2015 IL App (1st) 141335-U

No. 1-14-1335

Fourth Division
March 26, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

1801 W. IRVING, LLC and BOARD OF MANAGERS OF METRO NORTH CONDOMINIUM ASSOCIATION as assignee of 1801 W. IRVING, LLC, Plaintiffs- Appellants,	)	Appeal from the Circuit Court of Cook County.
	)	No. 14 L 418
v.	)	Honorable Margaret A. Brennan, Judge, presiding.
JONATHAN SPLITT ARCHITECTS, LTD. and JONATHAN SPLITT, Defendants-Appellees.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court erred by granting defendants' motion to dismiss where newly asserted claims in amended complaint did relate back to the date of the original complaint.

¶ 2 Plaintiff, 1801 W. Irving, LLC (1801), appeals from an order of the circuit court of Cook County granting motion to dismiss in favor of defendants, Jonathan Splitt (Splitt) and Jonathan Splitt Architects, Ltd. (JSA), on 1801's amended complaint. This case is on remand. This appellate court in its opinion in Appeal No. 12-1357 set forth a detailed recitation of the

history of the litigation and the facts germane to the dispute between 1801 and defendants. The facts relevant in the prior appeal are relevant to the instant appeal, in as much as this appeal is based on an amended complaint and its relation back to the original complaint. On appeal, 1801 contends that the court erred by granting defendants' motion to dismiss its amended complaint. For the reasons that follow, we reverse.

¶ 3 BACKGROUND

¶ 4 On July 1, 2009, 1801 filed a one-count complaint for breach of contract against defendants. The case was consolidated with two previously filed lawsuits concerning the condominium project at 1801 West Irving Park, Chicago, Il. 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) against defendants in connection with a number of alleged hidden and latent defects in the design and construction of a number of units in that building. Defendants filed a motion to dismiss 1801's complaint. In their motion, defendants' asserted that they entered into a written agreement with Jim Jaeger (Jaeger), that 1801 was a successor of Jaeger under the agreement, and that the agreement controlled the dispute between the parties. On November 19, 2009, the court denied the motion, finding that 1801 was not a successor of Jaeger, and that 1801 was not a party to or bound by the written agreement.

¶ 5 On August 6, 2010, 1801 filed a number of counter claims 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 the third party claim, 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. In August 19, 2010, 1801 voluntarily dismissed without prejudice its previously filed breach of contract claim against defendants.

¶ 6 In response to 1801's reinstated claim, on August 12, 2011, defendants filed a motion for summary judgment on 1801's third-party complaint, asserting that the record established that the parties had not entered into an oral contract because there was no evidence that 1801 made an offer. 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.

¶ 7 The written agreement signed by Splitt and Jaeger was dated February 24, 2004, and was incorporated into a standard form agreement. Jaeger was the owner of 1801 West Irving Park Road, Chicago, Il. JSA was to be the architect of record for the design of a seven story condominium building to be known as Metro North. The agreement provided that JSA would perform 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) assist in reviewing requests and change orders submitted by contractors and subcontractors; and (8) review the project at substantial completion.

¶ 8 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. Fifteen 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. JSA was to provide basic mechanical and/or structural layouts, diagrams, and notes for schematic design development. However, 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.

¶ 9 Jaeger stated in his signed affidavit that he was one of two members who comprised 1801 which was formed on September 28, 2004, as a limited liability company in the business of real estate development. 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.

¶ 10 Jaeger testified at his deposition 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.

¶ 11 Splitt averred in his signed affidavit that JSA was retained by Jaeger to obtain a permit for the buildings 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 sub consultant fees and reimburseables. Splitt averred that four lien waivers were executed by JSA for the project. Splitt further averred that he was directed by Jaeger to indicate in the lien waiver dated August 16, 2005, that JSA was employed by 1801 because the project was owned by 1801. Splitt also averred that JSA received $158,548.40 in total for the services rendered for the project under the architectural services agreement.

¶ 12 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 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 testified that defendants billed most everything through the written contract, including a number of reimburesables. 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.

¶ 13 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 included a copy of a copy of a waiver of lien and contractor's affidavit signed by Splitt, dated August 16, 2005 claiming it described the terms of the oral contract with 1801. Splitt signed the affidavit as owner of Jonathan Splitt Architects, and as the contractor furnishing architectural services work on the building located at 1801 W. Irving Park Rd., Chicago, Il. and owned by 1801, and that the total amount of the work including extras was $158,411.32.

¶ 14 In the complaint, 1801 specifically alleged that pursuant to the oral contract, JSA performed the following services in connection with the Project:

> "a. Reviewed applicable laws, codes and ordinances related to the construction of the Project;
>
> b. Prepared specifications for the construction of the Project, including specification Section 3450 – Plant-Precast Architectural Concrete, Section 0465 – Masonry Mortar and Grout, Section 0340–Plant-Precast Architectural Concrete, Section 05400 – Cold-Formed Metal Framing, Section 07170 – Bentonite Waterproofing, Section 07840 –

Firestopping, Section 07900 – Joint Sealers, Section 08114 – Standard Steel Doors, Section 08410 – Metal Door Store Fronts Section 08911 – Glazed Aluminum Curtain Wall, Section 09260 – Gypsum Board Assemblies and Section 14215 – Electric Traction Passenger Elevators;

c. Prepared site plan drawings for the underlying property located at 1801-13 W. Irving Park Road, Chicago, Illinois 60613 (the "Property");

d. Prepared preliminary architectural drawings for the construction of the Project;

e. Prepared floor plans of the Project for 1801 to use for marketing and sales purposes;

f. Prepared presentation materials and Zoning and Building data for 1801 to use for its Zoning and Building Approval submittal;

g. Coordinated the permit review process with expenditure, Burnham Nationwide;

h. Coordinated the permit approval process (including assembling and transmitting all the required documents) with Developers Services for the City of Chicago (and/or other agencies for the City of Chicago) for the foundation permit, the superstructure permit, the electrical permit and the sewer permit for the project;

i. Prepared, reviewed and revised the architectural drawings for the construction of the Project;

j. Prepared and stamped a final set of record drawings for the Project, (which including [sic] architectural, structural and MEP drawings) that were required to obtain the superstructure permit for the Project;

k. Assisted and advised 1801 in the process of obtaining bids from subcontractors, including but not limited to preparing bid documents;

l. Coordinated with Dukane Precast, Inc. ("Dukane") regarding all aspects of the precast structure of the Project;

m. Reviewed and revised the design details for the Projects' precast structure, including design details for the precast balconies, window details and dimensions, and caulking and/or sealant of the precast structure;

n. Reviewed and revised the structural shop drawings prepared by architects and engineers for Dukane (and revisions thereof) for the Project, and coordinated the precast shop drawings with JSA's architectural drawings for the Project;

o. Coordinated fabrication approval of the precast panels with Dukane engineers and architects;

p. Assisted and advised 1801 in choosing materials, finishes, and detail connections, including the angle irons, for the precast structure;

q. Inspected and approved the precast materials, finishes and connection details, including the angle irons, supplied by Dukane at the project site;

r. Participated in routine meetings between JSA, Dukane and 1801 in connection with the design of the Project and prepared meeting minutes for the meetings;

s. Coordinated with Matrix Engineering, structural architect of record for the Project, regarding all structural calculations and loads for the Project, foundation drawings for the Project and structural review of the Project design;

t. Coordinated dimensions and details of the crane (and staging of the crane) required for erection of the precise structure at the Property with Matrix Engineering and Ground Engineering Consultants, Inc.;

u. Participated in routine meetings between JSA, 1801, and engineers from Matrix Engineering in connection with the engineering and design of the Project and prepared meeting minutes of the meetings;

v. Coordinated design details of the window wall system for the Project with window subcontractor, CSC Glass, Inc. ("CSC");

w. Supplied CSC with project specifications for the Project's window wall system that JSA prepared;

x. Prepared drawings and cut sheets, and revisions thereof, for CSC in connection with the Project;

y. Prepared a "window area study" for the Project for 1801;

z. Coordinated design details for the mechanical, plumbing and electrical aspects (including all HVAC details) of the Project with Lehman Design Consultants, Inc. ("Lehman") and reviewed and revised the Mechanical Drawings (and revisions thereof) for the Project;

aa. Coordinated the site inspection by Lehman of the Project's HVAC units after they were installed;

bb. Coordinated design details for the caissons and foundation system for the Project with Revcon, and reviewed and revised the Revcon caisson layout shop drawings (and revisions thereof) for the Project;

cc. Coordinated design details for the elevators in the Project with KONE, Inc., and reviewed and revised the elevator shop drawings (and revisions thereof) for the Project;

dd. Coordinated design details of the sprinkler system for the Project with Sprinkler Contractors, Inc., and reviewed and revised the sprinkler shop drawings (and revisions thereof) for the Project;

ee. Coordinated design details for the steel connections and embed plates for the Project, and reviewed and revised the steel shop drawings (and revisions thereof) for the Project with Scott Steel Services;

ff. Coordinated with Pioneer Environmental regarding soil bearing and geotechnical engineering that was required prior to the construction of the Project;

gg. Assisted and advised 1801 with the selection of construction materials for the Project, including but not limited to what type of brick and siding material used on the Project;

hh. Visited and inspected the Project site and monitored conditions on the Project site on a weekly, if not daily basis, and prepared updates and issue [sic] memos of JSA's site observations for 1801; and

ii. Acted as the Project Architect and Design Professional of Record, as denoted by his stamp of the permit set of drawings submitted to the City of Chicago."

¶ 15 1801 alleged that JSA breached its duty by failing to provide sufficient designs for different aspects of the building or to adequately monitor construction of the building and alert 1801 of various problems that arose during construction. 1801 demanded damages in the amount of $100,000.

¶ 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 their motion for summary judgment. On

December 17, 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. The court granted the motion, finding that 1801 failed to state a cause of action because it was claiming that JSA had breached its duties under an oral contract that did not exist. The court found that the terms of the alleged oral contract were too uncertain and indefinite to enable a court to determine what the parties agreed to.

¶ 17 On December 20, 2011, 1801 filed a motion to reconsider the court's granting of summary judgment in favor of defendants and attached an affidavit signed by Jaeger dated December 19, 2011. On December 21, 2011, 1801 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 its 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 time, and then formed 1801 on September 28, 2004, to finish the project. In February 2004, Jaeger entered into a written contract with JSA under which it was to provide limited architectural work, which 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 to 1801.

¶ 19 1801 also asserted that in the fall of 2005, 1801 was providing JSA with written and oral direction on a weekly and sometimes on a daily basis. JSA acted as 1801's representative and designer of record in zoning, fire code, and other issues with the City of Chicago. 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 payments made to JSA were largely funded by a loan from Pullman Bank acquired on September 28, 2005. The only borrower under the loan with Pullman Bank for the project was 1801. 1801 borrowed the sum of $11,252,000. JSA made representations to Pullman Bank that it had a contract with the "borrower" and these representations were instrumental in 1801 obtaining project financing. JSA consented to the assignment of its contract with 1801 to Pullman Bank. The amended complaint also contained another copy of JSA's waiver of lien and contractor's affidavit dated August 16, 2005, and an additional one dated August 2, 2006, which had not been included in the original complaint.

¶ 21 In the first three counts of the amended complaint, 1801 re-alleged the counts on 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 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 intent to provide architectural services necessary to obtain zoning and permitting and to construct the building. Additionally, 1801 alleged that 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 JSA under the purported oral contract, *i.e.* "a to ii." 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 of the amended complaint 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, 1801 relied on defendants' representations that a contract existed, and defendants' should be stopped 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. 1801's additional allegations included claims for negligent representation (count 7); intentional misrepresentation (count 8); and, disgorgement (count 9).

¶ 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. 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 On May 10, 2012, 1801 filed its notice of appeal. On review, the appellate court noted that the record revealed that the trial court found that there were no issues of material fact regarding whether the parties entered into an oral contract but the record did not reveal that the court made findings as to whether defendants made a misrepresentation of fact by representing that a contract existed between the parties. 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 those claims should not have been dismissed pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code). 735 ILCS 5/2-619(a)(9) (West 2010). Accordingly, the appellate court affirmed the circuit court's orders which (1) granted summary judgment in favor of defendants on 1801's original complaint and (2) denied 1801's motion to reconsider the summary judgment order striking counts 1, 2, 3 and 6 of 1801's amended complaint; reversed the portion of the circuit court's order striking counts 4, 5, 7, 8 and 9 of 1801's amended complaint, and remanded the matter for further proceedings.

¶ 26 The appellate court further noted that at no point did the trial court make findings regarding the scope of the written agreement or the existence of a contract implied in fact. In addition, the court noted defendant's reliance on *Barry Mogul & Associates, Inc. v. Terrestris Developmemt Co.*, 267 Ill. App. 3d 742 (1994), in support of its argument that 1801's claim for a contract implied in fact should fail because it is based on services defendants performed pursuant to the parties' written contract. The court noted as well, 1801's response to the contrary, that its claim was based on defendants' conduct in providing services that were not part of or covered by the written agreement.

¶ 27 On remand, defendants filed a combined 735 ILCS 5/2-619.1 (West 2010) motion to dismiss the amended complaint arguing that the appellate court's finding that the new claims were separate and distinct mandated a finding that the new claims did not relate back and were not commenced within the time limited by law per 735 ILCS 5/2-619(a)(5) (West 2010). On April 3, 2014, 1801 filed its response arguing that the claims in the amended complaint did relate back to the original complaint. On April 22, 2014, after a hearing, the court granted defendants' motion finding that the new claims were barred by the statute of limitations and did not relate back to the original complaint. It is from that order that this timely appeal was filed.

¶ 28 ANALYSIS

¶ 29 We initially note that an assertion that a claim is time barred by the statute of limitations is a matter raised by a section 2-619 motion to dismiss of the Code. 735 ILCS 5/2-619 (West 2010). A section 2-619 motion admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned. *Porter v. Decatur Memorial Hospital, et. al.,* 227 Ill. 2d 343, 353 (2008) (citing *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 325 (1995)). Furthermore, when

ruling on a section 2-619 motion to dismiss, a court must interpret all pleadings and supporting documents in the light most favorable to the non-moving party. *Porter*, 227 Ill. 2d at 353 (citing *DeSmet v. County of Rock Island*, 219 Ill. 2d 497, 504 (2006). It is well settled that our review of a section 2-619 dismissal is *de novo*. *Porter*, 227 Ill 2d at 353 (citing *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 467-68 (2003); *Bryson v. News of America Publications, Inc.*, 174 Ill. 2d 77, 86 (1996) (applied *de novo* standard of review to trial court's section 2-619 dismissals of a claim on the basis of statute of limitations and the failure of the new claim to relate back under section 2-616(b)). 735 ILCS 5/2-616(b) (West 2010). Defendants combined motion, 735 ILCS 5/2-619.1(West 2010) included a motion to dismiss under section 2-615 of the Code, which tests the legal sufficiency of plaintiff's claims. 735 ILCS 5/2-615 (West 2010).

¶ 30 The circumstances of the present case indicate that the only question to be considered with respect to the amended complaint is whether it related back to the original complaint under section 2-616(b) so as to avoid the affirmative matter of the bar of the statute of limitations. 735 ILCS 5/2-616(b) (West 2010).

¶ 31 The parties agree that the amended complaint is barred by the statute of limitations of section 13-214 of the Code, 735 ILCS 5/13-214 (West 2010) unless the claim "relates back" to the date of filing of the timely filed original complaint. Section 13-214 of the Code provides in pertinent part:

> 13-214. Construction—Design management and supervision.
>
> "Actions based on tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property shall

be commenced within 4 years from the time the person bringing the action, or his or her privy, knew or should reasonably have known of such act or omission." 735 ILCS 5/13-214 (West 2010)

¶ 32 Section 2-616(b) governs the relationship back doctrine and provides in relevant part as follows:

"The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings, that the cause of action asserted, or the defense or cross claim interposed in the amended pleading *grew out of the same transaction or occurrence* set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery or defense asserted, if the condition precedent has in fact been performed, and for the purpose of preserving the cause of action, cross claim or defense set up in the amended pleading, and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended." (Emphasis added.) 735 ILCS 5/2-616(b) (West 2010).

¶ 33 1801 argues that the new counts in the amended complaint against defendants were timely pursuant to section 2-616(b) of the Code (735 ILCS 5/2-616 (b) (West 2010)) because they were based on defendants' negligent performance on the project, which arose out of the same transaction or occurrence as alleged in the original complaint. Defendants respond that the

new counts against it based on alleged negligence are time barred by the statute of limitations set forth in section 13-214 of the Code (735 ILCS 5/13-214) (West 2010)) because they are new and different claims and therefore do not relate back. We agree with 1801.

¶ 34 The purpose of the relation-back doctrine of section 2-616(b) is to preserve causes of action against loss by reason of technical default unrelated to the merits. *Porter*, 227 Ill. 2d at 355 (citing *Bryson*, 174 Ill. 2d at 106-07). 735 ILCS 5/2-616(b) (West 2010). Courts should therefore liberally construe the requirements of section 2-616(b) to allow resolution of litigation on the merits and to avoid elevating questions of form over substance. *Porter*, 227 Ill. 2d at 355 (citing *Bryson*, 174 Ill. 2d at 106). 735 ILCS 5/2-616(b) (West 2010) Additionally, both the statute of limitations and section 2-616(b) are designed to afford a defendant a fair opportunity to investigate the circumstances upon which liability is based while the facts are accessible. *Porter*, 227 Ill. 2d at 355 (citing *Boatman's National Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 102 (1995)). 735 ILCS 5/2-616(b) (West 2010).

¶ 35 Thus, it has been stated that the rationale behind the "same transaction or occurrence" rule is that a defendant is not prejudiced if " 'his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him' " *Porter*, 227 Ill. 2d at 355 (citing *Boatmen's National Bank.* 167 Ill. 2d at 102 (quoting *Simmons v. Hendricks*, 32 Ill. 2d 489, 495 (1965)). A court should consider the entire record, including depositions and exhibits, to determine whether the defendant had such notice. *Porter*, 227 Ill. 2d at 355 (citing *Wolf v. Meister-Neiberg, Inc.*, 143 Ill. 2d 44, 46 (1991)).

¶ 36 Under Illinois law, there is no question that relation back is appropriate where a party seeks to add a new legal theory to a set of previously alleged facts. *Porter*, 227 Ill. 2d at 359

(citing *In re Olympia Brewing Co. Securities Litigation*, 612 F. Supp. 1370, 1371-72 (1985)) (see also *Bryson*, 174 Ill. 2d at 108) (relation back is not prohibited merely based on the fact that the name of the cause of action or the legal theory used to support the claim for damages is changed in the amended pleading). It is also clear that an amendment which states an entirely new and distinct claim for relief based on completely different facts will not relate back. *Porter*, 227 Ill. 2d at 359; *Simmons*, 32 Ill. 2d at 497(a plaintiff cannot be allowed to slip in an entirely distinct claim in violation of the limitations act). However, there is a grey area where courts have allowed relation back where amendments have added new factual allegations that can be characterized as falling within the general "transaction" alleged in the original complaint. *Porter*, 227 Ill. 2d at 359 (citing *Olympia Brewing Co.*, 612 F. Supp at 1372).

¶ 37 The court in *Olympia Brewing Co*., noted that an amendment is considered distinct from the original pleading and will not relate back where (1) the original and amended set of facts are separated by a significant lapse of time, or (2) the two sets of facts are different in character, for example when one alleges a slander and the other alleges a physical assault, or (3) the two sets of facts lead to arguably different injuries. 612 F. Supp. at 1372. But new factual additions will be considered to relate back where there is a "sufficiently close relationship" between the original and new claims, both in temporal proximity and in the general character of the sets of factual allegations and where the facts are all part of the events leading up to the originally alleged injury. *Id.*

¶ 38 We apply the sufficiently close-relationship test as set forth in *Olympia Brewing Co.* and adopted by our supreme court in *Porter*, to determine whether the new allegations in the amended complaint grew out of the transaction or occurrence set up in the earlier pleadings

and to determine whether defendants can be considered to have had adequate notice. 227 Ill. 2d at 360 (citing *Olympia Brewing Co*. 612 F. Supp. at 1372-73) Under that test, a new claim will be considered to have arisen out of the same transaction or occurrence and will relate back if the new allegations, as compared with the timely filed allegations, show that the events alleged were close in time and subject matter to lead to the same injury. *Porter,* 227 Ill. 2d at 360 (citing *Olympia Brewing Co*. 612 F. Supp. at 1373).

¶ 39 1801 contends that its causes of action in its original complaint and in the amended complaint grew out of the defective architectural work performed by JSA for 1801 at the project. 1801 maintains that the causes of action set forth in the amended complaint relate back to the original complaint as they grew out of the same transaction or occurrence. 1801 argues that defendants and 1801 entered into an agreement for the performance of architectural services at the project, that JSA performed those services pursuant to either an oral contract or a contract implied in fact, that JSA breached its duty to 1801 and that 1801 was damaged by JSA's breach. 1801 further maintains that both contracts arose from the same facts and circumstances and encompass the same actions and injury, therefore, 1801contends that it is not asserting the existence of a new or separate contract in its amended complaint.

¶ 40 1801 maintains that the facts supporting the causes of action in the original complaint and the amended complaint are the same and only the theories of liability are different. The difference rests on whether the facts establish the existence of an oral contract or, in the alternative, the existence of an implied in fact contract, or in the alternative, no contract, giving rise to equitable remedies. 1801 further maintains that the different legal theories all arose from the same events during the same period of time, *i.e.* JSA's architectural services

on the project and the interaction between defendants and 1801, cover the same location, and are substantially similar in character and general subject matter.

¶ 41 1801 relies on *Porter*, 227 Ill. 2d at 346, for the proposition that defendants had notice of the facts supporting the amended complaint such that defendants suffered no prejudice. In *Porter*, the plaintiff originally filed a complaint arising from the treatment he received at the defendants' hospital. In his original complaint, the plaintiff asserted factual allegations regarding his treatment at the hospital and alleged negligence against his treating doctor. *Id*. at 347. After discovery, the plaintiff filed an amended complaint, asserting negligence against the treating doctor and claims against the hospital for breach of its duty of care. *Id.* at 348. After expiration of the statute of limitations, plaintiff sought to amend his complaint to add a negligence count based on agency of the radiologist's negligence in reading the plaintiff's CT scan. *Id*. The defendants maintained that the amendment was barred by the statute of limitations, arguing that the claim against it based on the radiologist's negligence was a new and different claim. *Id*. at 349. The court disagreed and held that there was a sufficiently close relationship between the two claims to show they grew out of the same transaction or occurrence. *Id*. at 361. The court further noted that the prior allegations put the hospital on notice that the plaintiff was asserting claims based on his treatment at the hospital and the hospital should have been aware this might include any procedure or test, including the CT scan. *Id*. at 362.

¶ 42 We note that the report of proceedings of the April 22, 2014, hearing, dated June 10, 2014, reflects the trial court’s express finding that "*Porter v. Decatur Memorial Hosp*., 227 Ill. 2d 343, 346 (2008) was distinguishable from this case." However, in light of the fact that

we find that the trial court erred in not finding the amended claims related back to the original claim, we further note that 1801's reliance on *Porter* is appropriate.

¶ 43 1801 maintains that all of the facts giving rise to the amended claims were either in the complaint, adduced during discovery, or argued in defendants' motion for summary judgment directing defendants' attention to the facts forming the basis of the amended claims. See *In re Olympia*, 612 F. Supp. at 1372-72. ("[n]ew factual additions will be considered to relate back where there is a 'sufficiently close relationship' between the original and the new claims, both in temporal proximity and in the general character of the sets of factual allegations and where the facts are all part of the events leading up to the originally alleged injury.")

¶ 44 Here the original claim for breach of an oral contract and the amended complaint for breach of implied in fact contract contain the exact same facts. They both state that JSA performed the previously noted services beginning with "a" and ending with 'ii" in connection with the project. The Illinois supreme court has ruled that relation back is appropriate when adding a new legal theory to a set of previously alleged facts. See *Porter*, 227 Ill. 2d at 358. The written services agreement between JSA and Jaeger, specifically excluded shop drawing documents, final project documentation drawings and specifications. Further, we note that the services agreement does not include any references to coordinating and meeting with subcontractors, preparing marketing and sales materials, or assisting and advising 1801 in choosing materials, finishes and detail connections.

¶ 45 Defendants contend that the premise of the original complaint was that JSA breached its purported contract with 1801 to provide architectural services to the project. Defendants argue that JSA contracted with Jaeger for architectural services for the project under the service agreement and not 1801. In support of its argument, defendants point out that the

court found that a contract did not in fact exist between JSA and 1801, and entered judgment in favor of defendants. Defendants maintain that the amended complaint adds new facts to support new claims; namely, that the services agreement was a preliminary or get started contract; that JSA completed its services under that agreement; then entered into a subsequent agreement with 1801 to provide services beyond the scope of the Services agreement, and that JSA breached that agreement causing 1801 damage. Alternatively, 1801 amended its complaint to allege facts and causes of action premised on the absence of a contractual relationship by and between 1801 and JSA. Defendants contend that none of the facts supporting the new claims were alleged in any iteration of 1801's original complaint against defendants.

¶ 46 Additionally, defendants maintain that the amended complaint alleges a breach of a different contract, involving different services and different damages than what was at issue in the original complaint. Further, defendants argue that the prejudice to defendants is evident; it litigated a contract claim for years, and obtained judgment on that claim and now is faced with defending an entirely new claim premised on a breach of a different contract with different terms and different scope of work than was originally pled and litigated. In *Zeh v. Wheeler*, 111 Ill. 2d 266, 276 (1986), upon which defendants rely, the plaintiff filed an amended complaint which changed the location of plaintiff's alleged slip-and-fall to an entirely different building. The court noted that prior precedent established that in a slip-and-fall case the correct location is a material element in that type of negligence action. *Id*. at 278. The court found that the amendment set up a cause of action which grew out of a different occurrence/transaction. *Id*. at 275.

¶ 47 In further support, defendants rely upon *Wilson v. Schaefer*, 403 Ill. App. 3d 688 (2009). In *Wilson*, the plaintiff originally filed a complaint alleging that the defendant doctor failed to disclose possible complications. *Id*. at 689. The plaintiff voluntarily dismissed the complaint and within one year filed an amended complaint which asserted the informed-consent claim and also asserted claims that the doctor was negligent in failing to determine the etiology of the sciatic nerve palsy the plaintiff developed after surgery. *Id.* at 690. The court dismissed the new claims as time-barred and found that they did not relate back. *Id.* In affirming the trial court's dismissal, the appellate court reasoned that the original claims dealt with what the doctor said or did not say prior to the plaintiff's surgery. *Id*. at 695. In contrast, the new claims dealt with the doctor's actions during the surgery and his care of plaintiff after surgery. *Id*. The court found that based on the timely filed complaint, the doctor could not have known the plaintiff had any plans of bringing a negligence claim for what occurred during or after surgery. *Id.* Here, defendants argue that the amended complaint is not an amplification of 1801's original complaint, and therefore, defendants maintain that the new claims are based on an entirely different transaction than set forth in the original action.

¶ 48 1801 responds that *Zeh* and *Wilson* are distinguishable because they deal with situations where there was a change in a material element and thus, the defendants were not on notice of the claims in the amended complaints. 1801 further maintains that the element of surprise stemming from the new, unrelated claims determinative in the above mentioned cases are not present in the case at bar.

¶ 49 We agree and find factual distinctions between the case at bar and the cases upon which defendants rely. In *Zeh* and *Wilson*, the complaints and their amendments alleged materially different facts to support materially different theories. By contrast, here, the amended

complaint and the original complaint arose from the exact same time period, the same performance by defendants, the same project, and involve the same damages for the defective design. We note that the original complaint alleged breach of an oral contract and was based on the relationship between 1801 and defendants during the project and the amended complaint alleges breach of an implied in fact contract based on the relationship between 1801 and defendants during the project. As noted in *Zeh*, 111 Ill. 2d at 279, the identity in the occurrence or transaction is "bottomed on the belief that if defendant has been made aware of the occurrence or transaction which is the basis for the claim, he can prepare to meet plaintiff's claim, whatever theory it may be based on."

¶ 50 Section 2-616(b) has one guiding element, which is notice to the defendant. *Porter*, 227 Ill. 2d at 354. (735 ILCS 5/2-616(b) (West 2010)). The facts alleged in the original complaint must put defendant on notice of the matter covered by the amendment. *Id*. Here, defendants contend that there was no notice from the prior pleadings that would indicate that the defendants should have been on notice that 1801 might eventually seek to amend their complaint to assert a claim against defendants based on a quasi contractual relationship. According to defendants, 1801 is simply selecting an arbitrary time interval of contractual performance and claiming that this is a transaction or occurrence.

¶ 51 We disagree and find that there is a sufficiently close relationship between the two sets of allegations to show that the later allegations grew out of the same occurrence which was the basis of the original complaint. Further, the two allegations were part of the same events leading up to the same ultimate injury for which damages are sought. Moreover, they are closely connected in both time and location. Furthermore, they were also similar in character and general subject matter, as they involved allegations of breach of contract that resulted in

negligence. Therefore, defendants were on notice from the original complaint that 1801 was asserting breach of contract because defendants were negligent in performance of their duties. We reason that defendants should have been aware that this would include their performance and responsibilities with regard to the project and their interactions with 1801.

¶ 52 Defendants' argument that they had no notice because the amended complaint was based on a new transaction, namely the breach of a new and different contract that was not the subject of the original complaint or, alternatively, new claims based on the absence of a contract are not persuasive. It takes too narrow a view of the "same transaction or occurrence" language. Furthermore, it seems that defendants ignore the "grew out of" language of section 2-616(b), as well as the proviso that relation back may be appropriate "even though the original pleading * * * failed to allege the performance of some act or the existence of some fact." 735 ILCS 5/2-616(b) (West 2010).

¶ 53 As the facts supporting the different causes of action were almost identical, and in fact, in some instances, the exact same, defendants clearly had notice of the facts underlying the amended claims. We find that the additional facts and allegations in the amended complaint were an amplification that grew out of the earlier allegations in the original complaint alleging breach of contract, and that both arose out of the same transaction or occurrence. Thus, we find that defendants had sufficient notice of the new allegations and were not prejudiced. Further, we note that Illinois courts are liberal in allowing amendments to pleadings after the running of a statute of limitations, reflecting a policy which favors the resolution of disputes on the merits. See *Bryson*, 174 Ill. 2d 106. Moreover, a court should consider the entire record, including depositions and exhibits, to determine whether defendant had notice. See *Porter*, 227 Ill. 2d at 355 (citing *Wolf*, 143 Ill. 2d at 46).

¶ 54 We next turn to defendants' contention that the appellate court's finding that the claims were distinct and separate and based on new facts other than those alleged in the original complaint was necessary to be the law of the case. Defendants maintain that this finding precludes 1801 from arguing that they relate back to the original complaint.

¶ 55 1801 responds that the law of the case has no application because the court did not rule on whether the new claims relate back. 1801 contends that the appellate court's finding that the original and the amended complaint were separate and distinct such that they were not barred by the trial court's grant of summary judgment does not necessitate a finding that the amended claims do not relate back. 1801 points out that breach of oral contract and breach of implied in fact contract are separate causes of action and that separate claims often grow out of the same transaction or occurrence. We agree.

¶ 56 The law of the case doctrine bars relitigation of an issue that has already been decided in the same case. *American Service Insurance Company v. China Ocean Shipping Company (Americas) Company*, 2014 IL App (1st) 1221895 ¶ 17 (citing *Kraustsack v. Anderson*, 223 Ill. 2d 541, 552 (2006)) such that the resolution of an issue presented in a prior appeal is binding and will control upon remand in the circuit court and in a subsequent appeal before the appellate court. (*Zabinsky v. Gelber Group, Inc.*, 347 Ill. App. 3d 243, 248 (2004)). The doctrine applies to questions of law and fact and encompasses a court's explicit decisions, as well as those decisions made by necessary implication. *American Service*, 2014 IL App (1st) 121895 ¶ 17 (citing *CNA International, Inc. v. Baer*, 2012 IL App (1st) 112174, ¶¶ 38-39. A ruling will not be binding in a subsequent stage of litigation when different issues are involved, different parties are involved or the underlying facts have changed. *American*

Service, 2014 IL App (1st) 121895 ¶ 17 (citing *Preferred Personnel Services, Inc. v. Meltzer, Purtill & Stelle*, LLC. 387 Ill. App. 3d 933, 947 (2009)).

¶ 57 The only difference between an express contract and a contract implied in fact is that in the former the parties arrive at their agreement by words, either oral or written, while in the latter, their agreement is arrived at by a consideration of their acts and conduct. *Century 21 Castles By King, LTD. v. First National Bank of Western Springs*, 170 Ill. App. 3d 544, 549 (1988) (citing *Mowatt v. City of Chicago*, 292 Ill. 578, 581 (1920)). Thus, a contract implied in fact arose not by express agreements but, rather, by a promissory expression which may be inferred from the facts and circumstances which show an intent to be bound. *Century*, 170 Ill. App. 3d at 549 (citing *Heavey v. Ehret*, 166 Ill. App. 3d 347, 354 (1988)).

¶ 58 The appellate court noted that 1801's allegations in its amended complaint are based on defendants' conduct in providing services that were not part of or covered by the written agreement. Further, we note that defendants signed two waivers of lien, two contractor's affidavits, and a promissory note indicating to third parties that they were in a contractual relationship with 1801. See *Cable America Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 20 (2009) (citing *Owen Wagner & Co. v. U.S. Bank*, 297 Ill. App. 3d 1045, 1052 (1994)) (quoting *Barry Mogul*, 267 Ill. App. 3d at 750) (A contract implied in fact goes beyond written words: a contract implied in fact " 'is arrived at by a consideration of [the parties'] acts and conduct' ").

¶ 59 We find that the appellate court's determination that "the claims in the amended complaint were distinct and separate from the original complaint" does not resolve whether the new claims relate back. The relation back statute contemplates that an amended pleading may set forth a new cause of action or theory of liability which arises out of the same

transaction or occurrence. See *Whitney*, 155 Ill. App. 3d at 719. Accordingly, for the reasons set forth above, we reverse the trial court.

¶ 60 We point out that the trial court found 1801's amended claims did not relate back and dismissed them as time barred. The court did not make any findings relating to defendants rule 2-615 arguments in their motion to dismiss. (735 ILCS 5/2-615 (West 2010)). Thus, the sufficiency of the allegations in the amended complaint in reference to count 5, equitable estopple; count 7, negligent misrepresentation, count 8, intentional misrepresentation, and count 9, disgorgement, are not before this court.

¶ 61 CONCLUSION

¶ 62 The judgment of the trial court is reversed, and the cause is remanded to the circuit court of Cook County for further proceedings consistent herewith.

¶ 63 Reversed.