2013 IL App (1st) 121357-U

FOURTH DIVISION
September 12, 2013

No. 1-12-1357

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

1801 W. IRVING, LLC and Metro North, Plaintiffs-Appellants, v. JONATHAN SPLITT ARCHITECTS, LTD., JONATHAN SPLITT, Defendants-Appellees.	)))))))))))	Appeal from the Circuit Court of Cook County No. 09 L 12485 11 L 10805 Honorable Daniel J. Pierce Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court did not err by granting summary judgment in favor of defendants on the claims of breach of contract and breach of implied contractual indemnity in 1801's original complaint and dismissing with prejudice 1801's claim for disgorgement of fees and investment because the terms of the alleged oral contract upon which each of those claims was based were too indefinite and uncertain. 1801 was not barred from raising the claims in its amended complaint by the entry of summary judgment on its original complaint because the claims in its amended complaint were distinct and separate from those in its original complaint.

¶ 2 Plaintiff, 1801 W. Irving, LLC (1801), appeals from orders of the circuit court of Cook County granting summary judgment in favor of defendants, Jonathan Splitt and Jonathan Splitt Architects, Ltd. (JSA), on the breach of contract and breach of implied contractual indemnity claims in 1801's original complaint; granting defendants' motion to dismiss with prejudice the disgorgement of fees and investment claim in 1801's original complaint; denying 1801's motion to reconsider the order granting summary judgment on the original complaint; and dismissing with prejudice 1801's amended complaint. On appeal, 1801 contends that the court erred by granting summary judgment on its original complaint, dismissing its claim for disgorgement of fees and investment, and granting defendants' motion to strike its amended complaint. For the reasons that follow, we affirm in part and reverse and remand in part.

¶ 3 BACKGROUND

¶ 4 On July 1, 2009, 1801 filed a one-count complaint for breach of contract against defendants. 1801 asserted that it owned and developed a condominium project located at 1801-1813 West Irving Park Road in Chicago and that Splitt was a licensed architect and practiced under the trade name Jonathan Splitt Architects Ltd. 1801 alleged that it entered into an oral contract with defendants under which defendants performed architectural services regarding the design, plan, and inspection of the project and that the contract contained an implied duty and warranty of a professional standard of care which defendants breached in the performance of their services under the contract. The case was consolidated with two previously filed lawsuits concerning the condominium project, and on November 9, 2009, those cases were consolidated with a lawsuit brought by the Board of Managers of the Metro North Condominium Association

(Association) in connection with a number of alleged hidden and latent defects in the design and construction of a number of the units in that building.

¶ 5 Defendants filed a motion to dismiss 1801's complaint in which they asserted that they entered into a written agreement with Jim Jaeger, that 1801 was a successor of Jaeger under that agreement, and that the agreement controlled the dispute between them and 1801. On November 19, 2009, the court denied the motion, finding, *inter alia*, that the documentary evidence showed that defendants reached a written agreement with Jaeger in his capacity as an individual, 1801 was not a successor of Jaeger, and 1801 was not a party to or bound by the written agreement.

¶ 6 On August 6, 2010, 1801 filed a number of counterclaims and third-party complaints for contribution and indemnity against various parties regarding the lawsuit filed by the Association, including a third-party indemnity claim against defendants in which 1801 alleged that defendants breached an oral contract entered into by the parties under which defendants agreed to perform architectural services regarding the design, plan, and inspection of the building at issue. On August 19, 2010, 1801 voluntarily dismissed without prejudice its previously filed breach of contract claim against defendants.

¶ 7 On August 12, 2011, defendants filed a motion for summary judgment on plaintiff's third-party complaint, asserting that the record established that the parties had not entered into an oral contract because there was no evidence showing that 1801 made an offer to enter into such a contract, 1801 admitted that the alleged contract lacked any definite or certain terms, the written agreement between Jaeger and defendants could only be modified by a written agreement, and the purported contract lacked consideration. Defendants attached a number of documents to the

motion, including a copy of the written agreement entered into by Jaeger and defendants, 1801's response to defendants' request for admissions of fact, the deposition testimony of Jaeger and Splitt, and signed affidavits from Jaeger and Splitt.

¶ 8 The written agreement was dated February 24, 2004, and signed by Splitt and Jaeger, and was incorporated into a standard form agreement that was dated February 10, 2004, and signed by Splitt and Jaeger. The agreement provided that JSA would perform eight basic services for Jaeger: (1) review zoning and building code requirements; (2) visit the project site and document the existing field conditions; (3) prepare a list of program requirements and use that information to prepare schematic design drawings; (4) prepare a set of contract documents for obtaining a foundation permit, for securing bids from contractors and subcontractors, and for construction of the work; (5) assist in assessing bids submitted by contractors and subcontractors; (6) assist in reviewing contracts for the hiring of contractors and subcontractors; (7) review payment requests and change orders submitted by contractors and subcontractors; and (8) review the project at substantial completion.

¶ 9 JSA charged an architectural fee of $68,000 for services one through four, charged hourly service fees for services five through eight at varying rates, and requested an initial retainer fee of $4,000. JSA was to submit monthly invoices based on the percentage of work completed. The costs of consulting engineers and/or reimbursables were to be paid to JSA. 15 full size sets and 10 half size sets of blueprints issued for permit were included in the fee, but additional printing was to be billed as a reimbursable. Additional zoning work, such as tax identification number research, zoning exceptions and/or zoning variances, were not included in the fee and were to be

billed as additional services. While JSA was to provide basic mechanical and/or structural layouts, diagrams, and notes for schematic design development, consulting structural and/or mechanical engineers services were not included in the agreement and the costs of such engineers were to be billed as reimbursables. In addition, architect shop drawing reviews and 10 site visits were included in the agreement, but shop drawing documents and final project documentation drawings and specifications were not.

¶ 10 Jaeger averred in his signed affidavit that 1801 was formed on September 28, 2004, as a limited liability company in the business of real estate development and that he was one of the two members which comprised 1801. In its response to defendants' request for admissions of fact, 1801 stated that on August 23, 2004, Jaeger & Haake Development, LLC (Jaeger & Haake), a real estate development company of which Jaeger was a managing member, acquired ownership of the property at 1801-1813 West Irving Park and that on April 26, 2005, Jaeger & Haake transferred ownership of the property to 1801.

¶ 11 Jaeger testified at his deposition that he entered into the written agreement with Splitt in his capacity as an individual and that JSA performed services one through four as set forth in that agreement. Jaeger also testified that at some point prior to April 8, 2005, he entered into an oral contract with Splitt under which he would pay Splitt "darn near" $68,000. When asked what he told Splitt regarding the contract, Jaeger responded "I asked him to do the work. He performed the work and we paid him for it." Jaeger explained that the "work" to which he referred was "to design the building, to be the architect of record, designer of record." Jaeger testified that Splitt performed substantially more services than were contemplated by the written agreement and that

Splitt reviewed shop drawings, made steel shop drawings, met with and referred subcontractors, designed window installations, performed zoning work, and dealt with issues regarding the Chicago building board of appeals. Jaeger and Splitt were constantly making oral modifications to their initial written agreement whereby Jaeger would tell Splitt what to do and then paid him to do it. Jaeger paid defendants more than $68,000 for the performance of services one through four of the original written agreement, and JSA was paid $158,411.32 to design the building under the oral contract.

¶ 12 Splitt averred in his signed affidavit that JSA was retained by Jaeger to obtain a permit for the building's construction and entered into a written architectural services agreement with Jaeger under which JSA prepared plans to obtain a permit in exchange for a flat fee of $68,000 and further payments for subconsultant fees and reimbursables. Splitt also averred that JSA retained three subcontractors for the project on a fixed fee basis for a total of $66,900 and that JSA received $158,548.40 in total for the services rendered for the project under the architectural services agreement.

¶ 13 Splitt testified at his deposition that defendants had completed the majority of their work for 1801 by August 16, 2005, because at that point "permit sets were done, design was done, zoning work was done, models, marking work was done and we were essentially waiting for Developer Services to issue a permit, and I might have a small bit of work to pick up permit changes, but at that point my contract is done." JSA did not perform design services during the construction phase of the project and defendants' contract ended with the issuance of a permit on September 2, 2005. Splitt also testified, however, that defendants performed a few services at

Jaeger's request after September 2, 2005, that "there were issues with drawings even into late '06, early '07," and that defendants helped Jaeger with issues regarding the building board of appeals and the building's windows, vents, lighting, and the steel step drawings. Splitt did not think defendants billed Jaeger for work performed after September 2, 2005, except possibly for work done regarding the building board of appeals, and while Jaeger paid defendants directly for some services, defendants billed most everything through the written contract, including a number of reimbursables. In April 2007, defendants gathered information for Jaeger regarding the building's windows and was paid for that work by Jaeger. Splitt further testified that he invested $50,000 in 1801 and that his investment was paid back with interest two years later.

¶ 14 On October 17, 2011, 1801 filed a direct complaint against defendants alleging claims of breach of contract, breach of contractual implied indemnity, and disgorgement of fees and investment. 1801 asserted that it entered into an oral contract with defendants under which JSA reviewed applicable laws, codes, and ordinances; prepared preliminary architectural plans and drawings; coordinated the permit approval process for a foundation permit, superstructure permit, electrical permit, and sewer permit; prepared a final set of drawings for the project; assisted in obtaining bids from subcontractors; coordinated with Dukane Precast, Inc., regarding all aspects of the precast structure for the project; coordinated with the structural engineer for the project; provided the window subcontractor with drawings and specifications and prepared a window area study; coordinated design details for the mechanical, plumbing, and electrical aspects of the project as well as the foundation system, elevators, and sprinkler system; coordinated with Pioneer Environmental, LLC, regarding soil bearing and geotechnical engineering; assisted with

the selection of construction materials; visited and inspected the project site on a weekly to daily basis; and acted as the project architect and design professional of record. 1801 also asserted that it paid JSA in full for those services performed under the oral contract.

¶ 15 In its breach of contract claim, 1801 alleged that the oral contract between the parties contained an implied duty and warranty of a professional standard of care and that defendants breached that duty by failing to provide sufficient designs for different aspects of the building or adequately monitor construction of the building and alert 1801 of various problems that arose during construction. In its breach of contractual implied indemnity claim, 1801 alleged that if it was found to be liable to the Association in the pending litigation, it would be as a direct and proximate result of defendants' breach of contract because defendants' actions contributed in whole or in part to the damages allegedly sustained by the Association and that in such an event, 1801 would be entitled to contractual implied indemnity from defendants. In the disgorgement of fees and investment claim, 1801 asserted that it paid defendants in excess of $50,000 for the services rendered pursuant to the oral contract, Splitt invested $50,000 and received a return of $62,500 on that investment, and defendants failed to provide it with a written disclosure of that investment as required by the relevant standards of professional conduct. 1801 alleged that it would be unjust and inequitable to permit defendants to retain the fees they had been paid or to permit Splitt to retain his investment and the return thereon.

¶ 16 On November 4, 2011, the court consolidated the lawsuit arising from 1801's October 17, 2011, complaint with the other lawsuits concerning the condominium project. On November 9, 2011, defendants filed a motion to amend its motion for summary judgment on 1801's third-party

complaint to include the breach of contract and breach of contractual implied indemnity claims set forth by 1801 in its direct complaint against defendants because those claims arose from the same alleged oral contract that formed the basis for 1801's third-party indemnity claim, and that motion was granted by the court. On December 7, 2011, the court entered an order granting summary judgment in favor of defendants on 1801's third-party indemnity claim and its direct claims of breach of contract and breach of contractual implied indemnity. On December 9, 2011, defendants filed a motion to dismiss with prejudice 1801's claim for disgorgement of fees and investment and the court granted that motion, finding that 1801 failed to state a cause of action because it was claiming that defendants had breached their duties under an oral contract that did not exist.

¶ 17 On December 20, 2011, 1801 filed a motion to reconsider the court's order granting summary judgment in favor of defendants and attached an affidavit signed by Jaeger and dated December 19, 2011. On December 21, 2011, plaintiff was granted leave to amend its complaint. On December 29, 2011, the court denied 1801's motion to reconsider, stating that it had granted summary judgment based on its finding that no oral contract existed between the parties and that 1801 failed to identify any error in the grant of summary judgment.

¶ 18 On December 29, 2011, 1801 filed an eight-count amended complaint against defendants in which it asserted that Jaeger began developing the project in early 2004, continued to develop the project on behalf of Jaeger & Haake for a brief period of time, and then formed 1801 on September 28, 2004, to finish the project. In February 2004, Jaeger entered into a written contract with defendants under which JSA was to provide limited architectural work that did not

include engineering work, final drawings, or permitting work after a foundation permit had been issued, in exchange for $68,000. Jaeger did not assign his rights under the contract to Jaeger & Haake or 1801.

¶ 19 1801 also asserted that on August 22, 2004, Jaeger & Haake purchased the land for the project and that on April 24, 2005, 1801 acquired the land from Jaeger & Haake. Around April 2005, Jaeger confirmed with Splitt that JSA would serve as the designer of record for the project on 1801's behalf, and 1801 subsequently made frequent oral and written requests of JSA to perform design services that went beyond the services covered by the prior written agreement during the permitting, construction, and preconstruction phases of the project. In fall 2005, 1801 was providing JSA with written and oral direction on a weekly and sometimes daily basis. JSA assisted with the bidding of work to subcontractors and evaluated subcontractor proposals. JSA acted as 1801's representative and designer of record in zoning, fire code, and other issues with the City of Chicago. JSA served as the design professional of record for 1801 throughout the permitting process. On September 25, 2005, JSA applied for approval of a sprinkler system on behalf of 1801. JSA continued to perform services during the construction phase of the project, including the issuance of at least six drawings culminating in the preparation of a set of final drawings in January 2006.

¶ 20 1801 further asserted that Jaeger paid JSA $43,733 from his personal account for services rendered through December 2004 and that the remainder of payments were made by 1801. 1801 obtained financing for the project through a loan from Pullman Bank and JSA consented to the assignment of its contract with 1801 to Pullman Bank and represented that it had a contract with

1801 when it did so. In addition, on August 16, 2005, Splitt signed a lien waiver and contractor's affidavit which related that JSA was employed by 1801 to furnish architectural services for the project for a contract price of $158,411.32.

¶ 21 In the first three counts of the amended complaint, 1801 re-alleged the counts of breach of contract, breach of contractual implied indemnity, and disgorgement of fees and investment upon which summary judgment had been granted to preserve those claims for appeal. In count 4, 1801 alleged that a contract implied in fact existed between the parties and that defendants breached the contract's implied duty and warranty of a professional standard of care in the same ways 1801 had alleged defendants breached the purported oral contract.

¶ 22 In support of the existence of a contract implied in fact, 1801 asserted that defendants expressed an intent to provide architectural services necessary to obtain zoning and permitting and to construct the building. Specifically, defendants performed architectural services at 1801's direction from 2004 to 2007; addressed the bills for the performance of those services to Jaeger & Haake; sent those bills to 1801's place of business; accepted payment from 1801 for all invoices issued after December 2004; consented to the assignment of their design contract with 1801 to Pullman Bank; signed and verified a contractor's affidavit and lien waiver on August 16, 2005, which stated that JSA was employed by 1801 and described the terms of the contract between the parties; certified as the representative of 1801 that the permit set of plans complied with city laws and ordinances; and acted as the designer of record on 1801's behalf in the zoning and permitting process. 1801 also made various assertions regarding the services JSA performed pursuant to the contract implied in fact which were identical to the assertions set forth in its

original complaint regarding the services allegedly rendered by 1801 under the purported oral contract. 1801 further asserted that it paid JSA in full for the services it performed pursuant to the contract implied in fact.

¶ 23 In count 5, 1801 alleged that if no contract was found to have existed between the parties, it should be able to recover damages under the doctrine of equitable estoppel because defendants represented that such a contract existed in the lien waiver and contractor's affidavit from August 16, 2005, and represented to Pullman Bank and the city that JSA was the designer of record, it relied on defendants' representations that a contract existed, and defendants should be estopped from denying the existence of such a contract. In count 6, 1801 alleged a claim of contribution, but subsequently consented to defendants' request to strike that claim. In count 7, 1801 alleged a claim of negligent misrepresentation, asserting that if there was no contract between the parties, then defendants' representation to the contrary in the lien waiver and contractor's affidavit from August 16, 2005, was false, and it relied on and was damaged by that misrepresentation. In count 8, 1801 alleged a claim of intentional misrepresentation, asserting that if there was no contract between the parties, then defendants intentionally misrepresented that such a contract existed to avoid legal liability and deny insurance coverage in the event of a lawsuit. In count 9, 1801 alleged a claim of disgorgement, asserting that it paid in excess of $100,000 in fees to JSA and that if no contract existed between the parties, then it would be inequitable to permit JSA to retain those fees.

¶ 24 On February 2, 2012, defendants filed a motion to reconsider the court's order granting 1801 leave to file an amended complaint and to strike the amended complaint. Defendants

asserted that 1801 should not have been allowed to amend its complaint because its claims were based on the same evidence and contractual theories as the claims in its original complaint, the amended complaint was prejudicial and caused substantial surprise, and 1801 had ample time to amend its complaint prior to the court's grant of summary judgment. Defendants also asserted that the amended complaint failed as a matter of law due to the court's previous finding that the parties had not entered into an oral contract. On April 10, 2012, the court conducted a hearing on the motions and denied the motion to reconsider the order granting 1801 leave to file an amended complaint. The court, however, granted the motion to strike the amended complaint, finding that the amended complaint was "a back-door attempt to rehash and reargue the same facts" that were at issue in the original complaint and that "I just don't think it is appropriate, right or just under the facts of this case to allow the amended complaint as it relates to [defendants] to stand."

¶ 25 ANALYSIS

¶ 26 I. Summary Judgment

¶ 27 1801 contends that the circuit court erred by granting summary judgment in favor of defendants on the claims in its original complaint because genuine issues of material fact exist as to whether the parties entered into an oral contract. A party is entitled to summary judgment when the pleadings, depositions, admissions, affidavits, and exhibits on file, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106 (2007). This court reviews the circuit court's ruling on a motion for summary judgment *de novo*. *Abrams v. City of Chicago*,

211 Ill. 2d 251, 258 (2004).

¶ 28 To establish a claim for breach of contract, whether oral or written, the plaintiff must prove the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and damages or injury to the plaintiff resulting from the breach. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 68. The elements of a valid and enforceable contract are offer and acceptance, definite and certain terms, consideration, and performance of all required conditions. *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1027 (2007).

¶ 29 1801 asserts that a genuine issue of material fact exists as to whether it made a valid offer for JSA to be the architect of record and design professional for the project, as Jaeger related in a sworn affidavit that Splitt agreed to be the designer of record and testified at his deposition that he asked defendants to design the building and be the designer of record. Defendants respond that 1801 cannot rely on Jaeger's affidavit in support of its challenge of the summary judgment order because that affidavit was not before the court when it granted summary judgment. On appellate review of an order granting summary judgment, the appellant may only refer to the record as it existed at the time of the court's ruling, outline the arguments made at that time, and explain why the court erred by granting summary judgment. *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 322 (2010). As Jaeger's affidavit was filed in support of 1801's motion to reconsider the summary judgment order and was not before the court at the time it entered that order, 1801 may not rely on the affidavit in support of its claim that summary judgment was improper.

¶ 30 As such, the only evidence of an offer is Jaeger's deposition testimony that he asked Splitt

to do "work," that Splitt and/or JSA did the "work" and was paid for it, and that the "work" to which he referred was "to design the building, to be the architect of record, designer of record." Defendants maintain that the terms of Jaeger's offer are too indefinite and uncertain to form the basis of a valid contract because Jaeger also testified that the terms of the alleged contract were constantly changing and he could not identify any material terms.

¶ 31 For a contract to be valid and enforceable, its terms and provisions must be sufficiently certain and definite to enable a court to determine what the parties agreed to do, and while some nonessential terms may be missing or left to be agreed upon, the parties' failure to agree upon an essential term of the contract indicates that mutual assent is lacking and there is no enforceable contract. *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1090-91 (2003). In this case, the only term included in Jaeger's offer according to his deposition testimony is that Splitt and/or JSA would design the building and be the architect of record and/or designer of record. Jaeger did not specify whether he was acting in his capacity as an individual or as a member of Jaeger & Haake or 1801 when he made the offer and numerous essential terms were lacking, including terms regarding compensation or obligations imposed upon Jaeger, Jaeger & Haake, or 1801. The terms of the alleged oral contract are, therefore, too uncertain and indefinite to enable a court to determine what the parties agreed to do. As such, we conclude that the court did not err by granting summary judgment in defendants' favor on 1801's claims for breach of contract and breach of contractual implied indemnity and dismissing with prejudice its claim for disgorgement of fees and investment because the claims all rely upon the existence of an oral contract between the parties.

¶ 32 II. Motion to Reconsider

¶ 33 Defendants maintain that 1801 waived its challenge of the court's denial of its motion to reconsider the order granting summary judgment on the original complaint in favor of defendants because it has failed to present any arguments regarding that issue in its appellant's brief. 1801 replies that the court's ruling on its motion to reconsider is reviewable because in appealing from a judgment of the circuit court, an appellant may challenge all related orders entered before the notice of appeal was filed, including the denial of any postjudgment motions. As points not argued in the appellant's brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for rehearing (Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)) and 1801 did not address the denial of its motion to reconsider in its appellant's brief, any challenge to that ruling has been forfeited.

¶ 34 Moreover, the court did not abuse its discretion by denying 1801's motion to reconsider. The purpose of a motion to reconsider is to allow a party to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 331 (2008). The decision of whether to grant a motion to reconsider rests within the discretion of the circuit court and will not be reversed absent an abuse of that discretion. *A.M. Realty Western, LLC v. MSMC Realty, LLC*, 2012 IL App (1st) 121183, ¶ 38. As stated earlier, the terms of the purported oral contract were too indefinite and uncertain to form the basis of a valid and enforceable contract. Also, a genuine issue of material fact as to the existence of such a contract cannot be based on Jaeger's signed affidavit, which was generated after the entry of summary judgment, because evidence is

only newly discovered if it was not previously available (*In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶ 41) and there is no indication that Jaeger could not have provided the court with his affidavit prior to its ruling on defendants' motion for summary judgment.

¶ 35 III. Amended Complaint

¶ 36 1801 contends that the court erred by striking the claims for breach of a contract implied in fact, equitable estoppel, negligent misrepresentation, intentional misrepresentation, and disgorgement set forth in its amended complaint. Defendants respond that 1801 was barred from raising the claims in its amended complaint by the court's prior grant of summary judgment on 1801's original complaint and, alternatively, the amended complaint was properly dismissed as untimely.

¶ 37 Initially, there is some confusion regarding the statutory basis for defendants' motion to strike. The record shows that in their motion to strike, defendants purported to be bringing the motion under section 2-619(a)(6) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(6) (West 2010)), which provides that a claim may be dismissed if it "has been released, satisfied of record, or discharged in bankruptcy," and asserted that 1801's causes of actions were barred by the court's prior order granting summary judgment on the original complaint. 1801 asserts that because section 2-619(a)(6) has no application to its claims, defendants likely intended to bring their motion pursuant to section 2-619(a)(4) (735 ILCS 5/2-619(a)(4) (West 2010)), which provides that a claim may be dismissed if it is barred by a prior judgment, and that dismissal was not warranted under that section because it only applies to claims that are barred by *res judicata* and the summary judgment order did not constitute a final judgment on the merits. In addition,

1801 devotes a substantial portion of its appellant's brief to arguing that its pleadings were sufficient to survive a motion to strike brought under section 2-615 (735 ILCS 5/2-615 (West 2010)). Defendants respond that the reference to section 2-619(a)(6) in their motion was a typo and that the motion was actually brought under section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2010)), which provides that a claim may be dismissed if it is barred by an affirmative matter avoiding the legal effect of or defeating the claim. Defendants also maintain that the issue of whether the amended complaint adequately stated causes of action to survive a section 2-615 motion to dismiss was not raised before the circuit court and that the court's dismissal of the amended complaint was not based on insufficient pleadings pursuant to section 2-615. As it is clear that neither section 2-619(a)(4) nor section 2-619(a)(6) applies to the amended complaint and there is no reference to section 2-615 in defendants' motion to strike or the court's order granting that motion, we will consider the motion as having been brought pursuant to section 2-619(a)(9).

¶ 38 A motion for dismissal brought under section 2-619(a)(9) admits the legal sufficiency of the plaintiff's complaint and asserts an affirmative matter outside the pleading that avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9) (West 2010); *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). The phrase "affirmative matter" encompasses defenses other than a negation of the essential allegations of a cause of action. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). In ruling on such a motion, the court will construe the pleadings and supporting documents in the light most favorable to the plaintiff and accept as true all well-pleaded facts in the complaint and draw all reasonable inferences therefrom in favor of

the plaintiff. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. The issue on appeal is whether a genuine issue of material fact exists to preclude dismissal of the plaintiff's claims, and we review the circuit court's ruling on the motion *de novo*. *Id.*

¶ 39 1801 asserts that the claims in its amended complaint were not barred by the grant of summary judgment on its original complaint because the claims in its amended complaint are separate and distinct from those in its original complaint. Defendants respond that 1801's claim for breach of a contract implied in fact was a recapitulation of its prior claim for breach of an oral contract and the other counts in the amended complaint were all predicated on the existence of a contract between the parties. In granting the motion to strike, the court stated that it viewed the amended complaint as a "back-door attempt" to reargue facts and circumstances as they related to defendants, that 1801 had knowledge of the facts and access to the legal theories in its amended complaint when it filed its original complaint, and that "I just don't think it is appropriate, right or just under the facts of this case to allow the amended complaint as it relates to [defendants] to stand."

¶ 40 A cause of action for breach of an express contract, whether written or oral, is distinct from a claim for breach of a contract implied in fact. *Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 20 (2009). Unlike an express contract, which arises from an agreement reached through words, either written or oral, a contract implied in fact arises from the parties' acts and conduct. *Century 21 Castles By King, Ltd. v. First National Bank of Western Springs*, 170 Ill. App. 3d 544, 548 (1988). "A contract implied in fact is one whereby a contractual duty is imposed by a court by reason of some expression or promise that can be inferred from the facts

and the circumstances." *Citizen's Bank-Illinois, N.A. v. American National Bank & Trust Co. of Chicago*, 326 Ill. App. 3d 822, 831 (2001).

¶ 41 In its original complaint, 1801 alleged that the parties entered into an oral contract but did not assert any facts regarding oral communications between the parties, and the only support for its claim of an oral contract was Jaeger's deposition testimony that he asked Splitt and/or JSA to design the building and to be the architect of record and/or the designer of record. In its amended complaint, 1801 alleged the existence of a contract implied in fact and asserted numerous facts in support of that claim regarding the performance of various services by JSA and 1801's payment of JSA for those services. As such, 1801's claims for breach of an oral contract and breach of a contract implied in fact are based upon different legal theories and supported by different facts, and we conclude that 1801's claim for breach of a contract implied in fact is not a recapitulation of its claim for breach of an oral contract upon which summary judgment had been granted but, rather, is a distinct and separate claim.

¶ 42 While defendants maintain that the circuit court found that the services performed by JSA were governed by the parties' written contract and that no other contract existed, whether oral or implied in fact, the record does not support such a claim, as the court only stated in its denial of 1801's motion to reconsider that no genuine issues of material fact existed regarding whether the parties entered into an oral contract. At no point did the court make any findings regarding the scope of the written agreement or the existence of a contract implied in fact. In addition, while defendants assert that 1801's claim for a contract implied in fact must fail because it is based on services defendants performed pursuant to the parties' written contract and cite *Barry Mogul &*

Associates, Inc. v. Terrestris Development Co., 267 Ill. App. 3d 742 (1994), in support of that proposition, 1801 has alleged that its claim for a contract implied in fact is based on defendants' conduct in providing services that were not part of or covered by the written agreement.

¶ 43 Defendants also maintain that 1801's claims for equitable estoppel, negligent misrepresentation, intentional misrepresentation, and disgorgement are barred by the grant of summary judgment because they are all predicated on the existence of a contract between the parties. However, these claims were all pled in the alternative and were explicitly based on the absence of a contract between the parties. While defendants later maintain that 1801's claims for equitable estoppel, negligent misrepresentation, and intentional misrepresentation were rejected by the court when it granted summary judgment on the original complaint, the record only shows that the court found there were no genuine issues of material fact regarding whether the parties entered into an oral contract and does not show that the court made any findings as to whether defendants made a misrepresentation of fact by representing that a contract existed between the parties. Further, to the extent defendants maintain that 1801's disgorgement claim was properly dismissed because the court found that the services performed by JSA were governed by the written contract, we again point out that the record does not disclose any such finding by the court. As such, the claims of breach of a contract implied in fact, equitable estoppel, negligent misrepresentation, intentional misrepresentation, and disgorgement in 1801's amended complaint were not barred by the grant of summary judgment on the original complaint. and we conclude that those claims should not have been dismissed pursuant to section 2-619(a)(9) of the Code.

¶ 44 Defendants also maintain that the circuit court correctly dismissed the amended complaint

as untimely pursuant to section 2-1005(g) of the Code (735 ILCS 5/2-1005(g) (West 2010)). The record shows that defendants filed a motion to reconsider the court's order granting 1801 leave to file an amended complaint in conjunction with the motion to strike the amended complaint and asserted that 1801 should not have been allowed to amend its complaint because the amended complaint was based on the same contractual theories that were rejected by the court when it granted summary judgment on the original complaint, was not based on any newly discovered evidence, and was prejudicial and caused substantial surprise. However, in striking the amended complaint, the court specifically stated that it was not granting defendants' motion to reconsider its order allowing 1801 to file an amended complaint. As such, the record shows that the court did not dismiss the amended complaint as untimely pursuant to section 2-1005(g) of the Code.

¶ 45 CONCLUSION

¶ 46 Accordingly, we affirm the orders of the circuit court of Cook County granting summary judgment in favor of defendants on 1801's original complaint, denying 1801's motion to reconsider the summary judgment order, and striking counts 1, 2, 3, and 6 of 1801's amended complaint, and we reverse that portion of the circuit court's order striking counts 4, 5, 7, 8, and 9 of 1801's amended complaint and remand the matter for further proceedings.

¶ 47 Affirmed in part; reversed and remanded in part.