2017 IL App (2d) 16-0284-U
Nos. 2-16-0284 & 2-16-0285 cons.
Order filed January 30, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TINLEY PARK ORTHODONTIC ASSOCIATES, P.C.,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 14-AR-1546
ACCOUNTING AND TAX ADVISORS, CPAS, P.C.,	)	Honorable Brian R. McKillip
Defendant-Appellee.	)	Judge, Presiding.

GLEN ELLYN ORTHODONTIC ASSOCIATES, P.C.,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 14-AR-1547
ACCOUNTING AND TAX ADVISORS, CPAS, P.C.,	)	Honorable Brian R. McKillip
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Entering judgment against plaintiffs in their equitable actions for unjust enrichment was not against the manifest weight of the evidence because express contracts governed the rights of the parties and equitable remedy was inappropriate.

¶ 2 Plaintiffs, Tinley Park Orthodontic Associates, P.C. (Tinley Park) and Glen Ellyn Orthodontic Associates, P.C. (Glen Ellyn), each filed a claim for unjust enrichment against defendant, Accounting and Tax Advisors, CPAs, P.C., to recover money paid for accounting services that admittedly were not performed. The actions were consolidated in the trial court and on appeal. Defendant argues that it may retain its fees because plaintiffs never provided the financial information necessary to perform the work. Following a bench trial, the circuit court entered judgment for defendant, concluding that the existence of express contracts between the two sides barred plaintiffs' equitable claims. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Although these actions culminated in a bench trial, most of the salient facts are undisputed. Plaintiffs are owned by Dr. Douglas Prince, who specializes in orthodontics, and defendant is owned by Bharat Shah, who is a certified public accountant (CPA). For many years, Dr. Prince and Shah had a professional relationship whereby defendant provided accounting and tax services for plaintiffs in exchange for fees that were billed monthly and yearly. Defendant created monthly financial reports to facilitate preparation of plaintiffs' tax returns.

¶ 5 The parties had a course of dealing whereby plaintiffs authorized defendant to withdraw its fees from plaintiffs' accounts as they became due. Each year, defendant periodically asked plaintiffs to provide background financial information for the work, but plaintiffs did not always submit the requested information in a timely manner. Sometimes, defendant withdrew its fee for a given month before work for that month was completed, but defendant was able to catch up as

plaintiffs supplied the necessary information so the work could be completed in time to file the tax returns. The parties adhered to this arrangement for several years.

¶ 6 On January 2, 2013, defendant sent each plaintiff a retainer letter for the 2013 calendar year. On February 28, 2013, Shah and Dr. Prince signed each letter, representing the two express agreements, which were nearly identical. Based on an hourly rate of $255, defendant estimated tax service fees of $2,850 to $3,250 for each plaintiff. Defendant also estimated monthly accounting fees of $1,850 for Tinley Park and $1,725 for Glen Ellyn. Each contract provided that "[defendant's] invoices of these fees will be rendered each month as work progresses and are payable on presentation."

¶ 7 To facilitate defendant's services, plaintiffs were "responsible" for (1) the preparation and fair presentation of the financial statements in accordance with the cash basis of accounting; (2) designing, implementing, and maintaining internal control relevant to the preparation and fair presentation of the financial statements; (3) preventing and detecting fraud; (4) identifying and ensuring that plaintiffs comply with the laws and regulations applicable to its activities; (5) the selection and application of accounting principles; and (6) making all financial records and related information available to defendant and for the accuracy and completeness of that information. According to Dr. Prince, the parties never agreed on a deadline for providing the financial documents to defendant, and there were often gaps in time between his submissions. He also asserted that defendant always obtained an extension for filing plaintiffs' tax returns and never filed them on the regular due date.

¶ 8 Each plaintiff filed an amended two-count complaint alleging conversion and unjust enrichment. The conversion claims were abandoned before trial. The unjust enrichment claims admitted the validity of the express written agreements but asserted that they "did not cover

paying defendant for services not performed by defendant." To show that defendant was incapable of performing the services under the contracts, plaintiffs admitted in the amended complaints that they did not provide defendant with the financial materials for completing the services during the relevant time period.

¶ 9 Defendant used the authorization by plaintiffs to withdraw its estimated monthly fees of $1,850 and $1,725 from plaintiffs' accounts, even though it was impossible to perform the work at that time. The trial court heard evidence that defendant did so for seven months, from January through July 2013, after which plaintiffs stopped payment on the August 2013 checks. Dr. Prince testified that defendant withdrew its fees for April 2013 despite his request to delay the withdrawal due to a lack of funds. Dr. Prince admitted that his delay request was a veiled objection to defendant's rate. There was no evidence that the April 2013 checks were dishonored. The court heard evidence that Dr. Prince and Shah discussed defendant's rate other times. Plaintiffs considered switching to another accounting firm but never told defendant that they wished to terminate the contracts.

¶ 10 On August 9, 2013, after plaintiffs stopped payment on the checks for August 2013, Shah sent Dr. Prince a letter stating that defendant would no longer provide its services to plaintiffs, effective that day. As grounds for terminating the agreements, Shah cited plaintiffs' failure to (1) timely provide monthly financial information over the years; (2) answer defendant's telephone calls or other communication; (3) provide information for the 2012 tax returns; (4) provide information to amend tax returns from previous years; (5) provide signed purchase contracts for practice buildings in Naperville and Orland Park to reflect payments and to amend the 2010 and 2011 tax returns; and (6) placing the stop orders, without notice, on the two checks for fees in August 2013.

¶ 11 The letter stated "[w]e wish to remind you that you must provide us any and all remaining accounting records for current tax year from January 1, 2013, through July 31, 2013, if you want us to provide you with monthly compiled financial statements. Your failing to provide such information immediately upon receipt of this letter will release us from our responsibilities." Plaintiffs admit that they never furnished the requested materials and claim that defendant knew it was impossible for them to do so. Shah testified that defendant should be allowed to retain the fees because it had to allocate resources to be prepared to do the work during the relevant period as contemplated under the contract. Shah denied that Dr. Prince expressed any dissatisfaction with his services or the rate before the stop payment orders.

¶ 12 The trial court found that plaintiffs' unjust enrichment claims must fail. The court explained that unjust enrichment does not constitute an independent cause of action but rather applies to unlawful or improper conduct or implied contracts. By admitting the existence of the valid express bilateral contracts, without any allegations of fraud, duress, or undue influence, plaintiffs failed to allege sufficient facts that could support the unjust enrichment claims. The court observed that Dr. Prince "made it clear that he wanted to terminate the relationship with the defendant but was unprepared and hesitant to take that step." The court entered a thorough written judgment for defendant, and plaintiffs' timely appeals followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, plaintiffs argue that they presented proper actions for unjust enrichment because defendant abandoned the contract and retained $25,025 for services it would no longer perform. Plaintiffs do not quarrel with the trial court's factual findings for the most part but disagree with the court's application of the law to the facts. Plaintiffs contend that, "since

[plaintiffs] withheld materials, defendant could do no work, and thus defendant did no work and thus, since defendant did no work, it was not entitled to keep the money that it was paid."

¶ 15 In support, plaintiffs accurately quote *HPI Health Care Services, Inc. v. Mount Vernon Hospital, Inc*., 131 Ill. 2d 145, 160 (1989), which provides that " '[t]o state a cause of action based on a theory of 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.' " Damages in an unjust enrichment claim are restitution measured by the defendant's gain, not the plaintiff's loss. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 257-58 (2004). A trial court's findings of fact will not be disturbed on appeal unless those findings are against the manifest weight of the evidence. *Gass v. Anna Hospital Corp*., 392 Ill. App. 3d 179, 183 (2009).

¶ 16 While plaintiffs potentially had breach of contract claims against defendant for work that was never completed, the judgment must be reviewed in the context of the unjust enrichment claims that plaintiffs chose to pursue. It is well-settled that "[u]njust enrichment is an equitable remedy and does not apply '[w]here there is a specific contract that governs the relationship of the parties.' " *Chicago Title Insurance Co. v. Bass*, 2015 IL App (1st) 140948, ¶ 21 (quoting *Nesby v. Country Mutual Insurance Co*., 346 Ill. App. 3d 564, 567 (2004)); *ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277, ¶ 83. Although a party may plead unjust enrichment in the alternative, it may not include allegations of an express contract in its counts for unjust enrichment. *Bass*, 2015 IL App (1st) 140948, ¶ 21.

¶ 17 In the amended complaints, at trial, and in portions of their appellate brief, plaintiffs repeatedly have alleged that express contracts governed their relationship with defendant. Since attaching a copy of the respective agreements to their amended complaints, plaintiffs have

contended that defendant wrongly retained the benefit of its fees without performing work according to the agreements and that plaintiffs performed as required. Perhaps plaintiffs could have pursued a legal remedy based on the contracts, but unjust enrichment is not available to them as a viable cause of action because express contracts govern their relationship with defendant. See *Gittlitz*, 2014 IL App (1st) 133277, ¶ 83 (where counterplaintiff premised his unjust enrichment claim on a purported verbal contract among counterdefendant's shareholders, the theory of unjust enrichment was inapplicable because unjust enrichment, an equitable remedy, is only available when there is no adequate remedy at law). On this point, the record supports the trial court's findings and legal conclusion, which are not against the manifest weight of the evidence.

¶ 18 In two sentences, plaintiffs suggest in passing that unjust enrichment is an appropriate claim because defendant rescinded the contracts in its August 9, 2013, letter, causing there to be no agreement governing the parties in 2013. " 'Generally, rescission means the cancelling of a contract so as to restore the parties to their initial status.' " *Horwitz v. Sonnenschein Nath and Rosenthal LLP*, 399 Ill. App. 3d 965, 973 (2010) (quoting *Puskar v. Hughes*, 179 Ill. App. 3d 522, 528 (1989)). " 'Where a contract is rescinded, the rights of the parties under that contract are vitiated or invalidated.' " *Horwitz*, 399 Ill. App. 3d at 973 (quoting *Puskar*, 179 Ill. App. 3d at 528). A claim for rescission is sufficient if it alleges: (1) substantial nonperformance or breach by the defendant; and (2) that the parties can be restored to the status quo *ante*. *Horwitz*, 399 Ill. App. 3d at 973 (citing *Ahern v. Knecht*, 202 Ill. App. 3d 709, 715-16 (1990)). Substantial nonperformance or breach of contract warrants rescission where the matter, in respect to which the failure of performance occurs, is of such a nature and of such importance that the contract would not have been made without it. *Horwitz*, 399 Ill. App. 3d at 974.

¶ 19 We need not consider whether either side had a right to rescission because plaintiffs offer no evidence or authority to show that any party intended to do so. In the August 9, 2013, letter, defendant stated "[w]e wish to remind you that you must provide us any and all remaining accounting records for current tax year from January 1, 2013, through July 31, 2013, if you want us to provide you with monthly compiled financial statements. Your failing to provide such information immediately upon receipt of this letter will release us from our responsibilities." Although the letter expressed an unambiguous intent to terminate the contracts prospectively, defendant also stated a willingness and ability to perform the work for the previous seven months upon receipt of plaintiffs' financial information. Defendant effectively told plaintiffs that any delay in providing the information for those seven months would be viewed as a breach of the agreements, releasing defendant from its obligations for that period. Nothing in the letter indicates the intent to rescind the contracts completely and restore the parties to the status quo *ante*.

¶ 20 Plaintiffs did not indicate the intent to rescind the contracts, either. Dr. Prince testified that he expressed dissatisfaction with defendant's rate and contemplated switching accountants, but he admitted that he never took any steps to modify or end the parties' contractual relationship. The disputed fees cover January 1, 2013, through July 31, 2013, and the parties consistently acted as though valid contracts governing their relationship existed during that period. Plaintiffs did not plead a claim for rescission in their amended complaints. Their sole theory at trial was unjust enrichment, without alleging rescission by either side.

¶ 21 Finally, in their reply brief, plaintiffs argue that defendant was required to plead as an affirmative defense that the existence of a contract barred the unjust enrichment claims. An affirmative defense does not negate the essential elements of the plaintiff's cause of action. To

the contrary, it admits the legal sufficiency of that cause of action and assumes that the defendant would otherwise be liable, if the facts alleged are true, but asserts new matter by which the plaintiff's apparent right to recovery is defeated. *Vroegh v. J & M Forklift*, 165 Ill. 2d 523, 530 (1995). Section 2-613(d) of the Code of Civil Procedure covers both affirmative defenses and other grounds "which, if not expressly stated in the pleading, would be likely to take the opposite party by surprise" and requires such defenses or grounds to be plainly set forth in the answer or reply. 735 ILCS 5/2-613(d) (West 2014).

¶ 22 Plaintiffs did not raise their affirmative-defense theory in their opening brief, which would have afforded defendant the opportunity to respond. We disregard the theory because plaintiffs improperly attempt to raise it for the first time in a reply brief. See Ill. S. Ct. R. 341(j) (eff. Feb. 6, 2013) ("The reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee and need contain only Argument").

¶ 23 In any event, the notion that the express contracts would bar equitable relief should not have taken plaintiffs by surprise. The amended complaints admitted the existence of the contracts. The trial court's written judgment unambiguously held that the parties had entered into valid express contracts that barred plaintiffs' claims. Alleging the express contracts as an affirmative defense was unnecessary, where plaintiffs' unjust enrichment claims were self-defeating in the way they alleged precisely that fact.

¶ 24 III. CONCLUSION

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

¶ 26 Affirmed.