

2012 IL App (2d) 101155-U
No. 2-10-1155 & 2-10-1170 cons.
Order filed January 30, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

R&W CLARK CONSTRUCTION, INC.,)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,)	
)	
v.	)	No. 10-L-147
)	
THE CITY OF ELGIN,	)	Honorable
	)	Robert B. Spence,
Defendant-Appellee.	)	Judge, Presiding.

R&W CLARK CONSTRUCTION, INC.,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.	)	No. 09-AR-3642
)	
THE VILLAGE OF WINFIELD,	)	Honorable
	)	Bruce R. Kelsey,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: Trial court's application of the four-year limitation period barring plaintiff's complaints was proper because plaintiff sought money damages related to defendants' acts or omissions due to planning, supervision, observation or

management of construction. 735 ILCS 5/13-214(a) (West 2010). We affirm the trial courts' dismissal of plaintiffs' complaints.

¶ 1 In two separate cases, plaintiff, R&W Clark Construction, Inc., sought money damages under the terms of contracts with the two defendants, the City of Elgin and the Village of Winfield. With the exception of one count against Elgin, the trial courts dismissed all counts against both defendants as time-barred by the four-year limitations period pursuant to section 13-214(a) of the Code of Civil Procedure (Code). 735 ILCS 5/13-214(a) (West 2010). The trial court dismissed the remaining count against Elgin for failure to state a claim.

¶ 2 In appeal no. 2-10-1155, R&W Clark appeals the trial court's dismissal of its complaint against Elgin arguing: (1) the trial court erred by applying the four-year limitations period under section 13-214(a) of the Code rather than the 10-year limitations period under section 13-206 of the Code (735 ILCS 5/13-206) (West 2010)) to its breach of contract and unjust enrichment counts; and (2) the trial court erred by dismissing its count alleging a violation of the Illinois Prompt Payment Act (50 ILCS 505/1 (West 2000)).

¶ 3 In appeal no. 2-10-1170, R&W Clark appeals the trial court's dismissal of its complaint against Winfield arguing that: (1) the trial court erred by applying the four-year limitations period under section 13-214(a) rather than the 10-year limitations period under section 13-206 of the Code; and (2) the four-year limitations period does not apply because the work contracted for and performed by R&W Clark was not an improvement to the property.

¶ 4 We consolidated these cases on appeal. For the reasons stated below, we affirm both judgments of the trial courts.

¶ 5

I. BACKGROUND

¶ 6

A. Claims Against Elgin

¶7 On March 16, 2010, R&W Clark filed a three-count complaint against Elgin. Count I alleged breach of contract, count II alleged unjust enrichment, and count III alleged violation of the Prompt Payment Act (50 ILCS 505/5 (West 2000)).¹ The following allegations were incorporated into all three counts. The parties entered into a written contract for water works improvement, river intake and pumping station expansion in March 2000. At the same time Elgin and another contractor, Martam Construction (Martam), also contracted to work on the river intake project. The contract between Martam and Elgin “was under the control of those parties.” “Martam’s contract was supposed to be completed prior to [plaintiff] beginning its contract but Martam’s contract was not done.” R&W Clark told Elgin that “the work was not being done by Martam and was delaying [plaintiff] from completing its contract.” R&W Clark “was delayed for over 8 months and not allowed to complete its contract because Martam was not done with the improvement under its contract.” “During the period in which [plaintiff] was delayed, Elgin notified [plaintiff] that [it] was terminating the contract effective October 24, 2001.”

¶8 Count I of R&W Clark’s complaint against defendant/Elgin, entitled “Breach of Contract,” alleged the following. “Due to a delay cause by Elgin and its contractor Martam, [plaintiff] was not able to complete the contract scheduled.” “Due to [Elgin’s] own delay [Elgin] was not able to terminate the contract on October 24, 2001 and such a termination was a breach of contract.” Count II, alleging unjust enrichment, alleged, *inter alia*, that Elgin “benefitted from [plaintiff’s] general contracting duties *** without making full payment for said services.” Count III, alleging violation

¹Count III alleged that R&W Clark presented defendant Elgin an invoice on August 1, 2001, but Elgin never paid R&W Clark. Further, the Prompt Payment Act required Elgin to pay within 60 days.

of the Prompt Payment Act (50 ILCS 505/5 (West 2010)), alleged that R&W Clark presented an invoice to Elgin on August 1, 2001. “Elgin never paid the invoice and continued to ignore invoices thereafter.”

¶ 9 Elgin filed a motion to dismiss R&W Clark’s complaint pursuant to sections 2-615 and 2-619(a)(5) of the Code. 735 ILCS 5/2-615, 2-619(a)(5) (West 2010). The motion to dismiss argued, *inter alia*, that counts I and II of the complaint were time-barred pursuant to the four-year limitations period contained in section 13-214(a) of the Code. 735 ILCS 5/13-214(a) (West 2010). In addition, Elgin argued count III of R&W Clark’s complaint failed to state a cause of action under the Prompt Payment Act.

¶ 10 R&W Clark filed a response to Elgin’s motion to dismiss arguing that the four-year limitations period did not bar its claim because Elgin was not engaged in any activity enumerated in section 13-214(a) of the Code. R&W Clark also argued that the 10-year limitations period contained in section 13-206 of the Code applied because it alleged a failure to pay under the parties’ contract.

¶ 11 Elgin filed a reply to R&W Clark’s response. Elgin attached to its reply, a letter from Elgin to R&W Clark, dated September 17, 2001, warning R&W Clark that it was not performing the contract and demanding that it complete the contract. Elgin also attached to its reply a letter to R&W Clark from Elgin dated October 12, 2001, stating that, pursuant to the previous letter, Elgin was going to complete the work R&W Clark was supposed to complete and deduct the costs from any payments due to R&W Clark. The letter also stated that, Elgin was terminating the contract “for breach.”

¶ 12 On October 14, 2010, the trial court dismissed with prejudice counts I and II of R&W Clark's complaint against Elgin as time-barred pursuant to section 13-214(a) of the Code. The trial court dismissed without prejudice, count III for failure to state a cause of action. R&W Clark timely appealed this order.

¶ 13 **B. Claims Against Winfield**

¶ 14 On August 17, 2010, R&W Clark filed a three-count second amended complaint against Winfield. Count I alleged breach of contract "for failure to pay for contracted work." Count II alleged breach of contract "for failure to return performance bond." Count III alleged violation of Illinois Prompt Payment Act citing, "50 ILCS 505/1 *et seq.*"

¶ 15 The following allegations were incorporated into all three counts. The parties entered into a contract on October 2, 2003, wherein R&W Clark was to "perform certain general contracting duties for the Winfield 2003 Drainage Improvement Program." R&W Clark "provided the services required by the contract and performed all conditions precedent to receiving payment under the contract." Regarding count I, R&W Clark also alleged the following. When R&W Clark completed the project, it issued a pay request for the contract amount of \$14,300. Winfield breached the contract by failing to pay R&W Clark the requested sum. R&W Clark further alleged:

"The contract did not include provisions whereby Winfield assumed the duties enumerated in 735 ILCS 5/13-214. Specifically, Winfield did not assume any duties by contract in the design, supervision, and construction of improvements to real property."

¶ 16 Regarding count II, R&W Clark alleged that its work was in substantial compliance pursuant to the contract and the "walk through punch list." R&W Clark requested that Winfield return its \$1,500 performance bond pursuant to paragraph 24 of the contract, but "it ha[d] refused."

¶ 17 Regarding count III, R&W Clark alleged that it submitted a bill for \$15,800 to Winfield on December 5, 2003. As of 60 days after submission of the bill and completion of the work, Winfield had not paid R&W Clark, in violation of the Prompt Payment Act.

¶ 18 R&W Clark attached a copy of the contract, including the appendices, to its complaint. Section three, paragraph 3 provided:

“The Contractor shall inform the Village in writing when all work has been completed. The Village will then inspect all work areas and inform the Contractor of any remaining work to be completed or outstanding issues that must be rectified. The Village reserves the right to withhold payment until all work has been completed to the satisfaction of the Village.”

¶ 19 Section four, paragraph 13 provided in relevant part:

“The Contract will remain in force for the full period specified and until the Village determines that all requirements and conditions have been satisfactorily met and the Village has accepted the work, and thereafter until the Contractor has met all requirements and conditions relating to the Work. However, the Village will have the right to terminate this Contract sooner if the Contractor has failed to perform satisfactorily the work required, as determined by the Village in its discretion.”

¶ 20 Appendix 4 provided, in relevant part: “If the Owner or the Engineer so directs, the Contractor shall stop all other Work and concentrate on clean-up and restoration.” “Satisfactory replacement shall mean approval of the replacement item by the property owner, the Village of Winfield, and the Engineer.” “All structures shall have a finished, poured concrete invert shape as directed by the Engineer.” “Furnished topsoil shall be used for shaping and trimming of the final surface, and as directed by the Engineer.” “This work shall consist of preparing seed bed, and

furnishing, transporting, and placing grass seed mixture, mulch and other material on the areas as outlined on the areas specified on the drawings, or as directed by the ENGINEER.” “The work shall consist of furnishing, transporting, placing, rolling, trimming, and watering sod in the areas specified on the drawings, or as directed by the Engineer.” “The type and source of sod shall be approved by the Engineer prior to placement.”

¶ 21 Winfield filed a motion to dismiss R&W Clark’s complaint pursuant to sections 2-615 and 2-619 of the Code. The motion stated the following. The contract between the parties was terminated on January 8, 2004, by Village of Winfield Resolution No. 2004-1, “due to nonperformance of R&W Clark, as determined by the Village as part of its construction supervision and/or management activities.” Winfield assumed numerous duties enumerated in section 13-214 of the Code, including the design and supervision of the project. The motion contained several provisions contained in appendix 4 of the parties’ contract. Winfield attached the Village of Winfield resolution terminating the contract between Winfield and R&W Clark. The resolution provided that R&W Clark:

“failed to meet the project specifications and discussions from the pre-construction walkthrough of the project areas and [plaintiff] has failed to complete the project in a timely manner and [plaintiff] has not responded to the correspondence sent from [Winfield] regarding completion of the project.”

The resolution further provided, “The [V]illage President and Board of Trustees of the Village of Winfield hereby approve the termination of the agreement between the Village of Winfield and [plaintiff].” The resolution was passed on January 8, 2004.

¶ 22 The trial court dismissed R&W Clark's second amended complaint with prejudice. Winfield appealed.

¶ 23

II. ANALYSIS

¶ 24 R&W Clark argues that the trial court erred by dismissing counts I and II against Elgin and the complaint against Winfield as time-barred by the four-year limitations period provided in section 13-214(a) of the Code. R&W Clark argues that the 10-year limitations period contained in section 13-206 of the Code (limitations period for actions based on, *inter alia*, breach of contract) applies because its allegations are based on Elgin's and Winfield's "failure to pay." Elgin and Winfield argue that the four-year limitations period applies because R&W Clark's counts alleged acts or omissions described by section 13-214(a); namely that they supervised, managed, observed or participated in construction. We agree with Elgin and Winfield.

¶ 25 A motion to dismiss pursuant to section 2-619(a)(9) of the Code admits as true the legal sufficiency of the factual allegations of the R&W Clark's claim, but asserts that an "affirmative matter" exists that nonetheless defeats the claim. 735 ILCS 5/2-619(a)(9) (West 2010); *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). Pursuant to section 2-619(a)(5) of the Code, a cause of action may be dismissed if the plaintiff failed to file its complaint within the applicable statute of limitations. 735 ILCS 5/2-619(a)(5) (West 2010). When ruling on a section 2-619 motion to dismiss, courts must construe the pleadings in a light most favorable to the nonmoving party. *Wackrow v. Niemi*, 231 Ill. 2d 418, 422 (2008). We review a trial court's ruling on a motion to dismiss pursuant to section 2-619 of the Code *de novo*. See *Czarobski*, 227 Ill. 2d at 369.

¶ 26 When construing a statute, a court's primary objective is to ascertain and give effect to the intent of the legislature. *Solon v. Midwest Medical Records Ass'n, Inc.*, 236 Ill. 2d 433, 440 (2010).

The primary source for determining legislative intent is the language of the statute, which is to be given its plain and ordinary meaning. *Solon*, 236 Ill. 2d at 440. Thus, where that language is certain and unambiguous, the courts' proper function is to enforce the statute as enacted. *155 Harbor Drive Condominium Ass'n v. Harbor Point, Inc.*, 209 Ill. App. 3d 631, 642 (1991) (refusing to examine the legislative history of section 13-214).

¶ 27 Section 13-214 provides in relevant part:

“Construction—Design management and supervision. As used in this Section ‘person’ means any individual, any business or legal entity, or any body politic.

(a) Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall be commenced within 4 years from the time the person bringing an action, or his or her privity, knew or should reasonably have known of such an act or omission.” 735 ILCS 5/13-214(a) (West 2010).

Thus, section 13-214(a) is applicable to actions for recovery of payments due under the contract for work by the defendants in their capacities as supervisors and/or managers of construction. *Blinderman Construction Co., Inc. v. Metropolitan Water Reclamation District of Greater Chicago*, 325 Ill. App. 3d 362, 366 (2001).

¶ 28 To determine whether section 13-214(a) applies here, we evaluate R&W Clark's complaints. See *Madigan v. Yballe*, 397 Ill. App. 3d 481, 488 (2009). “ ‘[T]he determination of the applicable statute of limitations is governed by the type of injury at issue, irrespective of the pleader's designation of the nature of the action.’ ” *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 466 (2008) (quoting *Armstrong v. Guigler*, 174 Ill. 2d 281, 286 (1996)). The title a plaintiff

gives to a cause of action is not dispositive as to the true nature of that action, and, thus, does not determine the limitations period that applies to it. *Yballe*, 397 Ill. App. 3d at 488.

¶ 29 A. Claims Against Elgin in Appeal No. 2-10-1155

¶ 30 R&W Clark alleged that the contract between Martam and Elgin “was under the control of those parties.” R&W Clark also alleged that it “was delayed for over 8 months and was not allowed to complete its contract because Martam was not done with improvements under its contract.” Regarding the breach of contract claim, R&W Clark alleged that, “[d]ue to the Defendant’s own delay, [defendant] was not able to terminate the contract *** and that such a termination was a breach of contract.” Thus, count I, alleging breach of contract, seeks to recover damages for work that allegedly could not be performed as a result of the acts or omissions of Elgin and/or Martam which was also under Elgin’s control. Thus, count I was subject to the explicit provisions of section 13-214(a). See *Blinderman*, 325 Ill. App. 3d at 367.

¶ 31 In addition, count II alleging unjust enrichment was also subject to section 13-214(a) because R&W Clark alleged that a specific contract governed the relationship of the parties. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604 (2005). Thus, the doctrine of unjust enrichment was not available to R&W Clark in this case. See *Guinn*, 361 Ill. App. 3d at 604. Accordingly, the trial court properly dismissed counts I and II of R&W Clark’s complaint against Elgin as time-barred.

¶ 32 This result is consistent with the holding in *Lombard Co. v. Chicago Housing Authority*, 221 Ill. App. 3d 730 (1991). In *Lombard*, the plaintiff building contractor sought to recover money it was allegedly owed from the defendant housing authority under the terms of a contract. *Lombard*, 221 Ill. App. 3d at 731-32. The plaintiff alleged, *inter alia*, that it was not able to fulfill its obligations under the contract because the defendant failed to make the site available to it on time. *Lombard*,

221 Ill. App. 3d at 732. The appellate court held that the allegation that the defendant failed to approve shop drawings in a timely manner brought the defendant within the purview of section 13-214(a). *Lombard*, 221 Ill. App. 3d at 735. The court stated that:

“[A]lthough one of the main purposes of section 13-214 is to prevent liability in perpetuity against persons involved in the design and construction of buildings, such as architects, contractors and engineers [citation], it also governs a landowner in a breach of contract action who is being sued for an act or omission of one of the specified construction related activities or for actual construction.” *Lombard*, 221 Ill. App. 3d at 735.

¶ 33 This case is similar to *Lombard* because, although R&W Clark seeks money pursuant to a contract, it alleged that defendant’s breach was due to “defendant’s own delay” caused by a contractor Elgin controlled. Thus, like the plaintiff in *Lombard*, R&W Clark alleged that Elgin breached the contract because of an act or omission in the planning, supervision or management of the construction project. See *Lombard*, 221 Ill. App. 3d at 735.

¶ 34 This case is also similar to *Blinderman*, 325 Ill. App. 3d at 362. In *Blinderman* the plaintiff construction company sought to recover money it was allegedly owed for extra work it performed for the defendant water reclamation district under the terms of a contract. *Blinderman*, 325 Ill. App. 3d at 363. The appellate court held that the four-year limitations period applied pursuant to section 13-214(a) because the defendant exercised its supervisory or managerial control over the project by ordering the extra work. *Blinderman*, 325 Ill. App. 3d at 367. Thus, the court reasoned, the plaintiff’s action sought to recover money for work performed “as a result of the acts or omissions of the [defendant].” *Blinderman*, 325 Ill. App. 3d at 367. Similarly, in this case, R&W Clark’s action alleged that it could not perform because Elgin exercised its supervisory or managerial

control poorly. Accordingly, counts I and II are within the purview of the four-year time limit of section 13-214(a).

¶ 35 R&W Clark cites *Prate Installations Inc. v. Thomas*, 363 Ill. App. 3d 216 (2006), to support its argument. In *Prate*, the plaintiff, a roofing business, filed a complaint against the defendants, homeowners, for failure to pay a bill after the plaintiff installed a new roof on the defendants' home. *Prate*, 363 Ill. App. 3d at 217. This court held that the 10-year limitations period for written contract applied pursuant to section 13-206, rather than the four-year limitations period pursuant to section 13-214 because the defendants were "not being sued for their act or omission in a construction-related activity." *Prate*, 363 Ill. App. 3d at 219. *Prate* is distinguishable from this case because the plaintiff essentially alleged that it, rather than the defendants, was engaged in construction-related activity. *Prate*, 363 Ill. App. 3d at 219. In this case, R&W Clark alleged that Elgin engaged in construction-related activity. Thus, *Prate* is not applicable to this case.

¶ 36 R&W Clark also cites *Paschen Contractors Inc. v. City of Kankakee*, 353 Ill. App. 3d 628 (2004), to support its argument. *Paschen* is distinguishable from this case. In *Paschen*, the plaintiff alleged that the defendants ordered additional work from plaintiff and failed to pay for it. *Paschen*, 353 Ill. App. 3d at 637. The appellate court held that the claim was governed by the 10-year limitations period because the defendants failed to pay the plaintiff for additional work as provided in the contract between the parties. *Paschen*, 353 Ill. App. 3d at 636-37. The court explained that the complaint "related to additional work beyond that 'engendered by [a defendant] in its capacity as supervisor and/or manager of construction.'" See *Paschen*, 353 Ill. App. 3d at 636-37. In this case, R&W Clark alleged that Elgin's failure to pay was caused by its acts or omissions related to

its supervision and/or management of the construction project. Thus, *Paschen* is not applicable to this case.

¶ 37 R&W Clark also argues that the Northern District of Illinois' unpublished decision in *Burbach Aquatics, Inc. v. The City of Elgin, Illinois*, No. 08-CV-4061, 2009 WL 1940787 (N. D. Ill., July 7, 2009) (unpublished opinion), supports its argument. Unpublished federal decisions are not binding on Illinois courts. *Horwitz v. Sonnenschein Nath and Rosenthal LLP*, 399 Ill. App. 3d 965, 976 (2010). However, even if *Burbach Aquatics* was binding, it would not control here because the plaintiff in *Burbach Aquatics* did not allege that the defendant's failure to pay was related to its professional planning, supervision or management of the project at issue. See *Id.* at *4. In this case, R&W Clark alleged that Elgin's failure to pay was caused by Elgin's own delay of the project. Thus, *Burbach Aquatics* is not applicable here.

¶ 38 Next, R&W Clark argues that the trial court erred by dismissing its count III seeking recovery against Elgin of interest and penalties due to vexatious delay pursuant to the Prompt Payment Act (50 ILCS 505/1 (West 2010)). R&W Clark concedes that it can only recover under the Prompt Payment Act if it can recover the principal due pursuant to count I or II. Because we have already determined that the trial court properly dismissed these counts, we also determine that the trial court properly dismissed count III. See *Herricane Graphics, Inc. v. Blinderman Construction Co., Inc.*, 354 Ill. App. 3d 151, 159 (2004).

¶ 39 R&W Clark also argues that the trial court abused its discretion by failing to allow it to amend its complaint to simplify the issues to one of non-payment. This court may not decide the merits of a proposed complaint that has not been made part of the record. See *O'Brien v. City of Chicago*, 285 Ill. App. 3d 864, 874 (1996). R&W Clark had the burden of presenting this court with

a sufficiently complete record that would support its claim of error. *Id.* Because the record does not contain R&W Clark's proposed amended complaint, its claim of error is forfeited. *Doe v. TCF Bank Illinois, FSB*, 302 Ill. App. 3d 839, 844 (1999).

¶ 40 B. Claims Against Winfield in Appeal No. 2-10-1170

¶ 41 R&W Clark argues that the trial court erred by dismissing its complaint against Winfield because it improperly applied the four-year limitations period under section 13-214(a) of the Code instead of the 10-year limitations period under section 13-206 of the Code. R&W Clark argues that the four-year limitations period does not apply because it alleged that Winfield failed to pay, an activity not enumerated in section 13-214(a). R&W Clark also argues that Winfield's termination of R&W Clark was not act in the exercise of its supervisory or managerial powers pursuant to section 13-214(a) because Winfield terminated R&W Clark after it failed to pay.

¶ 42 R&W Clark fails to recognize that, in ruling on a section 2-619 motion, a court considers not only the complaint, it also considers all the pleadings and the documents attached to the pleadings. See *Caywood v. Gossett*, 382 Ill. App.3d 124, 128 (2008). In this case, the pleadings and attached documents establish that the four-year limitations period was applicable to R&W Clark's complaint. Appendix 4 of the parties' contract set forth the detailed manner in which R&W Clark was to perform its work. The contract also provided that Winfield could "withhold payment until all work has been completed to" Winfield's "satisfaction." Further, Winfield had the right to terminate the contract if R&W Clark "failed to perform satisfactorily the work required, as determined by [Winfield] in its discretion." By resolution, Winfield exercised this right. Thus, Winfield's decisions to terminate R&W Clark and its failure to pay were acts and omissions exercised in the design, supervision, and/or management of the project. See *Blinderman*, 325 Ill. App. 3d at 367.

Therefore, R&W Clark's complaint is subject to the explicit activities enumerated in section 13-214(a). See 735 ILCS 5/13-214(a) (West 2010).

¶ 43 To support its argument, R&W Clark cites *Prate*, 363 Ill. App. 3d 216, *Paschen*, 353 Ill. App. 3d 628, and *Burbach Aquatics*, No. 08-CV-4061, 2009 WL 1940787. These cases are distinguishable from the case at bar.

¶ 44 The plaintiff in *Prate* essentially alleged that it, rather than the defendant, engaged in constructed-related activity. *Prate*, 363 Ill. App. 3d at 219. In this case, Winfield and not R&W Clark, engaged in construction-related activity. Thus, *Prate* is not applicable to this case.

¶ 45 *Paschen* is distinguishable from the case at bar because in this case, defendant did not order additional work from R&W Clark pursuant to a contract. See *Paschen*, 353 Ill. App. 3d at 636-37. Rather, the pleadings and documents of record establish that Winfield terminated R&W Clark and failed to pay in exercise of its supervisory and/or managerial authority. Thus, *Paschen* is distinguishable from the case at bar.

¶ 46 As we discussed previously, *Burbach Aquatics*, an unpublished federal decision, is not binding on this court. See *Horwitz*, 399 Ill. App. 3d at 976. However, even if it was binding, it would not be controlling here, because it is distinguishable from this case. The plaintiff in *Burbach Aquatics* did not allege that the defendant's failure to pay was related to its professional planning, supervision or management of the project at issue. See *Burbach Aquatics*, No. 08-CV-4061, 2009 WL 1940787 at *4. In this case, R&W Clark alleged that Winfield's failure to pay was caused by Winfield's own delay of the project. Thus, *Burbach Aquatics* is not applicable here.

¶ 47 Next, R&W Clark argues that the four-year limitations period does not apply because the work contracted for and performed by R&W Clark was not an improvement to the property. The

record indicates that R&W Clark failed to raise this argument in the trial court in its response to Winfield's motion to dismiss. An argument not raised in the trial court in response to a motion to dismiss and presented for the first time on appeal is forfeited. See *Jespersen v. Minnesota Mining and Manufacturing Co.*, 288 Ill. App. 3d 889, 894-95 (1997). Therefore, we need not address the merits of R&W Clark's argument.

¶ 48 However, even if R&W Clark had raised the issue in the trial court, it would not have prevented dismissal of its complaint. The relevant criteria for determining whether an item is an improvement to real property is “whether the addition was meant to be permanent or temporary, whether it became an integral component of the overall system, whether the value of the property was increased, and whether the use of the property was enhanced. [Citations.]” *St. Louis v. Rockwell Graphic Systems, Inc.*, 153 Ill. 2d 1, 4-5 (1992). In this case, R&W Clark was required to, *inter alia*, construct manholes and roadway ditches and to install storm sewer pipes. These activities constitute “an improvement to real property” within the meaning of section 13-214(a) of the Code and were not merely repairs and replacements as asserted by R&W Clark. See *Continental Insurance Co. v. Walsh Construction Co. of Illinois*, 171 Ill. App. 3d 135, 140 (1988). Accordingly, the trial court properly granted Winfield's motion to dismiss R&W Clark's complaint.

¶ 49

III. CONCLUSION

¶ 50 For the reasons stated, we affirm the judgments of the circuit courts of Kane and Du Page Counties.

¶ 51 Affirmed.