12-8-2009

Terra-West, Inc. v. Idaho Mut. Trust, LLC Respondent's Brief Dckt. 36523

IN THE SUPREME COURT OF THE STATE OF IDAHO

TERRA-WEST, INC, an Idaho corporation, Plaintiff/Respondent, v. IDAHO MUTUAL TRUST, LLC, an Idaho limited liability company, Defendant/Appellant, And MIKE URWIN ENTERPRISES, INC., an Idaho corporation; RED CLIFF DEVELOPMENT, INC., an Idaho corporation; ALLOWAY ELECTRICAL WHOLESALE SUPPLY CO., INC., and Idaho corporation; KRISTEN R. THOMPSON, an individual; ALL PERSONS IN POSSESSION OR CLAIMING ANY RIGHT TO POSSESSION, Defendants.	)	SUPREME COURT NO. 36523

RESPONDENT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County, the Honorable Ronald J. Wilper, District Judge, Presiding

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I. STATEMENT OF THE CASE

This case comes to the Court on an interlocutory appeal from the district court's grant to the Plaintiff/Respondent of leave to amend its Complaint to add a cause of action to enforce a claim of lien. The district court's discretionary grant of leave should be affirmed on appeal because the motion to amend timely commenced proceedings to enforce the lien within the six-month limitations period set forth in Idaho Code § 45-510, and because even if such motion had itself been untimely, it would relate back to the original complaint which arose out of the same conduct, transaction, or occurrence.

II. STATEMENT OF THE FACTS AND COURSE OF PROCEEDINGS

Appellant Terra-West Inc. ("Terra-West") is a company based in Caldwell, Idaho, which specializes in excavation and preparing property for construction. In 2006, Terra-West agreed to provide Red Cliff Development Inc. ("Red Cliff") with excavation and irrigation related labor and materials for the development of an approximately 40 acre parcel of property to be known as the Sadie Creek Subdivision. R. p. 90. Terra-West began work in the August of 2006. R. p. 90.

During the course of Terra-West's performance, Red Cliff entered into an agreement with Mike Urwin Enterprises ("Urwin") in which Urwin purchased the development from Red Cliff, and also assumed all obligations and agreements for the development, including Red Cliff's agreement with Terra-West. R. p. 90. Terra-West continued its performance through November 30, 2007, at which point the work remaining under the contract included certain excavation and irrigation work and the installation of pipelines. Further work, however, was impossible until Urwin could obtain government approval for certain other irrigation work required under the contract.

Since Terra-West had not been fully paid for its work on the subdivision and was uncertain as to when Urwin would, if ever, obtain the necessary government approvals necessary for Terra-West to complete its work under its agreement with Red Cliff/Urwin, Terra-West recorded a Claim of Lien with the Ada County Recorder on December 6, 2007. R. p. 91. This Claim of Lien was served upon the owners, or reputed owners, of the property the following day. R. p. 91.

In May, 2008, Terra-West had still not been fully paid for its work. Accordingly, on May 30, 2008, Terra-West filed the present action in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, which was within the six month statutory time period for the initiation of a foreclosure action pursuant to Idaho Code § 45-510. R. p. 6-13. Terra-West's Complaint and Demand for Jury Trial included causes of action for foreclosure of its lien on the subdivision property against all persons and entities claiming an interest in the property, as well as for unjust enrichment and for breach of contract by Urwin. R. p. 6-13. The case was assigned to the Honorable Ronald J. Wilper.

Idaho Mutual Trust, LLC, ("Idaho Mutual") brought a motion to dismiss with respect to the portion of the suit concerning foreclosure of Terra-West's lien. R. p. 28-29. On September 3, 2008, the district court ruled in favor of Idaho Mutual's motion, concluding that statement in the lien that the signer was "knowledgeable of the matters stated therein and verily believes the same to be true and just" was inadequate to satisfy the requirement in Idaho Code § 45-507(4) that the lien claimant verify by oath that he or she believes the lien claim to be just. R. p. 31-34. The present suit continued however, since there were remaining

claims to be resolved. Idaho Mutual did not seek, nor did it receive, an Idaho Rule of Civil Procedure 54(b) certificate of final judgment permitting it to exit the suit.

Shortly before the suit was filed, Urwin notified Terra-West that it had finally received government approval (with certain conditions) to complete the Sadie Creek Subdivision. Urwin instructed Terra-West to resume work pursuant to the 2006 contract. Terra-West complied, providing labor and materials for the improvement of the property until its work on the Sadie Creek Subdivision was substantially completed on May 25, 2008. R. p. 91.

Less than 90 days later, on August 12, 2008, Terra-West filed a Second Claim of Lien with the Ada County Recorder, reflecting the additional work performed and the new amount owed to Terra-West as a result. R. p. 91. A copy of this Second Claim of Lien was served by certified mail upon the owners, or reputed owners, of the property. R. p. 91.

Terra-West remained unpaid for its work, and so less than six months later, on January 16, 2006, Terra-West moved to amend its Complaint in the present action to recover pursuant to the Second Claim of Lien. R. p. 37-62. The district court granted the motion to amend on April 22, 2009, and the Amended Complaint was filed the following day. R. p. 80-110. Idaho Mutual filed a motion seeking permission to appeal from the district court's interlocutory order, which was denied. Idaho Mutual then sought and received permission from the Idaho Supreme Court to file an interlocutory appeal pursuant to Idaho Appellate Rule 12. Idaho Mutual's appeal is now before the Court.

III. ADDITIONAL ISSUES ON APPEAL

1. Is Terra-West entitled to an award of attorney fees on appeal pursuant to Idaho Code § 12-121?

IV. STANDARD OF REVIEW

Idaho Rule of Civil Procedure 15(a) states that "a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...." I.R.C.P. 15(a); *see also Clark v. Olsen*, 110 Idaho 323, 326, 715 P.2d 993, 996 (1986); *Smith v. Shinn*, 82 Idaho 141, 149, 350 P.2d 348 (1960); *Markstaller v. Markstaller*, 80 Idaho 129, 134, 326 P.2d 994 (1958). Idaho courts "should favor liberal grants of leave to amend." *Wickstrom v. North Idaho College*, 111 Idaho 450, 725 P.2d 155 (1986).

> [T]he purpose of the rule is two-fold: First, to allow the best chance for each claim to be determined on its merits rather than on some procedural technicality; and, second, to relegate pleadings to the limited role of providing parties with notice of the nature of the pleader's claim and the facts that have been called into question. Issue formulation is to be left to the discovery process and pleadings are not to be viewed as carrying the burden of fact revelation or of controlling the trial phase of the action.

Clark, 110 Idaho at 326, 715 P.2d at 996 (citing C. Wright and A. Miller, *Federal Practice and Procedure*, Civil 2d §1471 (1971)).

New theories of recovery may be raised when the basic facts that gave rise to the recovery have not changed. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 272-73, 561 P.2d 1299, 1305-06 (1977). The Idaho Supreme Court has "placed the burden of showing why a court should not grant leave to amend a complaint on the parties opposed to the amendment." *Clark*, 110 Idaho at 326, 715 P.2d at 996; *Smith*, 98 Idaho at 272-73, 561 P.2d at 1305-06. "Amendment to pleadings should be allowed within the discretion of the trial court, and such exercise of discretion will not be disturbed absent a showing of clear error." *Wing v. Martin*, 107 Idaho 267, 270, 688 P.2d 1172, 1175 (1984). Amendment should be allowed "unless to do so would deprive the complaining party of some

substantial right." *Ada County Highway District v. Acarrequi*, 105 Idaho 873, 875, 673 P.2d 1067, 1069 (1983).

"The purpose of the mechanic's lien statutes is remedial in nature and seeks to provide protection to laborers and materialmen who have added directly to the value of the property of another by their materials and labor." *Baker v. Boren*, 129 Idaho 885, 934 P.2d 951 (Ct.App. 1997). Idaho's "lien statutes are to be liberally construed 'with a view to effect their objects and promote justice.'" *Id.* (quoting *Metropolitan Life Ins. Co. v. First Security Bank of Idaho*, 94 Idaho 489, 493, 491 P.2d 1261, 1265 (1971)).

V. ARGUMENT

Idaho Mutual's interlocutory appeal is predicated on its theory that the amendment to Terra-West's complaint to include the Second Claim of Lien was untimely. Idaho Mutual's argument, however, is without merit for two reasons. First, the Second Claim of Lien was timely since it was filed within 90 days of the completion of work in compliance with Idaho Code § 45-507, and proceedings to enforce the lien were commenced by the motion to amend within six months after the claim of lien was filed. Second, even if the motion to amend Terra-West's complaint had not commenced enforcement proceedings, the amended complaint would nonetheless be timely because pursuant to Idaho Rule of Civil Procedure 15(c) it would relate back to the date the original complaint was filed.

A. The Amended Complaint was timely because the operative date for the commencement of proceedings to enforce the Second Claim of Lien was the date the motion to amend was filed.

Idaho's mechanic's lien statutes provide that one who "surfaces or otherwise improves any land" has a lien upon the land for the labor, materials, and services furnished. I.C. § 45-501. The relevant time constraints are set out in two statutes: Idaho Code § 45-

507 and Idaho Code § 45-510. The first of these, Idaho Code § 45-507, provides that any claim of lien must be "filed within ninety (90) days after the completion of the labor or services, or furnishing of materials." I.C. § 45-507(2). The second statute, Idaho Code § 45-510, provides that in order to enforce such a lien, proceedings must be commenced within six months of the date the lien was filed.

In the present case, Terra-West substantially completed work on the subject property on May 25, 2008. The Second Claim of Lien was filed with the Ada County Recorder on August 12, 2008, and copies were served on the owners or reputed owners of the property. This filing was less than 90 days after work was completed, and was thus timely under Idaho Code § 45-507. Then, on January 16, 2009, Terra-West filed a motion to amend its complaint so as to enforce the Second Claim of Lien. This motion was filed approximately five months after the Claim of Lien was recorded, and was accordingly timely under the six-month limit imposed pursuant to Idaho Code § 45-510.

Idaho Mutual's argument that the amendment was untimely is based on drawing a distinction between the date the motion to amend was filed – which was less than six months after the lien was filed – and the date the district court actually issued its ruling approving the motion – which was more than six months after the lien was filed. Idaho Mutual asserts that a motion to amend an existing complaint cannot "commence" an action pursuant to Idaho Code § 45-510 because an amended complaint is not deemed to be filed until it is submitted following a grant of leave to amend by the court. Idaho Mutual contends that a claimant in Terra-West's position seeking to meet the six month statutory period must either (1) file a motion to amend and hope that the district court issues its ruling quickly, or (2) file a new complaint beginning a second action concerning the

performance of the same contract, effect service to all the same parties again, and then move to consolidate that second lawsuit to the action already pending.

The difficulty with Idaho Mutual's argument is that the rule it proposes – that an amended complaint is not deemed filed for timeliness purposes until it is submitted as a separate document after a formal grant of leave by the court – does not actually exist. Indeed, the firmly established rule is the exact opposite of that suggested by Idaho Mutual. "[T]he settled rule in both federal and state court is that a complaint is deemed filed as of the time it is submitted to a court together with a request for leave to file the amended pleading." *Buller Trucking Co. v. Owner Operator Independent Driver Risk Retention Group, Inc,* 461 F.Supp.2d 768, 776-77 (S.D. Ill. 2006). Once filed, "the motion to amend stands in place of the actual amended complaint while the motion is under review by the court." *Frazier v. East Tenn. Baptist Hospital, Inc.*, 55 S.W.3d 925 (Tenn. 2001). It is the filing of the motion to amend, not the court's later ruling on the motion or the even later submission of the amended complaint that determines the date on which the action is "commenced" for the purposes of Rule 3. *Nett v. Bellucci*, 774 N.E.2d 130, 138-39 (Mass. 2002).

The application of the rule is illustrated in *Mauney v. Morris*, 340 S.E.2d 397 (N.C. 1986), where the North Carolina Supreme Court considered a set of facts similar to the present case and under a similar procedural posture. In *Mauney*, the plaintiff filed a complaint which he later moved to amend to add a claim of lien. *Id.* at 399. At the time the plaintiff filed his motion to amend, the claim of lien was within the statutory time limit. *Id.* at 400. However, by the time the trial court got around to ruling on the motion to amend the following month, that time limit had expired. *Id.* Applying the national rule,

the *Mauney* court rejected the same argument now offered by Idaho Mutual, observing that "[t]he date of the filing of the motion, rather than the date that the court rules on it, is the crucial date in measuring the period of limitations." *Id.* Accordingly, the court in *Mauney* held that the plaintiff's amendment to add a claim of lien was timely based on the date the motion to amend was filed – without regard to the date on which the trial court actually ruled on the motion or on which the amended complaint itself was submitted. *Id.*

The reason for the rule was set out in the frequently quoted case of *Gloster v. Penn. Railroad Co.*, 214 F.Supp. 207, 208 (W.D. Penn. 1963). The court wrote:

> The filing of the complaint, and not final court approval was sufficient to meet the requirements of Rule 3. . . . To give sanction to objections to the amendment, that leave to amend must await the actual placement of the judge's signature on an order to amend, would to lend impracticality and injustice to federal judicial process and procedure. . . . The Court had need for researching and deliberating upon the law as applied to the facts of the case, and this had to be done while applying time and energy to the many other matters in a busy court. The necessary time so consumed . . . should not and cannot be permitted as an obstacle to justice. Such is the intendment and spirit of the Federal Rules of Civil Procedure.

Id. Another court summarized the basis of the rule by noting that "[i]f the date of commencement is based on when the court grants the motion to amend rather than when the plaintiff files the motion and proposed complaint, the plaintiff is left with uncertainty over whether the statute of limitations requirements will ever be met. The matter is out of the hands of the plaintiff and is controlled by the vagaries of the court's workload. The better rule is that the action is commenced when the plaintiff files the motion to amend *and* the proposed complaint irrespective of when the court grants the motion to amend." *The Children's Store v. Cody Enterprises, Inc.*, 580 A.2d 1206, 1210 (Vt. 1990) (emphasis in the original).

The Supreme Judicial Court of Massachusetts set forth a particularly thorough analysis of the rule in *Nett v. Bellucci*, 774 N.E.2d 130 (Mass. 2002). The court wrote:

> While the plaintiff has unilateral control over when [the motion to amend] is filed, the plaintiff has no way of controlling or even predicting the time at which any permission to amend will be granted, and thus no ability to control the date on which the amended complaint itself may be filed. It may take only a matter of days before the motion is allowed and the complaint can be filed, but it may be a matter of weeks, or even months, depending on a host of factors, all of which are outside the plaintiff's control. If the statute of repose cannot be satisfied until the later filing of the amended complaint after the motion to amend has been allowed, the repose period will effectively be shortened by some unpredictable amount of time, as a plaintiff would have to file the motion to amend some considerable period in advance of the expiration of the repose period and simply hope that the court's ruling would be sufficiently prompt. It is only that first step, the filing of the motion, that the plaintiff can control. Thus, the filing of the motion is comparable to the original filing of the complaint, both in the sense that each is the first step that the plaintiff takes and the first document that the plaintiff files with the court concerning the action, and in the sense that both the filing of the original complaint and the filing of the motion to amend are steps that remain unilaterally in the plaintiff's control.

Id. at 136.

The court in *Nett* considered and rejected the process proposed in the present case by Idaho Mutual: that a plaintiff seeking to timely amend its complaint should be required to file and serve an entirely new lawsuit, and then move to consolidate the new lawsuit with the action already pending between the parties. *Id.* at 136-37. The court noted that requiring such a process would waste time and judicial resources, as well as encourage undesirable litigation tactics. *Id.* The court observed that the approach now urged by Idaho Mutual:

> would waste scarce judicial resources and impose pointless litigation costs. . . . [I]t creates needless confusion and duplication to force the plaintiff to bring the claim as a separate action, followed by a motion for consolidation, merely to avoid the bar of the statute of repose. Indeed, the plaintiff might well file a motion to amend, wait to see whether the motion would be

> allowed in time to get the amended complaint filed before the repose period ran out, and, if there were still no ruling from the court as the expiration date drew near, file the separate action and the accompanying motion to consolidate. We fail to see how such duplication of effort and procedural clutter would advance the purposes underlying the statute of repose.

Id. at 136-37.

The volume of reported decisions applying the rule that a motion to amend stands in the place of an amended complaint while the motion is under review by the court precludes an exhaustive listing of such cases. The following, however, is a non-exhaustive sampling: *Schillinger v. Union Pacific Railroad Co.*, 425 F.3d 330, 334-35 (7th Cir. 2005) (courts look to the date the motion to amend was filed when determining the timeliness of an amended complaint); *Newby v. Enron Corp.*, 542 F.3d 463, 470 (5th Cir. 2008) (determining timeliness of an amended complaint based on the date of the motion to amend); *Moore v. State of Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993) (motion to amend satisfies limitations period in place of the later amended complaint); *Mayes v. AT & T Information Systems, Inc.*, 867 F.2d 1172, 1173 (8th Cir. 1989) (motion to amend constitutes the "commencement" of an action for the purposes of Rule 3 in lieu of later amended complaint); *Buller Trucking Co*, 461 F.Supp.2d at 776-77 ("the settled rule in both federal and state court is that a complaint is deemed filed as of the time it is submitted to a court together with a request for leave to file the amended pleading"); *Bradley v. Armstrong Rubber Co.*, 46 F.Supp.2d 583, 586-87 (S.D. Miss. 1999) (where motion to amend was filed within the statutory period, it stands in place of the later amended motion); *In re Glacier Bay*, 746 F.Supp. 1379, 1389-90 (D.Alaska 1990) (amended complaint was timely where the motion to amend was filed within the limitations period); *Wallace v. Sherwin Williams Co., Inc.*, 720 F.Supp. 158-59 (D.Kan. 1988) ("The court

holds that plaintiff's amended complaint was effectively filed when his motion for leave to file an amended complaint was filed on May 20, 1988. To hold otherwise would punish plaintiff and other similarly situated plaintiffs for the court's unavoidable delay in issuing an order granting leave to amend a complaint"); *Pearson v. Niagara Machine & Tool Works*, 701 F.Supp. 195, 196 (N.D. Okla. 1988) (amendments timely where motion to amend was submitted within the statutory period); *Eaton Corp. v. Appliance Valves Co.*, 634 F.Supp. 974, 982-83 (N.D. Ind. 1984) (amended complaint timely if the motion for leave to amend was submitted within the statutory period); *Longo v. Penn. Electric Co.*, 618 F.Supp. 87 (W.D. Penn. 1985) ("The timely filing of this Motion to Amend and not the final court approval was sufficient to meet the requirement of Fed.R.Civ.P. 3 that 'a civil action is commenced by the filing of a complaint with the court'"); *Gloster*, 214 F.Supp. at 208 (filing of the motion to amend constituted commencement of an action); *Nett*, 774 N.E.2d at 139-40 ("We find considerable supporting authority in other jurisdictions, which (in the absence of any 'relation back' provisions) take the position that the filing of the motion to amend, not the court's later ruling on that motion or the even later filing of the complaint following allowance of that that motion, is the date on which the new action is commenced"); *Totura & Co., Inc. v. Williams*, 754 So.2d 671, 680 (Fla. 2000) ("under proper analysis, the motion to amend was sufficient to stand in place of an amended complaint and the action was, therefore, deemed commenced"); *Perez v. Paramount Communications, Inc.*, 709 N.E.2d 83, 86-87 (N.Y. 1999) (timeliness of amended complaint is based on the date the motion to amend was filed); *Frazier*, 55 S.W.3d at 930 ("the motion to amend stands in place of the actual amended complaint while the motion is under review by the court"); *The Children's Store*, 580 A.2d at 1209-

10 ("The state and federal courts that have confronted this question have held that an action against a new party, brought in through amendment to a preexisting complaint, is commenced when the motion to amend, and the new complaint, is filed even though permission to make the amendment is given at a later date"); *Mauney v. Morris*, 340 S.E.2d 397, 400 (N.C. 1986) ("The timely filing of the motion to amend, if later allowed, is sufficient to start the action within the period of limitations"); *A.M.C.B. v. Cox*, 292 S.W.3d 428, 434-35 (Mo. App. 2009) (requirements for "commencing an action are met when a motion to amend is *filed* even if the trial court does not grant the motion until after the limitation period"); *Toy v. Katz*, 961 P.2d 1021, 1037 (Ariz.App. 1997) (motion to amend constitutes "commencement" of an action); *R.A. Jones & Sons, Inc. v. Holman*, 470 So.2d 60, 65 (Fla. App. 1985) (for timeliness purposes, a motion to amend is "considered filed at the time of filing the motion for leave to amend"); *Allstate Ins. Co. v. Emsco Homes, Inc..*, 93 A.D.2d 874, 875 (N.Y. App.Div. 1983) ("service of a notice of motion and the proposed amended complaint upon a defendant *prior* to the expiration of the applicable Statute of Limitations timely interposes the claim or claims asserted in the amended complaint"); *Smith v. Metropolitan Dade County*, 338 So.2d 878, 879 (Fla.App. 1976) (a motion for leave to amend filed within the statutory period stands in the place of the actual amendment); *see also* 54 C.J.S. *Limitations of Actions* § 287 ("when a motion to amend a complaint and a proposed amended complaint are filed prior to the running of the statute of limitations, the motion to amend stands in place of the actual amended complaint while the motion is under review by the trial court, and the fact that an order granting the motion to amend is entered after expiration of the statute of limitations does not make the amended complaint untimely").

In support of its proposed alternative to the rule, Idaho Mutual points to *Viafax Corp. v. Stuckenbrock*, 134 Idaho 65, 995 P.2d 835 (Ct.App. 2000). In its brief on appeal, Idaho Mutual asserts that in *Viafax* the Idaho Court of Appeals "expressly held" that the filing of a motion to amend does not constitute the filing of a complaint. *Appellant's Brief*, at 8. Following this assertion, Idaho Mutual added a block quote from the *Viafax* decision purporting to demonstrate the claimed holding. *Appellant's Brief*, at 8-9.[1]

Viafax contains no such holding. Even if one were to analogize a motion to amend the complaint with the counterclaim at issue in that case, a reading of *Viafax* demonstrates that the case is distinguishable and does not contradict (or even pertain to) the national rule that a timely filed motion to amend a complaint stands in place of the later amended complaint.

The pertinent facts in *Viafax* were as follows: the defendant moved for leave to file a counterclaim, and served this motion on the plaintiff. *Id.* at 67-68, 995 P.2d at 837-38. The plaintiff did not respond. *Id.* The district court granted the defendant's motion for leave to file the counterclaim, but this order was not served on the plaintiff. *Id.* at 68, 995 P.2d at 838. Later, at a hearing conducted without notice to the plaintiff, the defendant moved for a default judgment on the counterclaim since no responsive pleading had been filed; the district court subsequently granted the motion for default. *Id.* When the plaintiff learned that a default judgment had been entered against it, it moved to set aside the judgment on the grounds that it had never been served with the counterclaim and thus was

[1] One of several difficulties with Idaho Mutual's use of *Viafax* is that the *Viafax* decision did not involve or discuss a motion to amend a complaint, but instead concerned a motion to file a counterclaim. Idaho Mutual's solution to this problem was to remove the word "counterclaim" every time it appeared in the text being quoted (five times) and replace it with the bracketed words "amended complaint." *Appellant's Brief*, at 8-9. The actual text of the decision in *Viafax* does not, of course, contain Idaho Mutual's alterations, and thus the 'express holding' claimed by Idaho Mutual does not exist.

not aware that a responsive pleading called for. *Id.* The trial court denied the plaintiff's motion for relief, but that ruling was reversed on appeal by the Idaho Court of Appeals. *Id.* at 70, 995 P.2d at 840.

The Court of Appeals in *Viafax* reasoned that the plaintiff was entitled to relief from the default judgment pursuant to I.R.C.P. 60(b)(1) which provides such relief based on "surprise." The *Viafax* plaintiff was "surprised" by the default judgment because the plaintiff was never served with the order granting leave to file the counterclaim, nor was the plaintiff served with the counterclaim itself. *Id.* Since the plaintiff was never given notice that there was a counterclaim, the plaintiff was excused from having failed to file a responsive pleading, and the grant of a default judgment against the plaintiff in *Viafax* was judged improper. *Id.*

With the issues that were in dispute in *Viafax* in mind, it would be appropriate to revisit the language from that decision on which Idaho Mutual relies. The full paragraph from which Idaho Mutual selected a portion states as follows:

> The district court focused upon the fact that Viafax [the plaintiff] was served with Stuckenbrock's [the defendant] motion for leave to file the counterclaim. Viafax has acknowledged receipt of this motion and does not challenge the validity of the service made on its attorney on the day of the attorney's withdrawal. However, in our view the district court erred in concluding that service of this motion alone was sufficient to put Viafax at risk of a default judgment. Service of a motion for leave to file a counterclaim, even with the proposed counterclaim attached, is not the equivalent of service of the counterclaim itself. As Viafax argues, receipt of the motion gave it notice only that it could object to a counterclaim being filed and that the motion might be granted. It remained possible that the court would deny the motion, even without an objection from Viafax, or that Stuckenbrock would abandon the effort. Filing and service of the counterclaim itself could be properly accomplished only *after* permission had been obtained from the court. *See* I.R.C.P. 13(e); 15(d). Such service was never performed.

Id. The court in *Viafax* was discussing the requirement that a plaintiff must be served with notice of a counterclaim (rather than only a motion for leave to file a counterclaim) before he can be required to submit a responsive pleading and before a default judgment can be entered against him; it did not concern or discuss the point at which filing is effective to commence an action for the purpose of timeliness.

In *Nett*, the Supreme Judicial Court of Massachusetts noted that the same principle expressed in *Viafax* is actually consistent with the rule that an motion to amend commences proceedings for the purposes of timeliness. 744 N.E.2d at 140-41. Immediately following a sentence in which the court wrote: "[w]e adopt the more accurate formulation that the filing of the motion to amend actually commences the new action for these purposes, with the motion to amend 'stand[ing] in the place of' the amended complaint," the court placed a footnote in which it observed that: "[w]hile the filing of the motion 'commences' the action for purposes of satisfying a statute of repose, that filing does not trigger the new defendant's obligation to serve a responsive pleading. That obligation does not arise until the new defendant is served with the amended complaint, which will not occur unless and until the motion to amend is allowed." *Nett*, 744 N.E.2d at 140-41 n.14 (internal citations omitted). In short then, a motion to amend (1) commences proceedings and stands in the place of the later amended pleading for the purposes of timeliness, but (2) the motion to amend does not trigger the other party's obligation to file a responsive pleading, which does come due until after the motion is approved and the amended pleading has been served. The first rule is determinative in this case. The second is the principle applied in *Viafax*. As observed in *Nett*, both rules are correct, and the two rules are entirely compatible. *Nett*, 744 N.E.2d at 140-41 n.14.

Accordingly, nothing in the *Viafax* decision contradicts, or is even relevant to, the established rule that for the purposes of timeliness a motion to amend stands in the place of an amended complaint while the motion is under review by the court. *See, e.g., Nett*, 774 N.E.2d 135-39; *Mauney*, 340 S.E.2d at 400-01; *Buller Trucking Co.*, 461 F.Supp.2d at 776-77.

The other decision that Idaho Mutual points to in its briefing is *Diehl Lumber Transportation, Inc., v. Mickelson*, 802 P.2d 739 (Utah.App. 1990). However, as the district court in the present case noted, *Diehl* is distinguishable because that case concerned a party seeking to file a third-party complaint against an unrelated party with no notice, and revolved around the validity of a *nunc pro tunc* order. R., p. 83. Further, *Diehl* is inapplicable in light of Utah's unique statutory scheme, in which a claimant is required not only to commence an action to enforce a lien within the statutory period, but also to record a *lis pendens* on the property within the same time frame. *See* Utah Code § 38-1-11(3)(a); *Projects Unlimited, Inc. v. Copper State Thrift & Loan Co.*, 798 P.2d 738, 752 (Utah 1990); *see and compare* I.C. § 45-510.

Applying the established rule to the present case, Terra-West's timely filing of its motion to amend stood in place of the amended complaint itself while the motion was under review by the district court. Terra-West had control over the date it filed the motion to amend, but it could not control the timing of the court's subsequent ruling approving the motion. If Terra-West or similarly situated litigants seeking to amend a complaint were instead compelled to file and serve a new action against the same parties with respect to the same contract, and to then consolidate the action, such a cumbersome work-around would result in pointless procedural clutter and would waste time and judicial resources. "The

settled rule in both federal and state court is that an complaint is deemed filed as of the time it is submitted to a court together with a request for leave to file the amended complaint." *Buller Trucking*, 461 F.Supp.2d at 776-77. Accordingly, Terra-West's amended complaint was timely filed, and the district court's order granting leave to amend was not an abuse of discretion.

B. Even if the filing of proceedings to enforce the Second Claim of Lien had itself been untimely, it would relate back to the date of the original complaint because it relates to the same transaction and occurrence which was already put at issue in this litigation.

As discussed in the prior section, since the commencement of proceedings to enforce the Second Lien was itself timely, its validity is not dependent on either the timing or the viability of the claims described in the original complaint, including the foreclosure claim on the First Lien. Consequently, if the Court agrees that Terra-West's motion to amend stood in place of the later amended complaint, then the motion to amend was properly granted and the analysis of the present appeal need go no further.[2]

If, however, the Court were to determine that a motion to amend does not stand in place of the amended pleading while the motion is under review by the trial court, it would then be necessary to consider whether Terra-West's amended complaint relates back to the date of the original complaint. The doctrine by which an amended pleading may relate back to the date of the original pleading is governed by Idaho Rule of Civil Procedure 15(c). Rule 15(c) provides in pertinent part that "[w]henever a claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or

[2] The district court's ruling granting leave to amend was based on the second lien relating back to the date of the original complaint pursuant to Idaho Rule of Civil Procedure 15(c). R. p. 83-85. That ruling was correct and should be upheld on appeal. The district court was not, however, asked to consider the rule that an amended complaint is deemed filed on the date of the motion to amend. That rule is presented on appeal because an appellate court may affirm the trial court on a theory not relied upon below. *McCuskey v. Canyon Country*, 123 Idaho 657, 663, 851 P.2d 953, 959 (1993).

attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." I.R.C.P. 15(c).

In the present case, if the amended complaint had been untimely any such defect would be cured because the claims addressed in the amended pleading arose from the same circumstances as the original complaint, and thus relate back to the date of the timely filed original pleading. In ruling on the motion to amend, the district court below found that "the [second] lien attached to the same real property and arose from the same transaction [as set forth in the original complaint]. The Court finds that the claim arises out of the transaction set forth in the original pleading and therefore amendment relates back to that date." R. p. 84.

On appeal, Idaho Mutual has recast its 'relation back' argument away from its former assertion that the amended complaint did not arise out of the same conduct, transaction, or occurrence as the original pleading. Idaho Mutual's new argument is that the amended complaint does not relate back "[b]ecause the Original Complaint did not give notice of the Second Lien or that additional work might be performed pursuant to Terra-West's contract for improvement to the Property[.]" *Appellant's Brief*, at 13. In other words, Idaho Mutual's argument is that the amended complaint does not relate back because the original complaint did not mention the Second Lien or the additional work on the property that was performed after the original complaint was filed.

Idaho Mutual's argument stresses the requirement of "notice," contending that Idaho Mutual did not receive notice of the Second Lien because it was not specifically

discussed in the original complaint.[3] Idaho Mutual's argument, however, misunderstands the role of "notice" in the context of the relation back doctrine.

First, it should be remembered that the test for relation back is whether the new claims asserted in the amended pleading "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." *Herrera v. Conner*, 111 Idaho 1012, 1016-17, 729 P.2d 1075, 1079-80 (Ct.App. 1986). This "common core of operative facts" imparts the defendant with notice as to claims arising from those circumstances. *F.D.I.C. v. Jackson*, 133 F.3d 694, 702 (9th Cir. 1998). It is the original filing of a suit that places a defendant on notice that "the whole transaction described in it will be fully sifted, by amendment if need be, and that the form of the action or the relief prayed or the law relied on will not be confined to their first statement." 6A Wright & Miller, *Federal Practice and Procedure*, § 1497, 93 (2d ed. 1990) (quoting *Barthel v. Stamm*, 145 F.2d 487 (5th Cir. 1944)).

Idaho Mutual's argument also depends on a suggestion that an amended pleading cannot relate back unless those claims sought to be added were already contained in the original pleading. It is not, however, necessary for the exact claims in the amended pleading to be already contained in the original pleading, so long as the new claims arose out the same conduct, transaction, or occurrence. *See Herrera*, 111 Idaho at 1018, 729

[3] Terra-West understands Idaho Mutual's argument on appeal as concerning notice rather than the argument presented below that the amended complaint did not arise from the same conduct, transaction, or occurrence as set forth in the original pleading. Such an argument was properly rejected below as impermissibly seeking to litigate the merits of a claim on a motion to amend. "A court may consider whether the allegations sought to be added to the complaint state a valid claim in determining whether to grant leave to amend the complaint. A court, however, may not consider the sufficiency of evidence supporting the claim sought to be added in determining leave to amend because that is more properly determined at the summary judgment stage." *Estate of Becker v. Callahan*, 140 Idaho 522, 527-28, 96 P.3d 623, 628-29 (2004) (internal citations omitted). "[I]t is generally inappropriate to consider the substantive merits of the claim sought to be added when passing on a motion to amend." *Duffin v. Idaho Crop Improvement Association*, 126 Idaho 1002, 1013, 895 P.2d 1195, 1206 (1995).

P.2d at 1081. Indeed, the very purpose of Rule 15 "is to allow amendments to expand or cure defective pleadings." *Id.* at 1017, 729 P.2d at 1080. Logically, if, as Idaho Mutual insists, an amended or supplemental claim would be disallowed if it was not already contained in the original pleading, amended or supplemental claims could never relate back. After all, if the original pleading already contained the claims or amendments being added, there would be no need for the addition or amendment in the first place. This flaw in the argument now being advanced by Idaho Mutual was aptly addressed in *Scarfone v. Martin*, 442 So.2d 282, 283 (Fla. App. 1983). The court wrote:

> [T]he proper test of relation back of amendments is not whether the cause of action stated in the amended pleading is identical to that stated in the original (for in the strict sense almost any amendment may be said to be a change of the original cause of action), but whether the pleading as amended is based upon the same specific conduct, transaction, or occurrence between the parties upon which the plaintiff tried to enforce his original claim. If the amendment shows the same general factual situation as that alleged in the original pleading, then the amendment relates back – even though there is a change in the precise legal description of the rights sought to be enforced, or a change in the legal theory upon which the action is brought.

Id. (quoting *Keel v. Brown*, 162 So.2d 321, 323 (Fla. App. 1964)).[4]

[4] Idaho Mutual's apparent argument that the amended complaint does not relate back because it includes claims for work on the property performed after the original complaint was filed is similarly without merit. Amending a pleading pursuant to Rule 15 to add claims that have arisen since the date of the original pleading is not barred, and does not inhibit relation back of the new claims. Such pleadings, to the extent that they concern events subsequent to the original pleading, are called "supplemental pleadings." I.R.C.P. 15(d); *Mauney*, 340 S.E.2d at 401 n.1 ("Supplemental pleadings are distinguished from amendments because they deal with acts occurring after the filing of the complaint"). Supplemental pleadings are specifically permitted pursuant to Idaho Rule of Civil Procedure 15(d), which provides that a party may "serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim of relief." I.R.C.P. 15(d). "The clear weight of authority . . . in both the cases and the commentary, permits the bringing of new claims in a supplemental complaint to promote the economical and speedy disposition of the controversy." *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988).

Supplemental pleadings relate back to the date of the original pleading in the same manner as amendments to pleadings under Rule 15(c). *See Duff v. Draper*, 96 Idaho 299, 527 P.2d 1257 (1974) ("Rule 15(c), I.R.C.P., provides that amendments to pleadings are to relate back in time to the commencement of suit, as are supplemental pleadings").

There is no question that the district court was correct in its determination that the Amended Complaint arose out of the same conduct, transaction, or occurrence as the original Complaint. The amendment seeks only to add additional services and materials rendered that were required under the original contract between Terra-West and Red Cliff/Urwin. The original pleading puts at issue labor and materials required under a contract entered into in August of 2006. R. p. 9. The Amended Complaint notes that as of November 30, 2007, Terra-West had performed all work required under the agreement, excepting additional excavation and installation of certain pipeline and irrigation work along and through the development, which could not be performed until certain approvals from government authorities were obtained by Urwin. R. p. 91. However, subsequent to the original claim of lien's recording, Urwin obtained the necessary governmental approvals and instructed Terra-West to complete the remaining work under its original agreement with Red Cliff/Urwin. R. p. 91. Accordingly, Terra-West resumed its performance under the original agreement, providing labor and materials for the improvement of the property. Thus, while the amended pleading does relate to actions which occurred after the recording of the original claim of lien, all of Terra-West's claims relate to the same original agreement between Terra-West and Red Cliff/Urwin.

For that reason, the cases cited by Idaho Mutual once again are clearly distinguishable from the amended pleading presented by Terra-West. *Idaho First National Bank v. Bliss Valley Foods, Inc.,* 121 Idaho 266, 824 P.2d 841 (1991), sought to add a tort claim for defamation to the already existing contract related claims. In this case, Terra-West has not asserted any new theories of recovery. The original pleading asserts that it has provided services and materials upon real property, pursuant to an agreement with the owner, for which

it has not been paid. The amended pleading simply adds the work that Terra-West performed pursuant to the same agreement. Terra-West has not changed the theory of its case between the amended pleading and the original pleading as the proposed amendment in *Idaho First National* sought to do.

Likewise, in *Wing v. Martin,* 107 Idaho 267, 688 P.2d 1172 (1984), the proposed amendment sought to add post-filing facts that did not relate to the facts presented in the original litigation, but rather "occurred at a different time and location." *Wing,* 107 Idaho at 270, 688 P.2d at 1175. Terra-West's claims are not at a different time and location. The amendments concern acts rendered by Terra-West upon the same property, pursuant to the same agreement which is already put in issue by the existing litigation.

It is well recognized that new theories of recovery may be raised when the basic facts that give rise to the recovery have not changed. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 272-73, 561 P.2d 1299, 1305-06 (1977). The basic facts giving rise to Terra-West's claims have not changed. Terra-West seeks recovery of amounts for labor and materials that it provided pursuant to an agreement made in August of 2006. The identity of the parties has not changed and, in point of fact, neither has Terra-West's theories of recovery. Accordingly, the district court did not abuse its discretion in ruling that the amended complaint arose out of the same conduct, transaction, or occurrence at issue in the original pleading and therefore relates back to that date.

C. The District Court had jurisdiction to grant Terra-West's motion for leave to amend because the motion was timely and because no final order has been issued in this action.

Idaho Mutual asserts that the district court does not have the jurisdictional power to enforce the Second Lien because, in Idaho Mutual's view, Terra-West failed to initiate an

action for foreclose the lien within the six-month period provided in Idaho Code § 45-510. Idaho Mutual's argument, however, is without merit because Terra-West did commence proceedings to enforce the lien within the statutory period.

Terra-West substantially completed work on the subject property on May 25, 2008. The Second Claim of Lien was filed on August 12, 2008, and copies were served on the owners or reputed owners of the property. This filing was less than 90 days after work was completed, and was thus timely under Idaho Code § 45-507. Then, on January 16, 2009, Terra-West filed a motion to amend its complaint so as to enforce the Second Claim of Lien. This motion was filed approximately five months after the Claim of Lien was recorded, and was accordingly timely under the six-month limit contained in Idaho Code § 45-510.

As discussed in greater detail in section V(a) above, the filing of a motion to amend constitutes the commencement of an action for the purposes of timeliness, with the motion to amend standing in place of the amended complaint while under review by the court. *E.g.*, *Nett*, 774 N.E.2d at 140; *Mayes*, 867 F.2d at 1173; *Wallace*, 720 F.Supp. at 159; *Longo*, 618 F.Supp. at 89; *Mauney*, 340 S.E.2d at 400; *Toy*, 961 P.2d at 1037; *Totura & Co*, 754 So.2d at 680; *Mauney*, 340 S.E.2d at 400; *Frazier*, 55 S.W.3d at 929-30; *The Children's Store*, 580 A.2d at 1210. As a result, Terra-West's January 16, 2009 filing of the motion to amend the complaint constituted the commencement of proceedings to enforce the Second Lien against the Defendants. The Second Lien was therefore timely under Idaho Code § 45-510 and the court was fully vested with jurisdiction to grant leave to amend the Complaint.

Even if the amended complaint had not itself been timely filed, as discussed in greater detail in section V(b) above, it would have related back to the date of the original Complaint. Determination of whether an amended pleading relates back does not hinge on whether it is restricted by a statute of limitations or of repose, but instead depends on the same factors that normally govern the relation back doctrine. *Estate of Spell*, 622 S.E.2d 725, 728 (N.C. App. 2005).

Further, the district court has never lost jurisdiction over Terra-West's Complaint, or even over the First Claim of Lien. On motion from Idaho Mutual, the district court dismissed Terra-West's First Claim of Lien on the basis of an alleged technical error in the jurat. R. p. 31-36. The dismissal was not, however, a final order. As noted by the district court in its ruling granting leave to amend, Idaho Mutual did not request, nor did it receive, a Rule 54(b) certificate of Final Judgment removing it from the action. R. p. 84.

Similarly, and for the same reason, no final order has ever been entered with respect to the dismissal of the First Claim of Lien and the district court retains its jurisdiction over that claim. The present appeal is interlocutory, and was granted on motion from Idaho Mutual by the Supreme Court pursuant to Idaho Appellate Rule 12. Since no final judgment has ever been issued in this case, nothing has interrupted the district court's jurisdiction. Indeed, until a final order is issued, (and for 14 days afterward) Terra-West retains the ability to file a motion for reconsideration regarding the First Claim of Lien, and the district court retains the jurisdiction to entertain that motion – and potentially modify or reverse its earlier ruling of dismissal. I.R.C.P. 11(a)(2)(B) ("A motion for reconsideration of any interlocutory orders of the trial court may be made at any time before the entry of final judgment but not later than fourteen (14) days after the entry

of final judgment"); *Devil Creek Ranch, Inc. v. Cedar Mesa Reservoir & Canal Co.*, 126 Idaho 202, 879 P.2d 1135 (1994).[5]

There is no question that Terra-West's filing of the original pleading was timely. Rule 15 was specifically created "to allow amendments to expand or cure defective pleadings" such as in the present case. *See Herrera*, 111 Idaho at 1018, 729 P.2d at 1081. Since the district court never lost jurisdiction over Idaho Mutual or over Terra-West's original Complaint, the district court had, and has, jurisdiction to apply the doctrine of relation back to the amended complaint.

D. Idaho Mutual is not entitled to an award of attorney's fees on appeal.

Idaho Mutual requests attorney fees on appeal pursuant to Idaho Code § 12-121 and Idaho Appellate Rule 41. Idaho Appellate Rule 41 outlines the rules for requesting attorney fees, but does not itself provide a basis on which fees can be awarded. *Shawver v. Huckleberry Estates*, 140 Idaho 354, 365, 93 Idaho 685, 696 (2004). Idaho Code § 12-121 permits an award of attorney fees in a civil action to the prevailing party if the court determines the case was brought, pursued or defended frivolously, unreasonably or without foundation. *Mutual of Enumclaw Ins. Co. v. Pedersen,* 133 Idaho 135, 139, 983 P.2d 208, 212 (1999). This action has not been defended frivolously by Terra-West, and, indeed, Terra-West is the responding party having been granted a favorable ruling on its motion to amend by the district court below.

[5] It should be noted that the question of whether or not the First Claim of Lien was valid is not determinative in the present appeal. The district court ruled that the amended complaint relates back to the "original pleading" – the entire original pleading – not simply to that portion of the original pleading that described the First Claim of Lien. R. p. 84. The original pleading concerned the same property and the same conduct, transaction, or occurrence as the amended complaint and consequently serves as a basis for relation back pursuant to Rule 15(c). *See* R. p. 6-13; I.R.C.P. 15(c). As a result, the amended complaint would relate back to the original pleading even if the First Claim of Lien were invalid, and, indeed, even if the First Claim of Lien had never existed.

E. Terra-West should be granted attorney's fees on appeal.

Idaho Mutual requests an award of reasonable attorney fees on appeal pursuant to Idaho Code § 12-121, which provides for such an award if the court determines the case was brought, pursued, or defended frivolously, unreasonably, or without foundation. *Mutual of Enumclaw Ins. Co.*, 133 Idaho at 139, 983 P.2d at 212. Idaho Mutual's interlocutory appeal is frivolous in light of the well established rule that a motion to amend stands in the place of an amended pleading for the purposes of timeliness, and the clear absence of any abuse of discretion in the district court's determination that the claims in the amended complaint arose out of the same conduct, transaction, or occurrence set forth in the original pleading.

VI. CONCLUSION

Terra-West respectfully requests that the Court affirm the district court's discretionary grant of leave to file an amended complaint. Terra-West further requests an award of costs and attorney fees on appeal.

DATED this 8th day of December, 2009.

TROUT ♦ JONES ♦ GLEDHILL ♦ FUHRMAN, P.A.

By: _____
DANIEL LORAS GLYNN

CERTIFICATE OF SERVICE

The undersigned certifies that on the 8th day of December, 2009, he caused a true and correct copy of the foregoing to be forwarded by the method(s) indicated below, to the following:

Stephen C. Hardesty Ryan T. McFarland Beth Smethers HAWLEY TROXELL ENNIS & HAWLEY, LLP 877 W. Main Street, Suite 1000 Post Office Box 1671 Boise, Idaho 83701-1617	Hand Delivery U.S. Mail Facsimile Overnight Delivery	☒ ☐ ☐ ☐

DANIEL LORAS GLYNN