2013 IL App (1st) 113510-U

FIFTH DIVISION
December 13, 2013

Nos. 1-11-3510 and 1-12-1204
(Consolidated)

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).

ALICE E. DOLAN, Plaintiff-Appellee, v. JOSEPH MICHAEL O'CALLAGHAN, PC, n/k/a WEST MONROE LAW OFFICE, PC, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County No. 07 L 749 Honorables Allen Goldberg and John Griffin, Judges Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

ORDER

¶ 1 Held: Trial court's order entering judgment on jury verdict in favor of plaintiff is affirmed over defendant's objections that the court erred in denying defendant's motions to dismiss and defendant's posttrial motion, granting plaintiff's motion to dismiss defendant's counterclaim and affirmative defenses and denying defendant's motion for leave to appeal by permission.

¶ 2 This appeal arises from an order of the circuit court entering judgment on a jury verdict in favor of plaintiff Alice E. Dolan (Dolan) on her breach of contract action against defendant law firm Joseph Michael O'Callaghan, PC, now known as West Monroe Law Office, PC (JMO). JMO argues the court erred in (1) denying JMO's

motion to dismiss count I of Dolan's second amended complaint following adjudication of the claim in bankruptcy court; (2) denying JMO's motion to dismiss Dolan's initial complaint; (3) denying JMO's motion to dismiss Dolan's second amended complaint; (4) denying JMO's posttrial motion for a new trial or to reduce judgment; (5) granting Dolan's motion to dismiss JMO's counterclaim and JMO's third, fourth, fifth, sixth seventh and ninth affirmative defenses; and (6) denying JMO's motion for leave to appeal by permission pursuant to Illinois Supreme Court Rule 308. We affirm.

¶ 3 Background

¶ 4 Joseph Michael O'Callaghan, an attorney, was the sole proprietor of JMO. In November 1981, O'Callaghan hired Dolan as an associate attorney at JMO. In April 1982, Dolan met with O'Callaghan to discuss an increase in her salary. Dolan subsequently testified that O'Callaghan told her that he did not have the cash flow to increase her salary and, instead, would pay her 10 percent of JMO's fees. O'Callaghan prepared and signed the following handwritten note, dated April 27, 1982:

"**From** Jos. M. O'Callaghan

To Alice E. Dolan

Message

In lieu of and or in addition to other salary adjustments for the FY 1982-83, you are to receive 10% of the net fees of all cases of Joseph Michael O'Callaghan PC including but not limited to Sarka versus Gerbie et al.

Signed [by O'Callaghan]"

Dolan testified that she accepted the tendered agreement. She did not receive salary adjustments during her remaining time with the law firm. In March 1984, O'Callaghan terminated Dolan's employment and she left JMO in May 1984.

¶ 5 In November 1992, JMO/O'Callaghan settled the *Sarka v. Gerbie* case for $9 million, earning an estimated $3 million in legal fees. Dolan retained Michael Cogan, an attorney, to assist her in obtaining 10% of those fees pursuant to the agreement. Cogan telephoned O'Callaghan on Dolan's behalf, read the agreement to O'Callaghan over the phone and requested Dolan's share of the *Sarka* fees. O'Callaghan refused to pay, telling Cogan that the agreement was "a joke." Dolan subsequently testified that she had retained Cogan because, on two previous occasions, in 1984 and 1986, she had requested 10% of JMO's fees from O'Callaghan and he had told her he would not pay her.

¶ 6 In 1993, Dolan filed a two-count breach of contract action in the Chancery Division against (I) O'Callaghan individually and (II) JMO, case No. 93 CH 1056 (*Dolan I*). The court dismissed the action on defendants' motion. In *Dolan v. O'Callaghan*, 1-95-0438 (1996) (unpublished order pursuant to Illinois Supreme Court Rule 23), we reversed and remanded to the circuit court.

¶ 7 In August 1997, the court granted Dolan's motion to reinstate the case in the law division and assigned it a new docket number, No. 97 L 10245 (*Dolan II*). The court subsequently granted O'Callaghan's motion for summary judgment. In August 2001, the court granted Dolan's motion to voluntarily dismiss her action against JMO without

prejudice.

¶ 8 In July 2002, Dolan filed a two-count complaint against JMO, asserting claims for (I) breach of contract and (II) breach of fiduciary duty, case No. 02 L 9673 (*Dolan III*). Only the breach of contract claim and JMO's motions addressed thereto are at issue here.[1] Accordingly, we will limit our discussion to the procedural history relevant to the breach of contract claim.

¶ 9 In November 2002, JMO filed a motion to dismiss under sections 2-615 and 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 2-619 (West 2002)). In August 2003, Dolan filed an amended complaint almost identical to her initial complaint. The court denied JMO's motion to dismiss on January 5, 2004.

¶ 10 JMO moved for permission to file an interlocutory appeal pursuant to Illinois Supreme Court Rule 308. On April 7, 2004, the court denied the motion and ordered JMO to file its answer to the complaint.

¶ 11 In May 2004, JMO filed its answer, affirmative defenses and a counterclaim. In its counterclaim, JMO asserted that Dolan claimed entitlement to earnings as a result of

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[1] In 2012, following a jury verdict in Dolan's favor on the breach of contract claim, the court granted Dolan leave to voluntarily dismiss her breach of fiduciary duty claim against JMO. On appeal, JMO does not challenge the court's denial of assorted motions to dismiss JMO directed to the breach of fiduciary duty claim. Indeed, we would have no jurisdiction to consider such challenges. The denial of a motion to dismiss is not a final and appealable order and does not become final and appealable after the entry of a voluntary dismissal, where, as here, it was not a procedural step leading to entry of the voluntary dismissal. *Valdovinos v. Luna-Manalac Medical Center,* Ltd., 307 Ill. App. 3d 528, 537-38 (1999); *Saddle Signs, Inc. v. Adrian*, 272 Ill. App. 3d 132, 135-40 (1995).

her employment with JMO from 1984 to the present (then 2004), she had failed to render JMO any services during that time, substitute employees hired by JMO to render Dolan's services cost JMO in excess of $360,000 and, if Dolan was entitled to participation in fees, she should be required to pay JMO the value of the substitute employees.

¶ 12 Dolan moved to strike and dismiss JMO's affirmative defenses with prejudice and to dismiss its counterclaim pursuant to section 2-615 of the Code. On August 25, 2005, the court granted the motion to dismiss JMO's third, fourth, fifth, sixth, seventh and ninth affirmative defenses with prejudice, finding that they were not affirmative defenses since they raise questions of law that the Court had previously rejected. The court struck JMO's second, eighth and tenth affirmative defenses "for failing to state facts warranting these defenses" and gave JMO leave to replead those defenses. The court granted Dolan's motion to dismiss JMO's counterclaim but granted JMO leave to file an amended counterclaim.

¶ 13 In August 2005, in order to correct typographical errors, Dolan filed a second amended complaint, almost identical to the earlier complaints and asserting the same two claims against JMO: (I) breach of contract and (II) breach of fiduciary duty. As in her earlier complaints, Dolan sought in count I "an amount of at least $300,000" and in count II compensatory and punitive damages "in an amount to be determined at trial."

¶ 14 In October 2005, JMO moved to dismiss the second amended complaint, making essentially the same arguments that it had directed to the earlier complaints. Dolan

moved to strike and dismiss the motion to dismiss and for sanctions, asserting that the court had twice ruled against JMO on the same issues raised in the motion. On January 19, 2006, the court denied JMO's motion to dismiss the second amended complaint. It "not[ed] that the defendant brought this motion to preserve for appeal purposes, the court's reasoning in denying defendant's prior motions to dismiss." The court denied Dolan's motion for sanctions and gave JMO time for file its answer and affirmative defenses of laches, statute of limitations and statute of frauds.

¶ 15 In February 2006, JMO filed its answer to the second amended complaint. It also filed the same 10 affirmative defenses it had asserted in May 2004 and which the court had dismissed. The answer stated JMO was "realleg[ing] and replead[ing], FOR PURPOSES OF APPEAL ONLY, [ITS] PREVIOUSLY FILED Affirmative Defenses and thereby preserves and does not waive such defenses by pleading over them or failing to raise them." JMO filed four additional affirmative defenses which were "amplified" versions of his previously filed and dismissed laches, statute of frauds and two statute of limitations defenses. JMO also "REPLEADED FOR PURPOSES OF APPEAL" the counterclaim previously stricken by the court.

¶ 16 On June 12, 2006, the court granted Dolan's motion to strike and dismiss JMO's affirmative defenses and counterclaim. It granted JMO leave to replead the defenses and counterclaim but JMO did not do so.

¶ 17 In October 2006, JMO filed a Chapter 7 bankruptcy petition in the United States District Court for the Northern District of Illinois. The circuit court placed *Dolan III* on the

bankruptcy docket pending resolution of the bankruptcy case. Dolan filed an adversary complaint in the bankruptcy court, objecting to the discharge of JMO. In December 2006, the bankruptcy court closed JMO's bankruptcy case. In February 2007, it granted Dolan's motion to voluntarily dismiss her adversary complaint pursuant to federal Rule 7041 on the ground that JMO's bankruptcy case had already been closed.[2] On January 22, 2007, on Dolan's motion, the circuit court moved *Dolan III* from the bankruptcy calendar back to the trial court docket, assigning it a new case number, No. 07 L 749 (*Dolan IV*).

¶ 18 In February 2008, JMO moved to dismiss the renumbered second amended complaint pursuant to section 2-619, asserting that (a) reinstatement of the case to the original trial court's docket constituted an impermissible refiling of the action and (b) the case was barred by *res judicata*. The court denied the motion on December 24, 2008.

¶ 19 The court held that the case would go to jury trial on count I (breach of contract) and bench trial on count II (breach of fiduciary duty). The case then proceeded to jury trial on the breach of contract count. The jury heard testimony from Dolan, O'Callaghan and Cogan, Dolan's former attorney. It entered a verdict in favor of Dolan on the breach of contract count, awarding her $318,551.52 in damages from JMO. The court entered judgment on the jury verdict.

¶ 20 JMO filed a posttrial motion seeking a new trial, entry of judgment in its favor

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[2] The court had also informed Dolan that, because JMO was a corporation and a corporation cannot obtain a discharge of its debts under Chapter 7, Dolan's adversary complaint directed to JMO's bankruptcy filing was "a useless proceeding"

and, pursuant to Illinois Supreme Court Rule 222(b), a reduction of the jury verdict to $50,000. On November 7, 2011, the court denied the posttrial motion and set a status date on count II. On November 29, 2011, JMO filed a notice of appeal, No. 1-11-3510.

¶ 21 On April 2, 2012, the court granted Dolan's motion to voluntarily dismiss count II of her second amended complaint, the breach of fiduciary duty count. JMO filed a notice of appeal on April 19, 2012, No. 1-12-1204. We consolidated the appeals on May 17, 2012.

¶ 22 Analysis

¶ 23 In brief, JMO raises the following issues on appeal:

I. The court erred in denying JMO's section 2-619 motion to dismiss count I of Dolan's second amended complaint on December 24, 2008.

II. The court erred in denying JMO's combined section 2-615 and 2-619 motion to dismiss Dolan's amended complaint on January 5, 2004.[3]

III. The trial court erred in denying JMO's combined section 2-615 and 2-619 motion to dismiss Dolan's second amended complaint on January 19, 2006.

IV. The trial court erred in denying JMO's post-trial motion for new trial or to reduce judgment on November 7, 2011.

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[3] JMO refers to its motion to dismiss "the complaint." Although JMO did file its motion to dismiss against the complaint, Dolan subsequently filed an amended complaint and the court did not deny the motion to dismiss until some months after that filing. We presume, therefore, that the court considered the motion to dismiss to be directed to the amended complaint and will address it as such. The complaint and amended complaint are virtually identical.

V. The trial court erred in granting Dolan's section 2-615 motion to dismiss JMO's counterclaim and JMO's third, fourth, fifth, sixth seventh and ninth affirmative defenses on August 25, 2005.

VI. The trial court erred in denying JMO's motion for leave to appeal by permission pursuant to Illinois Supreme Court Rule 308 on April 7, 2004.

¶ 24 Before this court, on October 10, 2012, Dolan filed a motion to strike and dismiss JMO's arguments II, III (statute of frauds and failure to state a cause of action issues only), V (affirmative defenses only) and VI. In her motion, Dolan asserts that, when she filed her second amended complaint, that complaint became the controlling pleading in the case and JMO waived its right to object to the court's rulings on motions to dismiss and affirmative defenses directed to an earlier complaint. She also asserts that, under the doctrine of merger, any prior order denying a motion to dismiss is not reviewable following trial because the result of such denial is merged by law into the subsequent trial. She posits, therefore, that the jury's verdict in her favor on the breach of contract claim precludes JMO's contentions regarding the statute of frauds and failure to state a cause of action for breach of contract because the jury necessarily found the agreement constituted a contract between Dolan and JMO. JMO responded and, on October 25, 2012, we ordered that Dolan's motion be taken with the case.

¶ 25 We deny Dolan's motion to dismiss. First, she raises these same arguments in her appellate brief and we will address them in that context as necessary. Second, the waiver concept to which Dolan cites in *Pappas v. Pella Corp.*, 363 Ill. App. 3d 795

(2006), and *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.,* 96 Ill. 2d 150 (1983) applies to a plaintiff, not a defendant.[4] Third, although, under the doctrine of merger, the denial of a section 2-619 motion to dismiss is not generally reviewable on appeal after an evidentiary trial has been held, an exception exists where, as here, questions presented in the motion were questions of law rather than fact and not presented at trial. *In re. Parentage of G.E.M.*, 382 Ill. App. 3d 1102, 1114 (2008); *Mansmith v. Hameeduddin*, 369 Ill. App. 3d 417, 425 (2006); *Paulson v. Suson*, 97 Ill. App. 3d 326, 328 (1981). Lastly, JMO preserved its right to appeal the court's denial of his counterclaim and affirmative defenses directed to the earlier complaints by repleading the arguments "for purposes of appeal" in his answer to the second amended complaint. *In re. Parentage of G.E.M.*, 382 Ill. App. 3d at 1114.

¶ 26 We address JMO's arguments seriatim.

¶ 27 I. The December 24, 2008, Order

¶ 28 JMO first argues the trial court erred in denying JMO's motion to dismiss count I of Dolan's second amended complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2010)) on December 24, 2008. Citing Rule 41(a)(1)(B) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.

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[4] "Where a party files an amended pleading that does not refer to or adopt the prior pleadings, the earlier pleadings cease to be a part of the record." *Pappas v. Pella Corp.*, 363 Ill. App. 3d 795, 801 (2006) (citing *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.,* 96 Ill. 2d 150, 153-54 (1983)). "[A] party who files an amended pleading waives any objection to the trial court's ruling on the former complaints." *Foxcroft Townhome Owners Ass'n,* 96 Ill. 2d at 153.

41(a)(1)(B)) and section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217 (West 1993)), JMO argues that Dolan's voluntary dismissal of her adversary complaint in the federal bankruptcy proceeding precluded her from refiling her second amended complaint in the circuit court because it was barred by a prior judgment (735 ILCS 5/2-619(a)(4) (West 2010)) and had been released in bankruptcy (735 ILCS 5/2-619(a)(6) (West 2010)).

¶ 29 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses or other affirmative matters which avoid the legal effect of or defeat a claim. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004); *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584 (2000). Interpreting all pleadings and supporting documents in the light most favorable to the nonmoving party, the defect, defense or affirmative matter must be apparent on the face of the pleading attacked or be supported by affidavit. *Borowiec*, 209 Ill. 2d at 383. We review *de novo* a court's denial of a section 2-619 motion to dismiss. *Borowiec*, 209 Ill. 2d at 383.

¶ 30 JMO argues that, under federal Rule 41(a)(1)(B), Dolan's voluntary dismissal of her adversary complaint in the federal bankruptcy proceeding operated as an adjudication on the merits of her claim against JMO for her share of the firm's fees and precluded the reinstatement of her second amended complaint to the circuit court's docket. Rule 41(a)(1)(B) provides that "if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of [voluntary] dismissal [in federal court] operates as an adjudication on the merits." Fed. R. Civ. P.

41(a)(1)(B). JMO asserts that the adversary complaint "alleged the same factual allegations" against JMO as the second amended complaint and points out that Dolan had already voluntarily dismissed her state court claim against JMO in *Dolan II* in August 2001 by the time she voluntary dismissed her federal adversary complaint. It argues that, under Rule 41(a)(1)(B), the voluntary dismissal of the adversary complaint therefore operated as an adjudication on the merits of Dolan's claims against JMO and JMO was entitled to dismissal of those claims under section 2-619(a)(4) because they were barred by a prior judgment.

¶ 31 Rule 41(a)(1)(B) does not apply here. Rule 41(a) provides in its entirety:

> "(a) Voluntary Dismissal.
>
> (1) *By the Plaintiff*.
>
> (A) *Without a Court Order*. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:
>
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
>
> (ii) a stipulation of dismissal signed by all parties who have appeared.
>
> *(B) Effect. Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the*

> *plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.*
>
> (2) By Court Order; Effect. Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice." Fed. R. Civ. P. 41(a).

¶ 32 Read in context, it is clear that Rule 41(a)(1)(B) sets out the effect of a voluntary dismissal "without a court order," effectuated either by the plaintiff's filing of a "notice of dismissal" or "stipulation of dismissal." Dolan did neither. Instead, she filed a motion to voluntarily dismiss her adversary complaint. The bankruptcy court granted the motion on February 1, 2007 and issued an order dismissing the complaint. The voluntary dismissal of Dolan's adversary complaint was, therefore, "by court order" and Rule 41(a)(2) rather than Rule 41(a)(1) applies. Rule 41(a)(2) does not provide that a voluntary dismissal "by court order" is an adjudication on the merits and JMO's argument is, therefore, baseless.

¶ 33 JMO's second argument is that the court erred in reinstating Dolan's case after

her voluntary dismissal in bankruptcy court because the voluntary dismissal operated to preclude refiling pursuant to section 13-217 of the Illinois Code of Civil Procedure. Section 13-217 provides:

> "In the actions specified in Article XIII of this Act or any other act or contract where the time for commencing an action is limited, *if* *** *the action is voluntarily dismissed by the plaintiff*, *** whether or not the time limitation for bringing such action expires during the pendency of such action, *the plaintiff*, his or her heirs, executors or administrators *may commence a new action* within one year or within the remaining period of limitation, whichever is greater, *** after the action is voluntarily dismissed by the plaintiff ***." (Emphasis added.) 735 ILCS 5/13-217 (West 1993).[5]

¶ 34 JMO asserts that, under section 13-217, there can only be one refiling of a case and, therefore, since Dolan had already refiled her case against JMO once in 2002 (*Dolan III*), after having voluntarily dismissed her claim against JMO in 2001 (*Dolan II*), section 13-217 barred her from refiling the case a second time in 2007 and the court erred in reinstating the case (*Dolan IV*).

¶ 35 As our supreme court has explained, "section 13-217 expressly permits one, and only one, refiling of a claim even if the statute of limitations has not expired." *Flesner v.*

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[5] Public Act 89-7, which amended this section effective March 9, 1995, has been held unconstitutional in its entirety by the Illinois Supreme Court in the case of *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997). Accordingly, we apply the statute as it stood prior to its amendment by Public Act 89-7.

Youngs Development Co., 145 Ill. 2d 252, 254 (1991). However, to state the obvious, the circuit court's reinstatement of the case to its docket from the bankruptcy docket was not the equivalent of Dolan's refiling her case, *i.e.*, of her "commenc[ing] a new action" (735 ILCS 5/13-217 (West 1995)) under section 13-217.

¶ 36 A "refiling" presumes that the case had been dismissed at some point, whether involuntarily or voluntarily, and such was not the case here. Instead, when JMO filed its bankruptcy petition, an automatic stay imposed by section 362(a) of the United States Bankruptcy Code (11 U.S.C. § 362(a) (2000)) went into immediate effect, divesting the circuit court of jurisdiction to adjudicate any claims against JMO. *In re Application of County Collector for Judgment and Sale Against Lands and Lots*, 367 Ill. App. 3d 34, 39 (2006). Given the automatic stay, the circuit court moved Dolan's state court action against JMO to its bankruptcy docket, where it would, by necessity, remain open but unresolved pending resolution of the federal bankruptcy action. The case was not dismissed; only stayed. Following the close of the bankruptcy proceedings, on Dolan's motion, the court merely reinstated the stayed action, albeit with a different docket number. Dolan did not "commence a new action" and section 13-217, therefore, did not bar reinstatement of the stayed action. The court did not err in denying JMO's motion to dismiss count I of the second amended complaint on the basis of either Rule 341(a)(1)(B) or section 13-217.

¶ 37 II. The January 5, 2004, Order

¶ 38 In his second argument on appeal, JMO argues that the court erred in denying

its combined section 2-615 and 2-619 motion to dismiss Dolan's amended complaint (in *Dolan III*) on January 5, 2004. It asserts six bases for dismissal: (1) the breach of contract claim is barred by a prior judgment; (2) Dolan failed to exercise due diligence in refiling her complaint as required by Illinois Supreme Court Rule 369(c) (eff. July 1, 1982); (3) she failed to exercise due diligence in serving process as required by Illinois Supreme Court Rule 103(b) (eff. July 1, 2007); (4) only one refiling of an action is permitted pursuant to section 13-217 of the Code; (5) the agreement is unenforceable under the statute of frauds (740 ILCS 80/1 (West 2010)); and (6) the breach of contract claim failed to state a cause of action.

¶ 39 In its third argument on appeal, considered in section III below, JMO asserts six bases for dismissal of the second amended complaint, five of which are identical to five of the six bases it raises here in challenging the amended complaint. Indeed, JMO does not bother to restate these five bases in its third argument and confines itself to stating it "relies on the above stated reasons found at pages [citations to the brief as relevant to each of the five bases for dismissal] as to why the Second Amended Complaint should have been dismissed." Beyond minor typographical changes, the second amended complaint mirrors both the complaint and amended complaint. As the trial court recognized, JMO preserved the arguments it raised in its motion to dismiss the amended complaint for purposes of appeal by repleading them in its motion to dismiss the second amended complaint. Since five of the six arguments directed to the amended complaint here are *identical* as those directed to the second amended

complaint, we will consider them only once, in section III below.

¶ 40 In the sole issue here that is not restated in argument III, JMO argues that Dolan's amended complaint should have been dismissed pursuant to section 2-619(9) for her failure to exercise due diligence in pursuing her claim as required by Rule 369(c).[6] Rule 369(c) provides: "When the reviewing court remands the case for a new trial or hearing and the mandate is filed in the circuit court, the case shall be reinstated therein upon 10 days notice to the adverse party." Ill. S.Ct. Rule 369(c) (eff. July 1, 1982). The prevailing party on appeal has an affirmative duty to pursue her rights after the reviewing court's mandate has issued. *People v. NL Industries, Inc.*, 284 Ill. App. 3d 1025, 1028 (1996). "This duty is discharged when the prevailing litigant has the case reinstated within a reasonable time." *NL Industries, Inc.*, 284 Ill. App. 3d at 1028. The reasonableness requirement requires that the petitioner has exercised due diligence in filing the petition. *Ryan v. Kontrick*, 335 Ill. App. 3d 225, 229 (2002). "[D]ue diligence in filing a reinstatement petition requires the petitioner to have a 'reasonable excuse' for failing to timely file the petition." *Ryan*, 335 Ill. App. 3d at 229. We review the trial court's reinstatement of a case under Rule 369(c) for an abuse of discretion. *NL Industries*, 297 Ill. App. 3d at 301.

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[6] In argument III, JMO argues the second amended complaint should have been dismissed on the basis of *laches*, an argument it does not raise here in challenging the amended complaint. In its reply brief, in support of its *laches* argument, JMO then refers us to its memorandum of law in support of the motion to dismiss the second amended complaint for the proposition that dismissal was warranted under Rule 369(c), the same argument it makes here. However, JMO fails to elaborate on this argument and we do not consider it adequately raised for our review in argument III.

¶ 41 JMO challenges Dolan's diligence in refiling her involuntarily dismissed 1993 action (*Dolan I*) after the appellate court reversed and remanded the case in 1996. It argues that the circuit court erred in reinstating the case in 1997 after remand (*Dolan II*) because the appellate court's mandate was transmitted to the circuit court with notice to Dolan's counsel on November 4, 1996, and Dolan did not seek leave to refile the case until August 27, 1997, over nine months later, an excessive delay in violation of Rule 369(c). O'Callaghan and JMO had objected to reinstatement of the case at the time Dolan made her Rule 369(c) motion and, after the court allowed the reinstatement, they filed a motion to reconsider the reinstatement, which the court denied.

¶ 42 JMO argues here that Dolan never provided a reason for her delay in reinstating the case and the court, therefore, "erred by not dismissing [the *Dolan II* complaint] pursuant to Rule 369(c) as a result of [Dolan's] clear failure to exercise due diligence." Putting aside the fact that a court does not "dismiss" a complaint under Rule 369(c) but rather denies a Rule 369(c) petition to reinstate an action, we decline to address this issue.

¶ 43 Supreme Court Rule 341 governs the format and contents of appellate briefs. *In re M.M.*, 156 Ill. 2d 53, 56 (1993); 210 Ill. 2d R. 341. Pursuant to Rule 341(h)(7), an appellate brief must contain an argument section which contains “the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on.” 210 Ill. 2d R. 341(h)(7). JMO fails to provide any citations to the record supporting its assertion that Dolan presented no reason for her delay in

petitioning for reinstatement of her case. It provides no citation directing us to Dolan's petition for reinstatement under Rule 369(c), to a transcript of the hearing on the motion, if any, to the court's order granting the petition or even to its own motion to reconsider the reinstatement. We are not required to do an appellant's work for it and will not parse through the 21-volume record to find support for JMO's argument.

¶ 44 Arguments that do not comply with Rule 341(h)(7) merit no consideration on appeal and may be rejected by this court for that reason alone. *In re Marriage of Hendry*, 409 Ill. App. 3d 1012, 1019 (2011). Accordingly, we decline to address the issue of whether the court erred in granting Dolan's petition to reinstate her action after remand under Rule 369(c).

¶ 45 III. The January 19, 2006, Order

¶ 46 JMO argues the court erred in denying its motion to dismiss Dolan's second amended complaint on January 19, 2006, and asserts six bases in support of its argument.

¶ 47 (1) Failure to State a Claim for Breach of Contract

¶ 48 JMO first argues that count I should have been dismissed pursuant to 735 ILCS 2-615 for failure to state a cause of action for breach of contract since it failed to allege the elements of a contract. A section 2-615 motion to dismiss is based on the pleadings rather than on the underlying facts, admits all well-pleaded facts on the face of the complaint and attacks the legal sufficiency of the complaint, alleging only defects on the face of the complaint. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584 (2000); *Elson*

v. State Farm Fire and Casualty Co., 295 Ill. App. 3d 1, 6 (1998). Viewing the complaint in the light most favorable to plaintiff, we must determine whether the complaint alleges facts sufficient to state a cause of action upon which relief may be granted (*Ziemba v. Mierzwa*, 142 Ill. 2d 42, 46-47 (1991)) and do not consider the merits of the case (*Elson*, 295 Ill. App. 3d at 5)). We must construe the complaint liberally and dismiss only when it appears that plaintiff cannot recover under any set of facts. *Sheffler v. Commonwealth Edison Co.*, 399 Ill. App. 3d 51, 59 (2010). Our standard of review is *de novo*. *Neppl*, 316 Ill. App. 3d at 583.

¶ 49 JMO asserts that the complaint failed to state a cause of action for breach of contract because the note underlying the action is not a contract. "Contract formation issues turn on the elements of offer, a strictly conforming acceptance of the offer, and supporting consideration." *Martin v. Government Employees Ins. Co.,* 206 Ill. App. 3d 1031, 1035 (1990). "Consideration consists of some detriment to the offeror, some benefit to the offeree, or some bargained-for exchange between them." *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 112 (1999). " 'Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract.' " *Doyle*, 186 Ill. 2d at 112 (quoting *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 330 (1977)). JMO argues the note sets forth no obligations or consideration by Dolan, that Dolan "relies upon a note that promises payment in exchange for nothing," and is, therefore unenforceable under contract law.

¶ 50 We previously considered and rejected the argument that the contract lacked

consideration in *Dolan v. O'Callaghan*, No. 1-95-0438 (1996) (unpublished order pursuant to Supreme Court Rule 23). We held:

> "We believe Dolan alleged consideration. Dolan agreed under the contract to continue to work for Joseph M. O'Callaghan 'in lieu of salary' in return for a percentage of fees, including, specifically, fees from *Sarka v. Gerbie."* *Dolan v. O'Callaghan*, No. 1-95-0438 (1996), slip op. at 6 (unpublished order pursuant to Supreme Court Rule 23).

This holding stands and we will not reconsider the issue.

¶ 51 In addition to raising the issue of lack of consideration, JMO asserts in a brief, one sentence argument that "the note did not recite terms and conditions of the contract, nor did Plaintiff's complaint attempt to supply such terms and conditions though a writing or by way of parol." JMO does not support this assertion by citation to authority or show in what way the note is deficient. JMO does refer us to its memorandum of law in support of its motion to dismiss the original complaint for the proposition that "the note was not a contract." However, the memorandum is equally cursory in explaining how the note is not sufficiently definite to be a contract.

¶ 52 Nevertheless, we address the issue and find the note to be sufficiently definite. The note specifically states that, in lieu of or in addition to other salary adjustments [consideration], for the specific period of fiscal year 1982-1983 [definite term], Dolan was to receive a specific amount of a specific case, 10% of the recovery in *Sarka v. Gerbie* [amount due]. Dolan is solely seeking that 10% of the *Sarka* fees. Therefore,

the note is certainly definite enough to be enforced with regard to the particular claim at issue here.

¶ 53 With regard to Dolan's claim for a 10% share of the *Sarka v. Gerbie* recovery, the specific fee before us, the agreement was sufficiently definite. Anticipating argument that the contract was not sufficiently definite regarding a share in the recovery of other cases, cases that are, by the way, not at issue here, Dolan testified at trial that the agreement pertained to all cases pending at the JMO law firm during the relevant 1982-83 fiscal year. Appellant has failed to provide transcripts of the motion practice proceedings in question. However, at trial, Dolan testified as parol evidence that the agreement pertained only to "those cases in the office at that time", those cases pending at JMO during the time period specified in the agreement. Those cases understandably could be settled or resolved at a much later time. As Dolan testified, it "clearly wasn't going to happen" that the cases "would resolve in fiscal year '82" because they "hadn't been in the office long enough to resolve in that time frame." It is obvious that, as Dolan testified, "the idea was *** in the years to come that as these cases resolve, one way or the other, *** at [that] time *** then this 10 percent would kick in."

¶ 54 The court was correct in finding that the complaint stated a cause of action for breach of contract where the note was sufficiently definite to support Dolan's cause of

action for 10% of the *Sarka* fees.[7] It did not err in failing to dismiss count I for failure to state a cause of action.

¶ 55 (2) *Laches*

¶ 56 JMO argues that count I should have been dismissed pursuant to 735 ILCS 2-615 because of *laches*. "Laches is an equitable principle that bars an action where, because of delay in bringing suit, a party has been misled or prejudiced or has taken a course of action different from what the party otherwise would have taken." *Senese v. Climatemp, Inc.*, 289 Ill. App. 3d 570, 578 (1997). JMO asserts that, because the agreement was 11 years old by the time Dolan filed her first complaint in 1993 (*Dolan I*) and she presented no reason why she could not file it sooner, the doctrine of *laches* barred the action.[8]

¶ 57 We already considered and rejected the argument that Dolan's claim is barred by

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[7] The court's order denying JMO's motion to dismiss the original complaint states no reason for the court's finding. The court does note that it heard argument on the motion but there is no report of these proceedings in the record. We cannot, therefore, determine the court's reasons for denying the motion. Given that the court denied the motion to dismiss for failure to state a cause of action for breach of contract, the court must necessarily have found the note sufficiently definite to meet the requirements for an enforceable contract.

In the court's order denying JMO's motion to dismiss the second amended complaint, the court recognized that JMO had raised the same arguments that it had addressed to the original complaint for the purposes of preserving the court's reasoning regarding the prior motion to dismiss for purposes of appeal. However, given that this reasoning is not reflected in the record, we again cannot know the basis for the court's denial of the motion to dismiss and presume that the court found the note sufficient to support a cause of action for breach of contract.

[8] This is the only argument that JMO did not also direct to the amended complaint in its second argument, recited above in section II.

laches in *Dolan v. O'Callaghan*, No. 1-95-0438 (1996) (unpublished order pursuant to Supreme Court Rule 23). We held:

> "We find that laches is not a bar to her action. The argument presumes that Dolan had a cause of action before the fee in *Sarka v. Gerbie* was paid, but *Maxwell* is dispositive of the issue, as with the statute of limitations argument. Here, Dolan's complaint was filed within the statute of limitations and was filed shortly after learning of the settlement fee in *Sarka v. Gerbie*."[9] *Dolan v. O'Callaghan*, No. 1-95-0438 (June 6, 1996), slip op. at 7.

We will not readdress this issue. The court did not err in denying JMO's motion to dismiss on the basis of *laches*.

¶ 58 (3) Statute of Frauds

¶ 59 JMO argues count I should have been dismissed pursuant to 735 ILCS 2-619(7) as unenforceable under the statute of frauds. The statute of frauds prohibits a party from bringing an action based "upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon

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[9] "The statute of limitations begins to run 'when the party to be barred has a right to invoke the aid of the court to enforce its remedy.' *Maxwell for the Use of Maxwell v. Nieft*, 313 Ill. App. 354, 356 *** (1942). Here the statute of limitations began to run when O'Callaghan received his fees in *Sarka v. Gerbie* in December 1992, not when Dolan left the firm. Dolan's complaint was filed in 1993, well within the ten year statute of limitations for a written contract." *Dolan v. O'Callaghan*, No. 1-95-0438 (1996), slip op. at 7 (unpublished order pursuant to Supreme Court Rule 23).

"Certainly the plaintiffs could not have sued until they were injured." *Maxwell for the Use of Maxwell v. Nieft*, 313 Ill. App. 354, 356-57 (1942).

which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith." 740 ILCS 80/1 (West 2010). To satisfy the statute of frauds, a writing must contain, either on its face or by reference to other documents, "the names of the parties, an identification of the subject matter of the contract, and the terms and conditions of the contract." *American College of Surgeons v. Lumbermens Mutual Casualty Co.*, 142 Ill. App. 3d 680, 698–99 (1986). JMO asserts that the note underlying Dolan's action violates the statute of frauds because it does not contain any terms, let alone establish consideration or other necessary contract terms, and merely states an unenforceable promise.

¶ 60 Dolan responds that this argument should be stricken because, under the doctrine of merger, the court's denial of the motion to dismiss on this basis was merged into the trial proceedings and, by rendering a verdict for Dolan, the jury found a contract existed between Dolan and JMO which negates JMO argument regarding the statute of frauds. Generally, after an evidentiary trial has been held, a prior order denying a motion for summary judgment is not reviewable on appeal because the result of that denial merges with the trial that follows. *Robinson v. Tellabs, Inc.*, 391 Ill. App. 3d 60, 64 (2009); *Mansmith v. Hameeduddin*, 369 Ill. App. 3d 417, 425 (2006). This doctrine of merger has been extended to the denial of a section 2-619 motion to dismiss, which is analogous to a motion for summary judgment. See *Paulson v. Suson*, 97 Ill. App. 3d 326, 328 (1981). The rationale for the merger doctrine is that "it would be unjust for a verdict reached after trial, where the evidence was completely presented to the trier of

fact and subject to cross-examination, to be overturned on less evidence, that is, evidence obtained only from the pleadings and affidavits." *Paulson*, 97 Ill. App. 3d at 328.

¶ 61 However, the issue of whether the note met the requirements of the statute of frauds was a question of law that was not before the jury. The jury entered its verdict on the question of whether JMO breached the contract and the appropriate damages to be awarded, not whether the alleged contract was sufficient under the statute of frauds. The court's denial of the motion to dismiss on the basis of the statute of frauds did not merge into the judgment because the trial had not dealt with the issue raised in that motion. See *Battles v. LaSalle National Bank*, 240 Ill. App. 3d 550, 558 (1992). Accordingly, we consider the issue on its merits.

¶ 62 The note clearly meets the requirements of the statute of frauds. First, the names of the parties, O'Callaghan and Dolan, are set out in the writing and Dolan sufficiently alleged that O'Callaghan, president and majority shareholder of JMO, signed on behalf of JMO. Second, the subject matter of the contract is clearly identified: compensation to Dolan in lieu of salary adjustments. Lastly, the terms and conditions of the contract are clear, "In lieu of and or in addition to other salary adjustments for the FY 1982-83, you [Dolan] are to receive 10% of the net fees of all cases of Joseph Michael O'Callaghan PC including but not limited to Sarka versus Gerbie et al." Moreover, as noted in section III(1) above, in *Dolan v. O'Callaghan*, No. 1-95-0438 (1996) (unpublished order pursuant to Supreme Court Rule 23), we rejected the

argument that the contract lacked consideration, holding that "Dolan agreed under the contract to continue to work for Joseph M. O'Callaghan 'in lieu of salary' in return for a percentage of fees, including, specifically, fees from *Sarka v. Gerbie."* *Dolan v. O'Callaghan*, No. 1-95-0438 (1996), slip op. at 6 (unpublished order pursuant to Supreme Court Rule 23). The note meets the requirements of the statute of frauds and the court did not err in denying the motion to dismiss on the basis of the statute of frauds.

¶ 63 (4) Prior Judgment

¶ 64 JMO argues Dolan's claim for breach of contract is barred by a prior judgment and count I should, therefore, have been dismissed pursuant to 735 ILCS 2-619(4). It asserts that, under the doctrine of *res judicata*, the grant of summary judgment to O'Callaghan on the breach of contract claim in *Dolan II* also applied to Dolan's breach of contract claim against JMO in the same action and thus precluded a finding that JMO breached the parties' agreement in *Dolan IV*.[10]

¶ 65 "The doctrine of res judicata provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). "The doctrine prohibits not only those matters which

[10] JMO also refers us to its argument I, in which it asserts that Dolan was precluded from refiling her second amended complaint in 2007 under Rule 41(a)(1)(B) of the Federal Rules of Civil Procedure (Fed. R. Civ. P. 41(a)(1)(B)) and section 13-217. We rejected the argument in section I above.

were actually litigated and resolved in the prior suit, but also any matter which might have been raised in that suit to defeat or sustain the claim or demand." *Rein*, 172 Ill. 2d at 336. Whether a subsequent claim is barred by *res judicata* is a question of law, which we review *de novo*. *Saxon Mortgage, Inc. v. United Financial Mortgage Corp.*, 312 Ill. App. 3d 1098, 1105 (2000).

¶ 66 Three requirements must be met for *res judicata* to apply: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies. *Rein*, 172 Ill. 2d at 335. The court's grant of summary judgment against Dolan in her *Dolan II* action against O'Callaghan does not have *res judicata* effect on Dolan's action against JMO in *Dolan III* and *Dolan IV*.

¶ 67 There is no question that the grant of summary judgment to O'Callaghan was rendered by a court of competent jurisdiction. There is also no question that it was a final order, because it disposed of a definite and separate part of the controversy, the breach of contract claim against O'Callaghan individually. *Curtis v. Lofy*, 394 Ill. App. 3d 170, 183 (2009) (citing *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997)).

¶ 68 There is also an identity of causes of action, given that both the breach of contract claim against O'Callaghan in *Dolan II* and the breach of contract claim against JMO in *Dolan III* arose "from a single group of operative facts, *** from the same transaction." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998).

¶ 69 There is, however, no identity of the parties or their privies between the two actions. Here, the plaintiff is the same in both actions but the defendants are different. The summary judgment in *Dolan II* decided only Dolan's action against O'Callaghan as an individual while Dolan's action in *Dolan III* and *Dolan IV* was solely against JMO, a corporation. JMO argues, however, that the defendants were in privity because O'Callaghan was the president and controlling shareholder of JMO.

¶ 70 For purposes of *res judicata*, the parties need not be identical to be considered the same." *Langone v. Schad, Diamond & Shedden, P.C.*, 406 Ill. App. 3d 820, 832 (2010). Instead, "[l]itigants are considered the same when their interests are sufficiently similar, even if they differ in name or number." *Langone,* 406 Ill. App. 3d at 832. Privity exists between parties who adequately represent the same legal interests. *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 297 (1992). "It is the identity of interest that controls in determining privity, not the nominal identity of the parties." *People ex rel. Burris,* 151 Ill. 2d at 297. "Litigants are privies when 'a person is so identified in interest with another that he represents the same legal right.' " *Langone,* 406 Ill. App. 3d at 832. To paraphrase our supreme court, the issue here is whether JMO's interests "were adequately represented" by O'Callaghan in the summary judgment proceeding. *People ex rel. Burris*, 151 Ill. 2d at 297.

¶ 71 JMO's interests were not "adequately represented" by O'Callaghan during the summary judgment proceeding. They were not represented at all. The trial court granted summary judgment to O'Callaghan "on [his argument] that [Dolan] had not

introduced evidence that *** O'Callaghan, individually, is a party to the employment contract at issue." The court found the depositions, exhibits and affidavits supported O'Callaghan's argument that the corporate entity, JMO, and not the individual, O'Callaghan, was Dolan's employer. It held that there was no genuine issue of material fact regarding whether a contract existed between Dolan and O'Callaghan individually and granted O'Callaghan's motion for summary judgment.

¶ 72 The summary judgment in favor of O'Callaghan was based on a defense personal to O'Callaghan, a defense antithetical to JMO's interests. In the process of proving that he was not Dolan's employer, O'Callaghan claimed that JMO was her employer. He had averred as much in a verified affidavit filed in 1993 in *Dolan I*, in which he stated that he was the president of JMO, had never individually employed anyone for the purpose of practicing law and that Dolan was employed by JMO. In pursuing his motion for summary judgment, O'Callaghan was acting *contrary* to JMO's interests in that the question of whether JMO was a party to the agreement is one of the many issues to be resolved in Dolan's breach of contract action against JMO. Therefore, although O'Callaghan and JMO are related parties in that O'Callaghan was the president of JMO, they were not in privity with each other in these actions. The court did not err in denying JMO's motions to dismiss on the basis of *res judicata*.

¶ 73 (5) Rule 103(b)

¶ 74 JMO argues the second amended complaint should have been dismissed pursuant to 735 ILCS 2-619(9) as a result of Dolan's violation of Illinois Supreme Court

Rule 103(b) (eff. July 1, 1997) by failing to obtain proper service on JMO. Rule 103(b) provides for dismissal of an action for failure to exercise reasonable diligence in serving a defendant with a summons and complaint. *Long v. Elborno*, 376 Ill. App. 3d 970, 978 (2007); 134 Ill. 2d R. 103(b) (eff. July 1, 1997). We will not reverse the trial court's ruling on a motion to dismiss under Rule 103(b) absent an abuse of the court's discretion. *Long*, 376 Ill. App. 3d at 979.

¶ 75 At the time relevant here, Rule 103(b) provided:

> "If the plaintiff fails to exercise reasonable diligence to obtain service prior to the expiration of the applicable statute of limitations, the action as a whole or as to any unserved defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice. In either case the dismissal may be made on the application of any defendant or on the court's own motion." 134 Ill. 2d R. 103(b) (eff. July 1, 1997).[11]

¶ 76 In 1993, in *Dolan I*, Dolan served JMO through service on O'Callaghan, "individual and d/b/a/ [JMO]." JMO filed a special and limited appearance and moved to quash the service on JMO. In May 1994, the court granted the motion. It gave Dolan leave to file an amended complaint to properly name JMO as a defendant and JMO 28

[11] Supreme Court Rule 103(b) was amended, effective July 1, 2007, but JMO's motions to dismiss and the circuit court's rulings on those motions were based on the rule as it stood prior to that amendment. Accordingly, the prior version of the rule, effective July 1, 1997, applies here.

days to file an answer to the complaint. In 2001, after O'Callaghan was granted summary judgment, Dolan voluntarily dismissed without prejudice her remaining claim against JMO in *Dolan II*. In July 2002, she filed her *Dolan III* complaint within one year of her voluntary dismissal of *Dolan II* pursuant to section 13-217. Dolan served JMO with notice of *Dolan III* in September 2002. In November 2002, JMO moved to dismiss *Dolan III*, asserting that the complaint should be dismissed under Rule 103(b) for Dolan's failure to effect service on JMO in the original case, *Dolan I* (reinstated as *Dolan II*). The court denied the motion.

¶ 77 JMO argues, as it did below, that because service was not effectuated on JMO until September 2002, nine years after Dolan first filed her action, she showed a "total lack of diligence under Rule 103(b)" requiring dismissal of the action pursuant to section 2-619(9). Dolan does not assert that she timely served JMO. Instead, she responds that JMO waived its right to invoke Rule 103(b) as a grounds to dismiss by actively participating in the previously filed action. We agree.

¶ 78 "A ruling on a Rule 103(b) dismissal motion, made [as here] following service of process of a refiled action, *** requires an examination of the plaintiff's diligence in the original action as well as in the refiled action even if service was never effected in the original action." *Martinez v. Erickson*, 127 Ill. 2d 112, 119 (1989). However, "a party must interpose a timely objection to his opponent's failure to exercise reasonable diligence in serving a summons and complaint *before* defending a suit on its merits." (Emphasis added.) *Long*, 376 Ill. App. 3d at 977. "A defendant's participation in the

defense of his case may constitute a waiver of a Rule 103(b) objection." *Long*, 376 Ill. App. 3d at 977. "[T]he waiver rule *** only applies where it is obvious that the defendant's participation and utilization of available pretrial discovery procedures were in anticipation of a defense on the merits." *Long*, 376 Ill. App. 3d at 977.

¶ 79 JMO waived its objection to Dolan's failure to provide service in the prior action, *Dolan I*, by actively and fully participating in the defense of its case in *Dolan I* and *Dolan II*. The record contains JMO's 1994 motion to dismiss the complaint in *Dolan I*. It contains JMO's October 1998 Rule 213 interrogatories and third request for production of documents and its January 1999 motion to compel Dolan to answer the third request for production of documents and Rule 213 interrogatories. It contains JMO's 1999 reply to Dolan's motion to quash subpoenas, notice of deposition, subpoena for deposition and memorandum in opposition to Dolan's motion to bar JMO's proposed expert. It contains an October 1998 deposition taken of Dolan and May 2001 motions *in limine*. The record clearly shows that JMO actively and fully participated in the proceedings in *Dolan I* and *Dolan II* in anticipation of a defense on the merits. JMO's participation in the defense of its case was a waiver of its Rule 103(b) objection to Dolan's failure to serve process in *Dolan I*. *Long*, 376 Ill. App. 3d at 977. The court did not err in denying JMO's motion to dismiss under Rule 103(b).

¶ 80 (6) Section 13-217

¶ 81 JMO lastly claims the second amended complaint should have been dismissed pursuant to 735 ILCS 2-619(9) because Dolan is permitted only one re-filing of her

action pursuant to 735 ILCS 5/13-217 and the court improperly allowed her to refile her complaint three times: in 1997 after remand from the appellate court (*Dolan II)*, in 2002 after having voluntarily dismissed her claim against JMO in 2001 (*Dolan III*) and in 2007 after she voluntarily dismissed her adversary complaint in bankruptcy court (*Dolan IV*).[12]

¶ 82 As discussed in section I above, the reinstatement of Dolan's case in 2007 was not a refiling under section 13-217 given that the case had merely been stayed pending resolution of the bankruptcy action.

¶ 83 Similarly, the reinstatement of Dolan's case in 1997 following remand by the appellate court was not a refiling under section 13-217. "The purpose of section 13-217 is to extend the limitations period to enable plaintiffs to refile a case when their complaints suffer defects, primarily procedural in nature, which have resulted in dismissal without resolution on the merits." *National Underground Construction Co. v. E.A. Cox Co.*, 273 Ill. App. 3d 830, 834 (1995). "Section 13-217 does not pertain to the effect of a mandate remanding a case. Indeed, reinstatement after remand does not constitute the filing of a new action." *National Underground Construction Co.,* 273 Ill. App. 3d at 834 (citing *People ex rel. Hartigan v. Illinois Commerce Com'n,* 148 Ill. 2d 348, 404 (1992) ("Remandment involves the continuation of the same case rather than the beginning of a new and distinct case.")). Accordingly, by its terms, section 13-217 does not apply to the 1997 reinstatement after remand of Dolan's action.

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[12] This is contrary to JMO's assertion in its first argument, recited in section I, that Dolan refiled her case twice: once in 2002 and once in 2007.

¶ 84 The only actual "refiling" of the action was Dolan's refiling the case in 2002 after having voluntarily dismissed her claim against JMO in 2001. Since Dolan only refiled her action a single time, in 2002, she did not violate the provisions of section 13-217. The court did not err in denying JMO's motions to dismiss on this basis.

¶ 85 IV. The November 7, 2011, Order

¶ 86 JMO argues the trial court erred in denying its posttrial motion to reduce judgment or for new trial on November 7, 2011, because (a) Illinois Supreme Court Rule 222(b) requires that the judgment be reduced to $50,000; and (b) the court erred in refusing to allow JMO to impeach Dolan's witness, Michael Cogan, with a prior inconsistent statement.

¶ 87 a. Reduce Judgment

¶ 88 Illinois Supreme Court Rule 222 "sets forth reforms in the discovery process in cases seeking money damages not in excess of $50,000." Ill. S. Ct. R. 222, Committee Comments (adopted June 1, 1995). "If Rule 222 applies in a case, then the parties must comply with its limited and simplified discovery rules rather than with the general discovery rules set forth elsewhere in the Illinois Supreme Court rules." *Dovalina v. Conley*, 2013 IL App (1st) 103127, ¶ 14 (citing *Kapsouris v. Rivera*, 319 Ill. App. 3d 844, 850 (2001)). Rule 222 provides in relevant part:

> "(a) Applicability. This rule applies to all *** civil actions seeking money damages not in excess of $50,000 * * *.
>
> (b) Affidavit re Damages Sought. Any civil action seeking money

> damages shall have attached to the initial pleading the party's affidavit that the total of money damages sought does or does not exceed $50,000. If the damages sought do not exceed $50,000, this rule shall apply. Any judgment on such claim which exceeds $50,000 shall be reduced posttrial to an amount not in excess of $50,000." Ill. S. Ct. 222 (eff. July 1, 2006).

¶ 89 The court had entered judgment on the jury verdict awarding Dolan $318,551.52 in damages on count I of her second amended complaint. It denied JMO's posttrial motion to reduce the judgment to $50,000 for Dolan's failure to attach to her second amended complaint a Rule 222(b) affidavit stating that her total money damages sought did or did not exceed $50,000. JMO argues that the court erred in denying his motion to reduce the judgment because Rule 222(b) requires that a judgment in excess of $50,000 shall be reduced posttrial to $50,000 where, as here, the plaintiff fails to attach a Rule 222(b) affidavit to the complaint.

¶ 90 As we recently held in *Dovalina v. Conley*, 2013 IL App (1st) 103127, "a plaintiff's failure to attach the requisite affidavit does not mean that he is barred from recovering a judgment in excess of $50,000." *Dovalina*, 2013 IL App (1st) 103127, ¶ 26.

> "Rule 222 makes no provision for when a plaintiff fails to file the requisite affidavit. But, *** what matters in a determination of whether Rule 222 applies to an action is the amount of damages a plaintiff is seeking, whether this is shown by a Rule 222 affidavit or by a complaint, in order to protect the defendant from surprise." *Dovalina*, 2013 IL App (1st) 103127, ¶ 27.

Rule 222 applies " '[i]f the damages sought do not exceed $50,000' [Ill. S. Ct. R. 222(b) (eff. July 1, 2006)]." *Dovalina*, 2013 IL App (1st) 103127, ¶ 25. "Necessarily, therefore, if the damages sought exceed $50,000, the rule shall not apply." *Dovalina*, 2013 IL App (1st) 103127, ¶ 25.

¶ 91 In *Dovalina*, the plaintiff had filed a complaint without attaching a Rule 222 affidavit. However, we found that the plaintiff's complaint clearly showed that he was seeking in excess of $50,000 in damages and, therefore, Rule 222 did not apply to his action. *Dovalina*, 2013 IL App (1st) 103127, ¶ 25.

¶ 92 Here, as in *Dovalina*, the complaint at issue clearly sought a judgment in excess of $50,000. In Dolan's second amended complaint, she sought damages in "an amount of at least $300,000" on count I.[13] Dolan was clearly seeking a judgment in excess of $50,000 and, therefore, Rule 222 did not apply to her action. See *Dovalina*, 2013 IL App (1st) 103127, ¶ 25. JMO had no reasonable expectation that the damage award would be capped at $50,000. On the contrary, it could reasonably expect that the judgment would be in excess of $50,000 and that the rules set forth in Rule 222 would not apply to the action. *Dovalina*, 2013 IL App (1st) 103127, ¶ 28. The court did not err in denying JMO's posttrial motion to reduce the damage award to $50,000 for Dolan's failure to file a Rule 222(b) affidavit.

[13] She also sought compensatory and punitive damages in an amount to be determined at trial on count II.

¶ 93 b. Impeachment of Witness

¶ 94 Similarly, the court did not err in denying JMO's posttrial motion for a new trial on the basis that it should have allowed JMO to impeach plaintiff's witness, her former attorney Michael Cogan, with a prior inconsistent statement.

¶ 95 At trial, Cogan had testified that he opened his own law firm, Cogan and McNabola, in April 1993, was retained by Dolan in 1992 and made the December 1992 phone call to O'Callaghan requesting Dolan's share of *Sarka* verdict while he worked at another law firm. On cross-examination, JMO sought to impeach Cogan's testimony regarding when he opened his law firm by introducing a December 8, 1992, letter on Cogan and McNabola letterhead. In the letter, Cogan informed an attorney associated with the defendant in the *Sarka v. Gerbie* case that Dolan was claiming an attorney's lien in the *Sarka* recovery to the extent of her interest under the agreement.

¶ 96 JMO had not disclosed the letter prior to trial and Dolan objected to its admission. The court sustained the objection, noting that the date that Cogan started his own firm was a collateral issue irrelevant to the lawsuit.

¶ 97 Cogan then testified that he did not recall filing an attorney lien for Dolan. JMO showed the letter to Cogan to refresh his memory regarding whether he had filed an attorney lien for Dolan but Cogan testified it did not refresh his memory. Dolan again objected to the letter. JMO responded that the impeachment went to the credibility of Cogan's testimony regarding his telephone conversation with O'Callaghan. The court again sustained Dolan's objection to introduction of the letter.

¶ 98 JMO argues that it is entitled to a new trial because the court erred in refusing to allow it to test Cogan's credibility on cross-examination by impeaching him with the prior inconsistent statement regarding when he opened his law firm in the letter. It argues that, since Cogan was one of only three witnesses, the other two being Dolan and O'Callaghan, Cogan's credibility and believability were essential to the trial and, if the jury knew that Cogan was mistaken or untruthful in his testimony, it might have found the remainder of this testimony regarding his conversation with O'Callaghan unreliable.

¶ 99 A court should order a new trial only when it determines that the jury's verdict is against the manifest weight of the evidence. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999). A verdict is against the manifest weight of the evidence if the opposite conclusion is clearly evident or the jury's findings appear unreasonable, arbitrary, or not based on the evidence. *McClure*, 188 Ill. 2d at 132. We will not reverse the court's decision to deny JMO's motion for a new trial unless the court abused its discretion. *McClure,* 188 Ill. 2d at 132-33. To determine whether the court abused its discretion, we look to whether the jury's verdict in favor of Dolan was supported by the evidence and whether JMO was denied a fair trial. *Sbarboro v. Vollala*, 392 Ill. App. 3d 1040, 1053 (2009). The court did not err in barring impeachment by the letter and denying the motion for a new trial.

¶ 100 It is uncontested that JMO had not disclosed the letter prior to trial. JMO explained to the court at trial that it had obtained the letter one or two days prior to trial. Yet it had not notified Dolan that it intended to use the letter at trial. There is no

question that JMO's failure to disclosure the letter prior to trial is a violation of the discovery rules under Illinois Supreme Court Rules 213 and 214. The Illinois Supreme Court rules on discovery are mandatory rules of procedure with which the parties must strictly comply. *Jackson v. Seib*, 372 Ill. App. 3d 1061, 1074 (2007). Parties must seasonably supplement or amend prior answers or responses whenever new or additional evidence or information subsequently becomes known to that party. *Jackson*, 372 Ill. App. 3d at 1074. The decision to admit evidence lies within the circuit court's discretion. *Jackson*, 372 Ill. App. 3d at 1074. We will not reverse the court's ruling absent an abuse of discretion, absent a finding that no reasonable person would take the view adopted by the circuit court. *Jackson*, 372 Ill. App. 3d at 1074.

¶ 101 Here, Dolan made a timely objection to the letter and JMO gave no good-faith explanation for its failure to produce the letter prior to the trial. Accordingly, given that JMO had not attempted to disclose the letter prior to trial as required by the supreme court rules and failed to explain its failure to do so, the court did not abuse its discretion in sustaining Dolan's objection to introduction of the letter, whether for impeachment purposes or otherwise.

¶ 102 Further, a "cross-examiner may not impeach a witness on a collateral matter." *People v. Collins*, 106 Ill. 2d 237, 269 (1985). A matter is collateral if it "could be introduced for any purpose other than to contradict." *Collins*, 106 Ill. 2d at 269. JMO's attempt to impeach Cogan with the letter was clearly, as the trial court ruled, improper impeachment on a collateral issue. The court did not abuse its discretion in barring the

letter on this basis.

¶ 103 Looking at the record as a whole, the jury's verdict was supported by Dolan's testimonial evidence and the agreement between the parties. The court did not err in denying JMO a new trial.

¶ 104 V. The August 25, 2005, Order

¶ 105 JMO argues the court erred in granting Dolan's motion to dismiss JMO's (a) counterclaim and (b) JMO's third, fourth, fifth, sixth seventh and ninth affirmative defenses on August 25, 2005. It preserved the issue for appellate review by reasserting the counterclaim and affirmative defenses "for purposes of appeal only" in its 2006 answer to the second amended complaint.

¶ 106 a. Counterclaim

¶ 107 In its counterclaim, JMO asserted that Dolan claimed entitlement to earnings as a result of her employment with JMO from 1984 to "the present" (2004, then 2006 on refiling of the counterclaim), she had failed to render JMO any services during that time, substitute employees hired by JMO to render Dolan's services cost JMO in excess of $360,000 and, if Dolan was entitled to participation in fees, she should be required to pay JMO the value of the substitute employees. Dolan moved to dismiss under section 2-615, asserting, as she does here, that the counterclaim failed to state a claim upon which relief could be granted because JMO failed to allege a cause of action for breach of contract. We review *de novo* the court's dismissal of the counterclaim. *Chicago Commons Ass'n v. Hancock*, 346 Ill. App. 3d 326, 328 (2004).

¶ 108 The court did not err in dismissing the counterclaim. First, contrary to the assertion in the counterclaim that Dolan claimed entitlement to earnings as a result of her employment with JMO from 1984 to "the present," nothing in Dolan's various complaints supports such a conclusion. Dolan neither asserted that she was employed by JMO after 1984 nor claimed entitlement to 10% of the *Sarka v. Gerbie* fees on the basis of such employment. She claimed entitlement to 10% of the *Sarka* fees under the terms of the agreement, asserting that JMO agreed to pay her 10% of the net fees from all of JMO's cases in lieu of or in addition to other salary adjustments for the fiscal year 1982 through 1983, even if the *Sarka* case was resolved after that fiscal year.

¶ 109 Second, JMO failed to state a basis for the premise necessarily underlying its counterclaim: that an agreement existed under which JMO agreed to pay Dolan 10% of the *Sarka* fees in consideration for her employment with JMO and/or provision of services on behalf of JMO for the period from 1984 to "the present." To sufficiently plead a cause of action for breach of contract, a plaintiff must allege: (1) the existence of a valid and enforceable contract; (2) substantial performance of the contract by the plaintiff; (3) a breach of the contract by the defendant; and (4) resultant damages. *W.W. Vincent and Co. v. First Colony Life Ins. Co.*, 351 Ill. App. 3d 752, 759 (2004). "Only a duty imposed by the terms of a contract can give rise to a breach." *W.W. Vincent and Co.*, 351 Ill. App. 3d at 759. JMO's counterclaim failed to allege the existence of a contract, written or otherwise, under which Dolan was required to render services on behalf of JMO from 1984 to the present in exchange for her share of the

Sarka fees. Accordingly, it fails to state a cause of action for breach of contract. JMO asserts that "contracts are generally interpreted to require that performance precede payment" (*Miller v. Racine Trust*, 65 Ill. App. 3d 207, 215 (1978)). However, given that JMO failed to allege the existence of a contract, let alone one requiring Dolan to perform thereunder in perpetuity in exchange for a 10% share of fees, this argument is misplaced. The court did not err in dismissing JMO's counterclaim.

¶ 110 b. Affirmative Defenses

¶ 111 JMO argues the court erred in granting Dolan's motion to dismiss JMO's third, fourth, fifth, sixth, seventh and ninth affirmative defenses. In its August 2005 order, the court dismissed these affirmative defenses with prejudice, holding that "they are not affirmative defenses since they raise questions of law which this court has already rejected on two occasions." We will only address the propriety of the court's dismissal of the ninth affirmative defense.

¶ 112 The third, fourth, fifth, sixth and seventh affirmative defenses presented arguments identical to those asserted by JMO in its motion to dismiss the amended complaint: the breach of contract claim was barred by a prior judgment (third); the claim should be dismissed for violation of Rule 369(c) (fourth); the complaint was barred by violation of Rule 103(b) (fifth); the complaint was barred under section 13-217 (sixth); and the complaint failed to state a cause of action (seventh). As the court noted in granting Dolan's motion to dismiss those affirmative defenses, it had already rejected the same arguments twice, once on JMO's motion to dismiss the complaint and once

on JMO's motion for permissive appeal from that dismissal. Similarly here, we have already rejected these same arguments on appeal, in sections II and III below. Accordingly, we will not address them again.

¶ 113 Turning to the ninth affirmative defense, we find the court did not err in granting Dolan's motion to dismiss this defense. The ninth affirmative defense, in its entirety, stated as follows: "Plaintiff failed to plead any contractual or other ground for prejudgment interest and the same is not allowed by law." JMO asserts as a general proposition that the affirmative defenses were supported by the facts in its memorandum of law in support of its motions to dismiss which it had expressly incorporated into its affirmative defenses. JMO did indeed incorporate this memorandum into 8 of its 10 affirmative defenses. It did not, however, incorporate the memorandum into its ninth affirmative defense. The ninth affirmative defense consisted of a single sentence: "Plaintiff failed to plead any contractual or other ground for prejudgment interest and the same is not allowed by law." There were no facts plead in support of this defense.

¶ 114 Moreover, Dolan's amended complaint and second amended complaint were more than adequate to state a claim for prejudgment interest. "Absent an express agreement between the parties, allowance of prejudgment interest on written instruments is available under section 2 of the Interest Act (815 ILCS 205/2 (West 1992)) if the [principal] amount due [under the written instrument] is a fixed amount or easily computed." *Kruse v. Kuntz*, 288 Ill. App. 3d 431, 436 (1996). Section 2 of the

Interest Act provides:

> "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; *** and on money withheld by an unreasonable and vexatious delay of payment. In the absence of an agreement between the creditor and debtor governing interest charges, upon 30 days' written notice to the debtor, an assignee or agent of the creditor may charge and collect interest as provided in this Section on behalf of a creditor." 815 ILCS 205/2 (West 2010).

¶ 115 In her complaints, Dolan requested prejudgment interest on the approximately $300,000 she claimed as her 10% share of the *Sarka v. Gerbie* settlement fees under the note executed by O'Callaghan. Dolan asserted that, despite repeated requests, JMO refused to pay her the 10% share due under the note and consciously disregarded its obligations under that agreement. The note signed by O'Callaghan constituted a written instrument involving a debtor-creditor relationship. The amount due under that written instrument was easily calculated, being 10% of the *Sarka* settlement fees, or approximately $300,000. Accordingly, Dolan adequately plead grounds for an award of prejudgment interest under section 2 on the basis of the written instrument alone. She also arguably plead sufficient grounds for an award of prejudgment interest on the basis of unreasonable and vexatious delay of payment. There was no basis for JMO's ninth affirmative defense that Dolan "failed to plead any contractual or other ground for prejudgment interest" and the court did not err in dismissing the ninth affirmative

defense.

¶ 116 VI. The April 7, 2004, Order

¶ 117 JMO argues the court erred in denying its motion for leave to file an interlocutory appeal "by permission" pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010). JMO had filed the motion following the court's January 5, 2004, denial of its motion to dismiss the amended complaint. Rule 308(a) provides for permissive appeal from interlocutory orders not otherwise appealable where the trial court "finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved." Ill. S.Ct. R. 308(a) (eff. Feb. 26, 2010).

¶ 118 JMO argues that it had not sought appellate review of the court's application of the law to the facts, only the resolution of the following legal questions on which it asserts there is substantial ground for difference of opinion: (1) whether Dolan's breach of contract claim was barred by prior judgment, *i.e.*, whether summary judgment granted to an individual is *res judicata* to a corporation; (2) whether the complaint should have been dismissed for lack of due diligence where Rule 369(c) contains no express time limit for refiling an action and does not define "reasonable"; (3) whether the complaint should be dismissed on the basis of Rule 103(b) where "diligence" is undefined in the rule; (4) whether the complaint should have been dismissed because it represented a second refiling under section 13-217; (5) whether the complaint should

have been dismissed for failure to state a cause of action; and (6) whether the complaint was unenforceable under the statute of frauds.

¶ 119 As Dolan points out, the issues JMO asserts as underlying its request for a permissive Rule 308 appeal are the same issues JMO now raises on appeal in his argument II, recited in section II above.[14] Dolan argues that, since we can now address the court's decisions on those issues directly under Illinois Supreme Court Rule 301 in argument II, the propriety of the court's earlier denial of leave to file an interlocutory appeal by permission regarding those issues became moot. We agree. "[T]his issue is moot, because final judgment has been entered in this cause and [JMO] may now [and does] address directly the correctness of the trial court's ruling." *Millburn Mutual Insurance Co. of Lake Villa v. Glaze*, 86 Ill. App. 3d 1055, 1065 (1980). Accordingly, we will not address the merits of this argument.

¶ 120 Conclusion

¶ 121 For the foregoing reasons, we deny Dolan's motion to dismiss arguments II, III, V and VI of JMO's brief on appeal. We affirm the decision of the trial court.

¶ 122 Affirmed.

[14] In her motion, Dolan actually asserts that JMO raises these issues in its argument III but it is clear that she means JMO raised the arguments in argument II. JMO restates five of the six arguments in its argument III.