2013 IL App (2d) 120975-U
No. 2-12-0975
Order filed June 7, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CINDY CHIAPPE-KAY,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 09-CH-5084
	)	
DONALD BARTHEL and NANCY BARTHEL,	)	
	)	
	)	
Defendants-Appellees,	)	
	)	Honorable
(The Chicago Bears Football Club, Inc., Defendant).	)	Terence M. Sheen,
	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's orders entering summary judgment in defendants' favor and denying plaintiff's motion for restitution and prejudgment interest were affirmed where (1) there was no genuine issue of material fact that the purported agreement between plaintiff and defendants was barred by the statute of frauds, (2) plaintiff's complaint did not contain a claim for unjust enrichment, and (3) plaintiff forfeited her argument that she was entitled to prejudgment interest dating back to the date of the agreement.

¶ 2 Plaintiff, Cindy Chiappe-Kay, appeals from orders granting summary judgment in favor of defendants, Donald and Nancy Barthel, and denying plaintiff's motion for restitution and

prejudgment interest. The dispute arose out of an alleged oral agreement between plaintiff and defendants to transfer into plaintiff's name two permanent seat licenses (PSLs) entitling her to purchase annual season tickets for two specific seats in Soldier Field, the home of the Chicago Bears football team. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 In 1980, defendants applied for season tickets to the Chicago Bears and were placed on a waiting list. They acquired two season tickets in Mr. Barthel's name in 1992. In 1996, defendants relocated to another state because of a job transfer. Defendants began selling most of their season tickets at face value to plaintiff, their lifelong friend.

¶ 5 In April 2001, defendants received a letter from the Chicago Bears informing them of an opportunity to purchase at a season-ticket-holder discount two PSLs, which would guarantee defendants, as licensees, the permanent right to purchase annual season tickets for two specific seats in Soldier Field, beginning in 2003.

¶ 6 According to plaintiff's first amended complaint, plaintiff and defendants reached an agreement in 2002 whereby plaintiff would purchase the two PSLs. Initially, the PSLs would be placed in Mr. Barthel's name, because, as the season ticket holder of record, he was the only one eligible to purchase the PSLs. Plaintiff would then purchase all of the annual season tickets and sell to defendants, at face value, tickets to at least one home game per year.

¶ 7 Plaintiff alleged that, during 2002 and 2003, she made payments totaling $2,210 to the Bears organization, which then issued two PSLs in Mr. Barthel's name. From 2003 to 2007, plaintiff purchased the season tickets each year, either by sending payment directly to the Bears or by sending payment to defendants. She also sold to defendants, at face value, tickets to 10 games during that

period. According to plaintiff, because of the trust and long-standing friendship between her and defendants, the parties never "formally execute[d] the PSL transfer papers." In 2008, defendants allegedly breached the agreement when they refused to transfer the PSLs into plaintiff's name and stopped selling the season tickets to plaintiff.

¶ 8 Plaintiff's first amended complaint contained three counts. Count I sought specific performance of the agreement, count II sought enforcement of the agreement under a theory of promissory estoppel, and count III sought a declaratory judgment that plaintiff was the sole owner of the PSLs. Originally, the Chicago Bears Football Club, Inc., was named as a defendant, but the trial court dismissed the organization without prejudice pursuant to an agreed order.

¶ 9 On July 11, 2011, the trial court granted defendants' motion for summary judgment on all three counts. The court found that the purported agreement was subject to the statute of frauds (740 ILCS 80/1 (West 2010)) because it could not be performed within one year. The court further found that the agreement was unenforceable because it was not in writing. The court reasoned that the agreement was incapable of performance within one year because the agreement required plaintiff to sell to defendants tickets to at least one game per year for life. In the same order, the court ordered defendants to pay to plaintiff $2,210 in restitution, the amount plaintiff paid for the PSLs.

¶ 10 On July 25, 2011, plaintiff filed a "Motion for Restitution," which sought (1) restitution in the amount of the current fair market value of the two PSLs, purported to be in excess of $22,000; and (2) prejudgment interest on the funds. On August 8, 2011, while the motion for restitution was pending, plaintiff filed a notice of appeal from the July 11, 2011, order. This court dismissed plaintiff's appeal for lack of jurisdiction. *Chiappe-Kay v. Barthel*, 2012 IL App (2d) 110784-U.

¶ 11 On August 7, 2012, the trial court granted in part and denied in part plaintiff's motion for restitution. The court declined plaintiff's request for restitution in the amount of the fair market value of the PSLs, but awarded plaintiff 5% interest on the judgment from the date defendants stopped selling the season tickets to plaintiff. Plaintiff timely appealed.

¶ 12 ANALYSIS

¶ 13 On appeal, plaintiff argues that (1) the agreement between plaintiff and defendants was in writing, (2) full performance of the agreement took place within one year, (3) the agreement was a series of one-year oral contracts, (4) the declaratory judgment count should be reinstated, (5) restitution should be in the amount of the fair market value of the PSLs, and (6) plaintiff should be awarded interest from the date she paid for the PSLs.

¶ 14 Summary Judgment

¶ 15 Plaintiff's first four arguments on appeal relate to the trial court's order granting summary judgment in defendants' favor. Specifically, plaintiff challenges the trial court's determination that the agreement to transfer the PSLs was unenforceable under the statute of frauds. Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). A court ruling on a summary judgment motion must construe the materials submitted in support of and in opposition to the motion strictly against the movant and liberally in favor of the opponent. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 32. We review *de novo* an order granting summary judgment. *Colburn*, 2012 IL App (2d) 110624, ¶ 32.

¶ 16 The statute of frauds prohibits a party from bringing any action based "upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith." 740 ILCS 80/1 (West 2010). The purpose of the writing requirement is to avoid fraud "by barring actions based upon nothing more than loose verbal statements." *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 489 (1997).

¶ 17 Plaintiff first argues that the purported agreement between plaintiff and defendants met the writing requirement of the statute of frauds. Plaintiff paid for the PSLs in three installments. According to plaintiff:

> "For each of her three payments, Plaintiff filled out and signed her name to an application form to the Bears, filled in her own VISA card number and the date. She got the forms from Defendants, and Mr. Barthel signed three license agreement forms and sent them direct to Plaintiff for trans-shipment to the Bears." (Emphasis in original.)

Plaintiff contends that Mr. Barthel's signatures on the three license agreement forms were sufficient evidence of a written contract to satisfy the statute of frauds.

¶ 18 Initially, we note that plaintiff provides no citations to the pages of the record she relies upon in support of her statement that Mr. Barthel signed three license agreement forms. Nor does plaintiff cite any case law to support her argument. Plaintiff makes assertions about the law in Illinois, then cites only section 133 of the Restatement (Second) of Contracts (1981). Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) requires the argument section of an appellant's brief to include "citation of the authorities and the pages of the record relied on." Because plaintiff has failed to comply with Rule 341(h)(7), plaintiff has forfeited this argument. See *In re Marriage of Petrik*, 2012 IL App (2d)

110495, ¶ 38 ("The appellate court is not a depository in which the appellant may dump the burden of argument and research." (Internal quotation marks omitted.)).

¶ 19 Even if we were to overlook plaintiff's forfeiture, however, the record does not support plaintiff's assertion that Mr. Barthel signed three license agreement forms. Only one PSL application appears in the record. The application is dated March 13, 2002, contains plaintiff's credit card number, and is signed by plaintiff only. The record also contains a document entitled "Permanent Seat License Agreement," which is dated September 20, 2002, and is signed by Mr. Barthel only. Illinois courts have described the requirements for a writing sufficient under the statute of frauds:

> "A 'writing' sufficient to satisfy the Statute of Frauds may be made up of several documents, which may consist of various forms such as notes, papers, letters and telegrams, so long as, taken together, they contain on their face, or by reference to other writings, the names of the parties, an identification of the subject matter of the contract, and the terms and conditions of the contract." *American College of Surgeons v. Lumbermens Mutual Casualty Co.*, 142 Ill. App. 3d 680, 698-99 (1986).

The two documents contained in the record—the application signed by plaintiff and the PSL agreement signed by defendant—do not identify the subject matter of any agreement nor any terms or conditions thereof. There is no genuine issue of material fact that the writing requirement of the statute of frauds was not satisfied.

¶ 20 Next, plaintiff argues that the statute of frauds does not apply because full performance of the contract took place within one year. Plaintiff's entire argument on this point is as follows:

> "If the contract was merely oral, the Statute does not apply because full performance took place within a year. The money was paid right away as were the signatures and the dispersal of some game tickets to Defendants. The rights of the parties Plaintiff [*sic*] promptly vested. If several years later Plaintiff had refused tickets to the Barthels they could have sued for them."

As the quoted material makes clear, plaintiff has again failed to comply with Rule 341(h)(7). She cites no authority whatsoever. Nor does she provide citations to the pages of the record relied upon. Therefore, the argument is forfeited.

¶ 21 Once again, even if we were to overlook plaintiff's forfeiture, her argument would fail. As the trial court noted, the purported agreement between plaintiff and defendants contemplated the lifelong transfer of tickets between the parties. Thus, full performance could not have taken place within a year. See *McInerney*, 176 Ill. 2d at 491 (noting in the context of a contract for lifelong employment that full performance "would have required the plaintiff to work until his death, but our plaintiff lives"). Furthermore, although the trial court did not make this finding, the record reveals that the agreement could not have been performed within one year of its making because the Bears had imposed a one-year ban on the transfer of all new PSLs. A document from the Bears that explained the PSLs—which was attached as an exhibit to plaintiff's response to defendants' motion for summary judgment—states that the earliest any PSLs could be transferred was February 1, 2004. According to plaintiff, she reached her agreement with defendants sometime in 2002.

¶ 22 Finally with respect to the statute of frauds, plaintiff argues that the agreement was not subject to the statute of frauds because the parties entered into a series of one-year oral contracts. Plaintiff acknowledges in her reply brief that she did not make this argument before the trial court.

Therefore, the argument is forfeited. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85 ("[I]ssues not raised in the trial court are deemed forfeited and may not be raised for the first time on appeal.").

¶ 23 Because we agree with the trial court that the statute of frauds rendered the purported oral agreement unenforceable, we need not address plaintiff's fourth argument, that the declaratory judgment count (count III) should be reinstated. Without an enforceable agreement, plaintiff was not entitled to a declaratory judgment. Furthermore, although plaintiff makes no argument specifically in support of her promissory estoppel count (count II), the trial court was correct to grant summary judgment in defendants' favor on that count as well. *McInerney*, 176 Ill. 2d at 492 ("[P]romissory estoppel does not bar the application of the statute of frauds in Illinois.").

¶ 24 Restitution

¶ 25 We next address plaintiff's argument that the trial court should have awarded her restitution in the amount of the current fair market value of the PSLs. Because restitution is an equitable remedy (*Steadfast Insurance Co. v. Caremark Rx, Inc.*, 373 Ill. App. 3d 895, 900 (2007)), we review a trial court's order awarding or denying restitution for an abuse of discretion (see *Thede v. Kapsas*, 386 Ill. App. 3d 396, 399 (2008) ("We review the trial court's decision to refuse equitable relief for the abuse of discretion.")). "A trial court abuses its discretion where no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *Petrik*, 2012 IL App (2d) 110495, ¶ 19.

¶ 26 Plaintiff contends that permitting defendants to retain the PSLs, which purportedly are "worth maybe $25,000," would be unjust enrichment. The problem with plaintiff's argument, as defendants point out, is that plaintiff's complaint did not contain either a count for unjust enrichment or the

elements of an unjust enrichment claim. "To state a claim for unjust enrichment, 'a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience.' " *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25. The trial court could not have granted plaintiff relief on a theory not pleaded in her complaint. *Steadfast Insurance Co.*, 373 Ill. App. 3d at 900 (affirming the denial of a motion for restitution where the plaintiff's complaint did not contain a claim for unjust enrichment). Moreover, at no time did plaintiff seek leave to amend her complaint to add an unjust enrichment count.

¶ 27 Here, the court awarded plaintiff restitution based on *McInerney*, in which the supreme court stated:

> "A party's partial performance generally does not bar application of the statute of frauds, unless it would otherwise be 'impossible or impractical to place the parties in the status quo or restore or compensate' the performing party for the value of his performance." *McInerney*, 176 Ill. 2d at 491 (quoting *Mapes v. Kalva Corp.*, 68 Ill. App. 3d 362, 368 (1979)).

The trial court found that plaintiff had partially performed her obligations under the oral agreement—by paying $2,210 for the PSLs and by selling tickets to defendants from 2003 to 2007—and that restitution in the amount of $2,210 would place the parties in the *status quo* as it existed prior to the agreement. Had the trial court been unable to return the parties to the *status quo*, it could not have relied upon the statute of frauds in determining that the parties' oral agreement was unenforceable. Accordingly, we cannot say that the trial court abused its discretion in awarding restitution in this manner.

¶ 28 Prejudgment Interest

¶ 29 Plaintiff's final argument is that the trial court should have awarded her prejudgment interest from the date she paid for the PSLs. Plaintiff does not cite a single authority in her argument on this point. Therefore, plaintiff has forfeited this argument. See *Petrik*, 2012 IL App (2d) 110495, ¶ 38 ("The appellate court is not a depository in which the appellant may dump the burden of argument and research." (Internal quotation marks omitted.)).

¶ 30 CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 32 Affirmed.