

No. 1-12-2300

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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(Allied Drywall Materials & Management Corporation, d/b/a Allied Drywall Materials Corporation,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Parkway Bank & Trust Company, Parkway Bank and Trust Company, As Trustee Known as Trust Number 14165, MPC Construction, Western Recycling, Contractor's Acoustical Supply, Calumet Glass, Incorporated, CCMC Construction, LLC, Williw Brothers,	)	No. 09 CH 16585
	)	
Defendants.)	)	
	)	
BARBA CONCRETE, INCORPORATED,	)	
	)	
Defendant and Cross-Plaintiff,	)	
	)	
ALLADIN CONSTRUCTION, INCORPORATED, EVRIPIDIS GOGOS, THOEDORA GOGOS,	)	Honorable
	)	Brigid Mary McGrath,
Defendants and Cross-Defendants.	)	Judge Presiding

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PRESIDING JUSTICE HARRIS delivered the judgment of the court.  
Justices Simon and Pierce concurred in the judgment.

**ORDER**

**Held:** We hold the circuit court erred in granting cross-defendants' motion to dismiss pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)) because cross-plaintiff raised genuine issues of material fact precluding dismissal in this case.

¶ 1 Defendant and cross-plaintiff Barba Concrete, Incorporated (Barba Concrete), filed a second amended cross-complaint against defendants and cross-defendants, Aladdin Construction, Incorporated (Alladin Construction), Evaripidis Gogos, and Theodora Gogos (collectively the Gogos), alleging it was owed \$43,564.50 under a contract it entered into with the agent of the Gogos, Alladin Construction. The Gogos filed a motion to dismiss pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) alleging affirmative matter that negated the claim. 735 ILCS 5/2-619(a)(9) (West 2010). At issue is whether the circuit court erred in granting the Gogos' section 2-619(a)(9) motion to dismiss Barba Concrete's second amended cross-complaint. We hold the circuit court erred in granting the Gogos' motion to dismiss pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)) because Barba Concrete raised genuine issues of material fact precluding dismissal in this case.

¶ 2

**JURISDICTION**

¶ 3 On July 31, 2012, the circuit court entered its final order in this matter denying Barba Concrete's motion to reconsider. On August 2, 2012, Barba Concrete timely filed its notice of appeal. Accordingly, this court has jurisdiction to address Barba Concrete's claims pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 4

#### BACKGROUND

¶ 5 On May 8, 2009, plaintiff Allied Drywall Materials & Management, Corporation, doing business as Allied Drywall Materials Corporation (Allied Drywall), initiated the underlying lawsuit in this case by filing its complaint to foreclose a mechanics lien naming, relevant to this appeal, Barba Concrete, Aladdin Construction, and the Gogos as defendants. Allied Drywall, who is not a party to the present appeal, alleged it entered into a contract with Alladin Construction to provide drywall materials and equipment for a project at 16125 South 94th Street, in Orland Hills, Illinois. Allied Drywall alleged the Gogos were the beneficial owners of the premises. Allied Drywall named Barba Concrete as a defendant because Barba Concrete had also recorded a mechanics' lien against the premises, on or about December 15, 2006, which Allied Drywall alleged was "satisfied or otherwise inferior and subordinate to" its own claim.

¶ 6 On July 23, 2009, Barba Concrete filed its two count cross-complaint against Alladin Construction and the Gogos. Under count I of its complaint, Barba Concrete brought a breach of contract claim alleging the Gogos are the fee simple owners of the premises. Barba Concrete alleged further that "on or about February 6, 2006," it entered into a contract with Alladin Construction, the general contractor, to provide concrete materials and labor for a single-family residence owned by the Gogos for the price of \$43,564.50. Barba Concrete alleged that after providing the contracted for services, Alladin Construction still owed it \$43,564.50, and refused to pay that amount. Count II contained a claim for unjust enrichment, alleging that "at some point prior to February 6, 2006," Alladin Construction entered into an agreement with the Gogos to work as a general contractor for them. According to Barba Concrete, the Gogos had been unjustly enriched due to the services Barba Concrete.

¶ 7 On December 4, 2009, Barba Concrete moved for a default judgment against Alladin Construction and the Gogos. Relevant to this appeal, Barba Concrete attached a prove-up affidavit dated November 23, 2009, to its motion. The affiant on the prove-up affidavit was Richard Barba, Barba Concrete's president. Richard Barba attested that Barba Concrete agreed to supply concrete material and labor for a single family residence owned by the Gogos for the price of \$144,424.50. Additional work was also performed at the insistence of Alladin Construction in the amount of \$4,140. According to the prove-up affidavit, Barba Concrete had been paid \$105,000 as of November 23, 2009; which left a balance due and owing of \$43,564.50.

¶ 8 On December 10, 2009, the circuit court allowed the Gogos time to file an appearance in the matter. On January 19, 2010, the circuit court entered an agreed order dismissing Barba Concrete's motion for default as to the Gogos. On February 19, 2010, the circuit court entered default judgment in Barba Concrete's favor against Alladin Construction in the amount of \$43,564.50, plus costs. On March 15, 2010, the circuit court entered a citation to discover assets against Travis Gravitt, the president of Alladin Construction. On May 13, 2010, the circuit court dismissed the citation to discover assets, noting that "respondent having appeared and produced responsive documents."

¶ 9 On April 28, 2011, Barba Concrete amended its complaint to read that instead of a single family residence, the contract called for the development for a commercial strip center owned by the Gogos. On August 10, 2011, the circuit court granted the Gogos' motion to dismiss Barba Concrete's amended cross-complaint. In its order, the circuit court did not specify under what section of the Code it was dismissing Barba Concrete's amended cross-complaint. The circuit court did, however, allow Barba Concrete time to file another amended complaint.

¶ 10 On September 2, 2011, Barba Concrete filed its second amended cross-complaint in which it again named Alladin Construction and the Gogos as cross-defendants. Barba Concrete alleged the Gogos were the owners in fee simple of the real estate located at 16125 South 95th Avenue, in Orland Hills, Illinois. "On or about February 6, 2006," Barba Concrete entered into a contract with Alladin Construction whereby it agreed to, as a subcontractor, provide concrete materials and labor for a commercial strip center on the premises for the price of \$43,564.50. Barba Concrete alleged that "[o]n information and belief, prior to February 6, 2006," the Gogos had entered into an agreement with Alladin Construction authorizing Alladin Construction to enter into agreements with various subcontractors needed for construction of the commercial strip center on the premises. Barba Concrete further alleged Alladin Construction acted as the agent of the Gogos. According to Barba Concrete, it performed the agreed upon concrete work from approximately February 6, 2006, until its work was completed on or about October 20, 2006. Barba Concrete alleged "[t]hat after giving credit for all payments made to [it] for such labor and material, "Alladin Construction and the Gogos were still indebted to it for \$43,564.50. Barba Concrete alleged Alladin Construction and the Gogos refused to pay the \$43,564.50, and asked that judgment be entered in its favor, plus the costs of the suit.

¶ 11 On September 19, 2011, the circuit court of Cook County transferred the matter from the chancery division to the law division because "all lien claims [had] been dismissed." On October 19, 2011, the case was transferred to an individual commercial calendar within the law division of the circuit court.

¶ 12 On November 22, 2011, the Gogos filed a motion to dismiss Barba Concrete's second amended cross-complaint pursuant to section 2-619(a)(9) of the Code asserting affirmative matter that defeated the claim. 735 ILCS 5/2-619(a)(9) (West 2010). Under the heading

"Procedural Background," the Gogos stated, in relevant part, that although the matter arose out of a mechanic's lien action, "Barba \*\*\* had no lien rights so they filed a \*\*\* complaint against the general contractor Alladin Construction, Inc. and [the] Gogos." The Gogos argued Barba Concrete failed to attach a copy of the contract. The Gogos further argued that on November 30, 2006, Richard Barba, submitted on behalf of Barba Concrete, a sworn affidavit concerning the work performed at the premises. According to the Gogos, Richard Barba attested that the full contract amount, including extras, was \$107,000, and that Barba Concrete had received \$105,000. As such, the Gogos pointed out that according to Richard Barba's own affidavit submitted on behalf of Barba Concrete, all that remained due and owing was \$2,000. As such, the Gogos argued that "[i]t appears that [Barba Concrete] never completed the project or completed its contractual obligation but failed to submit a final waiver for the contractual balance of \$2,000.00." The Gogos asserted that it had no obligation to pay Barba Concrete "[u]ntil a final waiver is submitted and approved."

¶ 13 The Gogos attached both the affidavit and a check to its motion as exhibits. The sworn affidavit the Gogos referred to in their motion was titled "Waiver of Lien to Date and Contractor's Affidavit." In the affidavit, Richard Barba, "Pres" of Barba Concrete attested that Barba Concrete had been employed by Alladin Construction to furnish concrete at the premises. The owner of the premises is listed as "Kenny Gogo[]." <sup>1</sup> Richard Barba further attested "[t]hat the total amount of the contract including extras is \$107,000 on which he has received payment of \$90,000 prior to this payment." The affidavit had a section indicating that a company or person named, "THDavidson," furnished \$18,000 worth of material for the project.

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<sup>1</sup> The documents in the record do not disclose who "Kenny Gogo[]" is or the Gogos' relationship to this person.

Under that same section, the affidavit indicated that "there are no other contracts for said work outstanding." The affidavit contained the following clause:

"The undersigned, for and in consideration of \$15,000 and other good and valuable consideration, the receipt of whereof is hereby acknowledged, do(es) hereby waive and release any and all lien or claim of, or right to, lien, under that Statutes of the State of Illinois, relating to mechanic's liens, with respect to and on said above described premises, and the improvement thereon, and on the material, fixtures, apparatus or machinery furnished and on the moneys, funds or other considerations due or to become due from the Owner, on account of labor, services material, fixtures, apparatus or machinery, furnished to this date, by the undersigned for the above described premises, including extras as heretofore described."

The affidavit was dated November 30, 2006. Richard Barba signed the affidavit, which was also notarized. The Gogos also attached a copy of a check for \$15,000 made out to Barba Concrete and dated November 30, 2006.

¶ 14 In response, Barba Concrete first argued the Gogos' motion should be denied based on waiver because the Gogos allegedly cited no authority or support for their motion. Barba Concrete characterized the Gogos' motion as composed of unsupported allegations and improper conclusions. Barba Concrete disputed the Gogos' claim that it failed to attach a copy of a contract or agreement between the parties, arguing that there was no hard copy of the agreement to attach as the agreement between the parties was an oral agreement. Regarding the amount of

money it claimed was owed, Barba Concrete admitted it received \$105,000 in payments towards work it performed, but disputed that the total amount owed was only \$107,000. According to Barba Concrete, the total owed was \$148,564.50. Barba Concrete also disagreed with the Gogos' contention that they did not have to pay anything until a final waiver is submitted by Barba Concrete, arguing that this contention is directly contradicted by the allegations of their second amended cross-complaint and by Richard Barba, by way of affidavit.

¶ 15 Barba Concrete attached three exhibits to its response. First, Barba Concrete attached an affidavit from Richard Barba in which he attested that he is the president of Barba Concrete. He attested further that on or about February 6, 2006, Barba Concrete entered into an oral agreement with Alladin Construction for the materials and labor related to concrete construction of a strip mall on the property for the amount of \$144,424.50. Richard Barba described the Gogos in his affidavit as the owners of the property. Richard Barba attested that \$4,140 of additional work was also performed upon the request of Alladin Construction. According to Richard Barba, Barba Concrete had been paid only \$105,000 towards the work performed leaving a balanced owed of \$43,564.50. Richard Barba attested that:

"I executed several lien waivers that conflicted with the amount Barba Concrete is owed for the work that it performed, because I was told that was the only way I would receive any payment related to this project."

Richard Barba attested further that:

"I had an oral agreement with Travis Gravitt, the president of Aladdin Construction, that he would pay Barba Concrete the full

value of the work it performed as set forth on the invoices that were submitted to Alladin Construction."

The affidavit was notarized and dated December 28, 2011.

¶ 16 The final two exhibits Barba Concrete attached to its response were two invoices from Barba Concrete to Alladin Construction which indicated a total amount owed of \$144,424.50 and \$4,140, respectively.

¶ 17 In reply, the Gogos disputed that they waived any arguments contained in their motion and asserted Barba Concrete cited authority relevant to waiver in the appellate context as opposed to trial level proceedings. They argued Barba Concrete did not dispute that Richard Barba, on its behalf, submitted a signed and notarized contractor's affidavit stating in part that Barba Concrete waived its right to a lien on the premises. The Gogos also pointed out the second amended cross-complaint stated the contract was for \$43,564, but that Barba Concrete admitted that it received \$105,000 for work completed. The Gogos argued that Barba Concrete's second amended cross-complaint failed to state what work was unpaid. The Gogos emphasized that Barba Concrete did not attempt to exercise any lien rights by proceeding by way of a mechanic's lien claim. The Gogos characterized Richard Barba's affidavit as self-serving, but did not submit any exhibits to its reply.

¶ 18 On March 16, 2012, the circuit court granted the Gogos' section 2-619(a)(9) motion to dismiss in part. Specifically, the circuit court entered an order with the following language: "[The Gogos'] motion is granted in part but denied as to \*\*\* [\$]2,000\*\*\*. [The Gogos] shall have [until] May 18, 2012, to either answer or otherwise plead as to the \$2,000." The circuit court set the matter for status.

¶ 19 On June 29, 2012, Barba Concrete filed answers to Illinois Supreme Court Rule 213(f) interrogatories.

¶ 20 On July 18, 2012, The Gogos filed an offer of judgment in which they agreed to "tender a check for the entire [\$2,000] still claimed as due" by Barba Concrete. The Gogos asked the circuit court to strike the upcoming trial date, enter judgment on their motion, to enter a release and satisfaction of judgment in their favor, and to award them fees.

¶ 21 On July 26, 2012, the circuit court granted the Gogos' motion for judgment in the amount of \$2,000 and struck the upcoming trial date. The order noted that the motion was granted over the objection of Barba Concrete. The order also included language addressing Barba Concrete's objections, but as discussed *infra*, the circuit court later modified this language.

¶ 22 On July 31, 2012, the circuit court denied Barba Concrete's motion to reconsider. Absent from the record is the motion to reconsider or any pleadings in response to the motion. The record does contain, however, the written order from that day and a transcript of the proceedings. At the hearing, Barba Concrete argued there was no statutory basis for the offer of judgment, that the circuit court wrongly denied it a chance to present evidence on the remaining money owed, and because it thought it should be allowed to make an offer of proof with respect to the money that was stricken based on the motion to dismiss previously granted by the court. Alternatively, Barba Concrete asked the court to vacate its previous order because it did not set forth the appropriate facts. The Gogos argued that they wanted to offer the remaining \$2,000 at issue and Barba Concrete refused to accept it. The Gogos further argued that if Barba Concrete was concerned about an offer of proof, it should have made a motion near the time of the Gogos' section 2-619 motion to dismiss. The circuit court made the following findings regarding the procedural posture of the case:

"In March of 2012 I granted a 2-619 motion that had the effect of striking the majority of damages they sought in this action leaving \$2,000 at issue. Last week defendant appeared with a \$2,000 check and said we don't want to go to trial, we just want to pay the money, and the plaintiff said, no, we want a trial on the offer of proof for your ruling back in March."

The circuit court found it inappropriate to hold a trial to lay a foundation for an offer of proof of the earlier motion to dismiss granted on March 16, 2012.

¶ 23 The circuit court entered a written order denying Barba Concrete's motion to reconsider and modifying its July 26, 2012, order to read as follows:

"The Motion for Offer of Judgment is granted over the objection of Plaintiff Barba Concrete and Judgment is entered in favor of the Plaintiff Barba Concrete and against the Defendants Evripidis and Theodora Gogos in the amount of \$2,000.00 plus costs of suit."

The order also stated that:

"In denying Barba Concrete's Emergency Motion, and in the granting of Cross-Defendant's Motion for Offer of Judgment, the Court found that there were no remaining issues for trial, and refused to allow Barba Concrete to go to trial solely for the purpose of making an offer of proof as to the Courts March 16, 2012, ruling on Defendants' 2-619 motion."

The circuit court further found all of its prior orders to be final and appealable and struck the trial date.

¶ 24 On August 2, 2012, Barba Concrete filed its notice of appeal. On September 23, 2013, this court, on its own motion, ordered the case to be taken for consideration on the record and Barba Concrete's brief only as Alladin Construction and the Gogos failed to file briefs before this court.

¶ 25 ANALYSIS

¶ 26 Before this court, Barba Concrete argues that issues of material fact exist that preclude the dismissal of its second amended cross-complaint pursuant to section 2-619(a)(9) of the Code. 735 ILCS 5/2-619(a)(9) (West 2010). Barba Concrete points out that under the Mechanic's Lien Act, the question of whether an innocent party relied upon a lien waiver is a question of fact that would also preclude dismissal of its second amended cross-complaint. Barba Concrete maintains that it raised an issue of material fact contradicting the lien waiver produced by the Gogos when it submitted the affidavit of its president Richard Barba. According to Barba Concrete, Richard Barba's affidavit disputed the total amount of the contract and provides a reason why the lien waiver was signed.<sup>2</sup> As previously discussed, cross-defendants the Gogos and Alladin Construction did not contest this appeal.

¶ 27 A motion to dismiss pursuant to section 2-619(a)(9) of the Code allows for the involuntary dismissal of a claim when the "claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9)

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<sup>2</sup> Barba Concrete also raised the following issues: (1) whether the Gogos waived any contention in their section 2-619(a)(9) motion for failing to cite authority; (2) whether the circuit court erred in regard to allowing the Gogos to file an offer of judgment; and (3) whether the circuit court abused its discretion by failing to allow it to file an offer of proof as to actual damages. Due to our ultimate conclusion in this case, however, we do not need to address these arguments. However, it should be noted that the circuit court's refusal to allow an offer of proof would be sufficient to reverse and remand.

(West 2008). "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). Under section 2-619 of the Code, the defendant admits the legal sufficiency of the complaint, but asserts some affirmative matter that defeats the claim. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003); see also *Reynolds v. Jimmy Johns Enterprises, LLC*, 2013 IL App (4<sup>th</sup>) 120139, ¶31 (quoting *Winters v. Wangler*, 386 Ill. App. 3d 788,792(2008)) ("In a section 2-619(a) motion, the movant is essentially saying ' ' ' Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim.' " '). The affirmative matter "is something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Illinois Graphics Company v. Nickum*, 159 Ill. 2d 469, 486 (1994). All facts in the pleadings, depositions, and affidavits found in the record may be considered upon review. *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 396 (2009). Pleadings and supporting documents must be interpreted by the court in the light most favorable to the nonmoving party. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008).

¶ 28 Our supreme court has held that a dismissal pursuant to section 2-619(a)(9) of the Code is similar to a summary judgment. *Epstein v. Chicago Board of Education*, 178 Ill.2d 370, 383 (1997). In that regard, a court of review "considers whether 'the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Id.* (quoting *Kedzie & 103<sup>rd</sup> Currency Exchange Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993); *Czarobski*, 227 Ill. 2d at 369). Furthermore, our supreme court has also explained how the burdens shift between the parties in a section 2-619 motion. *Epstein*, 178 Ill. 2d at 383. Specifically, our supreme court held:

"The 'affirmative matter' asserted by the defendant must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. [Citation]. Once a defendant satisfied this initial burden of going forward on the section 2-619(a)(9) motion to dismiss, the burden then shifts to the plaintiff, who must establish that the affirmative defense asserted is either 'unfounded or requires the resolution of an essential element of material fact before it is proven.' [Citation]. The plaintiff may establish this by presenting 'affidavits or other proof.' 735 ILCS 5/2-619(c) (West 1992). 'If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed.' [Citation]." *Id.*

Our review of a dismissal pursuant to section 2-619(a)(9) of the Code is *de novo*. *Czarobski*, 227 Ill. 2d at 369.

¶ 29 We hold the circuit court erred in granting the Gogos' motion to dismiss pursuant to section 2-619(a)(9) of the Code because Barba Concrete raised genuine issues of material fact precluding dismissal in this case. Before we explain our reasoning for our holding, however, we must discuss the procedural posture of this case and how it influenced our conclusion. This matter comes before us on the Gogos' motion to dismiss brought pursuant to section 2-619(a)(9) of the Code. 735 ILCS 5/2-619(a)(9)(West 2010). Although Eviropidis Gogos and Theodora Gogos maintained a unified defense with a single attorney, that attorney did not also represent defendant and cross-defendant Alladin Construction. The Gogos filed their motion to dismiss

on their own behalf, not on behalf of Alladin Construction. It is unclear from the record what Alladin Construction's status is in this litigation. It appears that at one point in time, Barba Concrete managed to obtain a default judgment against Alladin Construction. It also appears in the record a citation to discover assets was issued against Travis Gravitt, the president of Alladin Construction. On May 13, 2010, however, the record shows the circuit court dismissed the citation to discover assets, noting that "respondent having appeared and produced responsive documents." We found no pleadings in the record after May 13, 2010, filed on behalf of Alladin Construction. Due to the procedural posture and our ultimate conclusion in this case, however, we need not determine its status at this point in time.

¶ 30 Although Alladin Construction's status in this litigation is not clear, it is clear that the Gogos filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code on their own behalf. Under section 2-619(a)(9) of the Code, the legal sufficiency of the complaint is admitted. *Van Meter*, 207 Ill. 2d at 367. Additionally, we must construe the pleadings and supporting documents the light most favorable to the nonmoving party, Barba Concrete. *Porter*, 227 Ill. 2d at 352. With these principles in mind, we note that Barba Concrete's second amended cross-complaint contained a single count and contained the following allegations: that it entered into a contract on or about February 6, 2006, with Alladin Construction, who acted as an agent of the Gogos, for \$43,564.50; the contract was for concrete work at a property owned by the Gogos; that it completed the work by providing concrete material and labor on or about October 20, 2006; that after giving credit for payments made, \$43,564.50 still remained owed to it; and that Alladin Construction and the Gogos refused to pay the remaining balance. Unlike its cross-complaint and amended cross-complaint, Barba Concrete never specifically alleged that their cause of action was for breach of contract. It is also unclear what the total contracted

amount was, as opposed to what was owed. Barba Concrete alleged that it entered into a contract for \$43,564.50, and that, after various credits for payments made, that same amount was still owed. The Gogos, however, brought their motion based on other affirmative matter that defeats the claim under section 2-619(a)(9) of the Code. As such, they admitted the legal sufficiency of the second amended cross-complaint. For purposes of our review, we make no opinion on the sufficiency of Barba Concrete's second amended cross-complaint due to the procedural posture of this case, but proceed finding that a contract existed between the parties, and that \$43,564.50 is still owed under that contract.

¶ 31 Additionally, we note that although this case was originally brought as a mechanics lien claim by Allied Drywall, who is not a party to this appeal, Barba Concrete's second amended cross-complaint is not seeking relief under the Mechanic's Lien Act. The Gogos produced a document titled "Waiver of Lien to Date and Contractor's Affidavit" which they alleged defeated the claim. We stress that we do consider this document to be relevant to our decision, but note that our review is not under the Mechanics Lien Act as that is not the relief sought in Barba Concrete's second amended cross-complaint. See *Cordeck Sales, Inc. v. Construction Systems, Inc.*, 382 Ill. App. 3d 334, 364-65 (2008) (explanation of how waiver of lien rights operates under the Mechanics' Lien Act). Furthermore, on September 19, 2011, the circuit court transferred the matter from its chancery division to its law division because "all lien claims have been dismissed." Accordingly, although the lien waiver and contractors affidavit supplied by the Gogos here is relevant to our determination in this case, we point out that Barba Concrete is not seeking relief under the Mechanic Lien Act under its second amended complaint.

¶ 32 With the above principles in mind, we hold the circuit court erred in granting the Gogos' motion to dismiss pursuant to section 2-619(a)(9) of the Code because Barba Concrete raised

genuine issues of material fact precluding dismissal in this case. *Epstein* 178 Ill.2d at 383 (quoting *Kedzie & 103<sup>rd</sup> Currency Exchange Inc.*, 156 Ill. 2d at 116-17.) (a court of review "considers whether 'the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' ") As affirmative matter, the Gogos produced the "Waiver of Lien to date and Contractor's Affidavit" in which Richard Barba, president of Barba Concrete, attested that the total contract amount was for \$107,000. Richard Barba further attested that Barba Concrete received \$90,000 and that "in consideration for \$15,000 and other \*\*\* consideration, \*\*\* hereby waive and release any and all lien or claim of, or right to, lien, under th[e] Statutes of the State of Illinois, relating to mechanic's liens, with respect to the above described premises." The Gogos additionally pointed out that Barba Concrete failed to attach a copy of the alleged contract to its complaint. Accordingly, the Gogos arguably presented affirmative matter that would defeat Barba Concrete's claim; *i.e.*, that Barba Concrete already received \$105,000 of a \$107,000 contract, and that Barba Concrete failed to produce a contract which would indicate an agreement between the parties.

¶ 33 Under the burden shifting analysis proper under a section 2-619(a) (9) motion to dismiss, Barba Concrete had to "establish that the affirmative defense asserted is either 'unfounded or requires the resolution of an essential element of material fact before it is proven.'" *Epstein*, 178 Ill. 2d at 383 (quoting *Kedzie & 103<sup>rd</sup> Currency Exchange, Inc.*, 156 Ill. 2d at 116). In response, Barba Concrete produced a new affidavit from Richard Barba in which he explained that Barba Concrete entered into an oral contract with the Gogos' agent, Alladin Construction, and the total contract price was \$144,424.50, and that \$4,140 of additional work was performed. According to this second Richard Barba affidavit, Barba Concrete had only

been paid \$105,000; leaving a balance of \$43,564.50. Richard Barba also attested that he executed several lien waivers "because I was told that was the only way I would receive any payment related to this project." Barba Concrete therefore, raised issues of material fact refuting both of the Gogos' contentions in their motion. Specifically, Barba Concrete raised a genuine issue of material fact regarding the total contract price, *i.e.*, whether the total contract price was \$107,000, or \$144,424.50 with \$4,140 of additional work. Barba Concrete also refuted that it needed to attach a contract by asserting, by affidavit, that the agreement was an oral contract. Accordingly, we hold the circuit court erred when it granted the Gogos' motion to dismiss brought pursuant to section 2-619(a)(9) of the Code because Barba Concrete raised genuine issues of material fact concerning the agreement between the parties.

¶ 34

#### CONCLUSION

¶ 35 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is reversed, and the cause is remanded for further proceedings.

¶ 36 Reversed and remanded.