*, 2015 IL App (1st) 123452, ¶ 27.

¶ 47 Because the circuit court's dismissal of counts XX, XXI, XXII, and XXIII on section 2-615 grounds was well founded, we need not address the other arguments related to those counts. See *McNeil v. Carter*, 318 Ill. App. 3d 939, 944 (2001) (declining to "address the viability of the alternative grounds upon which the trial court may have relied in dismissing the complaint").

¶ 48 Finally, the Association argues that the circuit court erred in dismissing its count for aiding and abetting common law fraud (XXV). The court initially dismissed the aiding and abetting count on section 2-615 grounds, but granted plaintiff leave to replead. After hearing argument on cross-motions to reconsider, the court dismissed that count as time-barred.

¶ 49 We begin by examining when the limitations period began to run on plaintiff's aiding and abetting claim. The statute of limitations begins to run "when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused." *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981). Although the question of when the limitations period begins is generally a question to be determined by the fact finder, it is a matter of law for the court to decide if it is apparent from undisputed facts. *Witherell v. Weimer*, 85 Ill. 2d 146 (1981). The running of the limitations period commences when the injured party "becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Knox*, 88 Ill. 2d at 416.

¶ 50 The Bank argues that the undisputed facts show that the Association was aware of its injuries and that they were wrongfully caused no later than March 2011. The Association argues that it neither knew of nor reasonably could have known of any cause of action against the Bank until the summer of 2016 when it learned of the 2008 loan modification. Alternatively, the Association argues that the earliest possible triggering date of its claims was July 21, 2013 when it received the engineer's report. The Association alternatively argues that the triggering date for the statute of limitations is a question of fact to be determined by the jury.

¶ 51 We agree that a fact question exists as to when plaintiff became aware of its injury and its wrongful cause. It is undisputed that multiple demands regarding water infiltration were made upon Catalpa Partners as early as 2009. Remediation efforts made by Catalpa Partners and its agents in response to those complaints proved inadequate and the complaints continued. In September 2010, the Association received the Transition Study that concluded that "common elements of Catalpa Gardens exhibit condition, design or construction defects" and

recommended that plaintiff "retain legal counsel to consider and implement any discussion with or legal action involving another third party, i.e., the Developer." In March 2011, plaintiff accepted the engineer's proposal to conduct an invasive investigation to "assess the significance" of the design or construction defects identified in the Transition Study. However, the Association did not receive the engineer's study until July 2013. The engineer's invasive inspection in October 2012 revealed, among other things, defects with the masonry, waterproofing, and the installation of windows and doors.

¶ 52 The Bank argues that the undisputed facts show that the Association was aware of its injury and its wrongful cause when it received the Transition Study in 2010, and, at any rate, no later than March 2011 when, in the words of the *Knox* court, it hired an engineer to "inquire further to determine whether an actionable wrong was committed." *Knox*, 88 Ill. 2d at 416. The Association maintains that the actionable wrong, Catalpa Partners' alleged fraud and the Bank's aiding and abetting that fraud, could not have been discovered until, at the earliest, the invasive investigation revealed the extent of the construction defects. In support of this argument, plaintiff relies on *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139. In *Henderson*, the trial court dismissed claims for breach of the Chicago Municipal Code and breach of fiduciary duty. *Id.*, ¶ 1. This court reversed that ruling and the supreme court affirmed. *Id.* Specifically, the supreme court found that the plaintiffs had adequately pled that the defendants had fraudulently concealed defects and that the defects could not have been discovered short of "extensive testing and opening up the walls." Id., ¶ 39. The supreme court held that the trial court had erred in finding that there was no factual question as to when the plaintiffs discovered their claims. *Id.*

¶ 53 The Association argues that supreme court held that the statute of limitations did not start running for the *Henderson* plaintiffs "as a matter of law until the contractor opened up the wall and first discovered the defects inside the wall because it was that discovery of concealed defects that informed the association that its injury was 'wrongfully caused.'" This is a misstatement of the holding. The supreme court did not determine when the limitations period started "as a matter of law." It only found that dismissal under section 2-619 of the Code was improper because when the plaintiffs discovered their causes of action was a question of contested fact. *Id.* The facts here are strikingly similar to those in *Henderson*. Although the Association had the Transition Study in 2010 which informed them of an estimated $3.8 million worth of construction or design defects in the condominium, it is unclear whether those defects are the same as those identified by the engineer in its 2013 report.

¶ 54 Additionally, the Association argues that remediation attempts delayed their ability to discover that the water infiltration was wrongfully caused. In *Knox*, the plaintiff's new roof began leaking almost immediately after installation. *Knox*, 88 Ill. 2d at 412. The roofing subcontractor conducted repairs at its own expense and over the next several years occasional repairs were required. *Id.* Only years later did the plaintiff learn that the entire roof needed to be replaced because of deficiencies in the roofing system. *Id.* In holding that the timing of the statute of limitations was a question of fact, the supreme court stated:

> "It may be that the nature of the leak and the fact that the subcontractor undertook at once to remedy it were facts which would not cause a reasonable person to investigate further. However, if not the first leak, at some point along the line, Knox had sufficient information to put a reasonable person on inquiry as to the nature of the defect in the roof and whether a cause of action existed in favor of

Knox. That point must be determined by the trier of fact, and it must determine whether that information was acquired more than 5 years prior to the time that Knox filed suit." *Id.* at 417.

¶ 55 Plaintiff has alleged that there were defects that were undiscoverable short of an invasive inspection and that remediation attempts by certain defendants reasonably delayed the discovery of those defects. As in *Knox* and *Henderson*, the point at which the Association knew of its injury and the existence of a cause of action must be determined by the trier of fact. We reverse the circuit court's dismissal of count XXIV on section 2-619 grounds.

¶ 56 Finally, the Bank argues that we should affirm the dismissal of count XXIV on section 2-615 grounds. The Association argues that count XXIV was adequately pleaded and that even if its pleading was deficient, we should not affirm dismissal where the pleading deficiency could be remedied. See *Village of Pawnee v. Knostman*, 115 Ill. App. 3d 842, 854-55 (1983) ("justice would not be served by affirming a dismissal of a judgment against a party on the basis of a pleading defect which could be remedied by amendment.") The circuit court's basis for dismissing count XXIV with prejudice on September 27, 2017 was the statute of limitations. Although the circuit court had previously dismissed count XXIV on May 22, 2017 for failure to state a claim, it did so without prejudice and with leave to replead. It is clear, therefore, that although the circuit court found count XXIV to be defective, the plaintiffs could possibly have remedied those defects. "Although an appellee may raise any ground in the record to affirm the judgment, it would not be fair to address on appeal the issue of the failure to state causes of action and to affirm on this alternative basis because plaintiffs could possibly have amended their complaint to cure any defects." *Mann v. Kemper Financial Companies, Inc.*, 247 Ill. App. 3d 966, 984 (1992). Accordingly, we do not review the dismissal of count XXIV on section 2-615

grounds. On remand, plaintiff shall have the opportunity to replead count XXIV. We express no opinion on whether the repleaded count will withstand a renewed section 2-615 motion.

¶ 57 CONCLUSION

¶ 58 We affirm the dismissal of counts XX, XXI, XXII, and XXIII for failure to state a claim upon which relief could be granted. We reverse the dismissal of count XXIV on section 2-619 grounds.

¶ 59 Affirmed in part and reversed in part. Cause remanded.