

NOTICE

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FILED

April 13, 2018
Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 170058-U

NO. 4-17-0058

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

NATHAN BYRAM, Individually; and LINWOOD)	Appeal from
2000, INC.,)	Circuit Court of
Plaintiffs-Appellants,)	Vermilion County
v.)	No. 14L44
MARY SUSAN DANNER; FRED C. DANNER, JR.;)	Honorable
and DANNER 2000, INC., d/b/a REMAX 2000,)	Nancy S. Fahey,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Harris and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed in part and reversed in part, concluding the trial court properly dismissed portions of plaintiffs’ third-amended complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2016)) and erred by dismissing others.

¶ 2 This case involves a failed business transaction between plaintiff Nathan Byram (Byram) and defendant Mary Susan Danner. In July 2015, plaintiffs, Byram and Linwood 2000, Inc., filed a third-amended complaint against defendants, Mary Susan Danner (Danner), Fred C. Danner (Fred), and Danner 2000, Inc., d/b/a ReMax 2000, alleging 11 counts, including common-law fraud (counts I through III), tortious interference (counts IV and V), breach of contract (count VI through IX), and unjust enrichment (counts X and XI). In October 2015, defendants filed a motion to dismiss counts I through V, X, and XI. In September 2016,

defendants filed a motion to dismiss counts VI through IX. The trial court granted the motions and dismissed counts I through XI with prejudice.

¶ 3 Plaintiffs appeal, arguing the trial court erred by dismissing the counts in the third-amended complaint based on sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2016)). Specifically, plaintiffs argue (1) counts I through III set forth facts that satisfied the elements for claims of common-law fraud; (2) counts IV and V set forth facts that satisfied the elements for claims of tortious interference with a prospective economic advantage; (3) counts VI through IX were properly pleaded and were not subject to defeat by any affirmative matter; and (4) counts X and XI were repleaded to preserve plaintiffs’ right to appeal and set forth facts that satisfied the elements for claims of unjust enrichment. We affirm in part and reverse in part.

¶ 4 I. BACKGROUND

¶ 5 A. Original Contract

¶ 6 Sue and Fred Danner owned and operated Danner 2000, a real estate business. In August 2012, the parties entered into a written agreement for the “sale of assets including terms regarding managing broker.” The agreement provided for the sale of some assets of Sue Danner and Danner 2000 (“sellers”) to Byram (“buyer”). In part, the contract provided as follows:

“1. Assets to be Sold: Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, the following assets of Seller:

A. Seller’s rights under her franchise agreement with Remax Realty, but only if Buyer exercises his option to assume

Seller's franchise agreement effective September 21, 2014, and only if the franchisor, Remax, accepts Buyer as a franchisee.

* * *

D. The name 'Remax', address and telephone number, i.e., good will, but only if Buyer exercises his option to assume Seller's franchise agreement effective September 21, 2014, and only if the franchisor, Remax, accepts Buyer as a franchisee.

* * *

I. An option to assume Seller's franchise, as provided in paragraph 11 herein.

* * *

3. Manner of Payment of Purchase Price: The payment of the purchase price shall be (a) the sum of \$15,000 on September 21, 2012; (b) the sum of \$15,000, plus interest computed at an annual rate of 1% on the remaining balance, on March 21, 2013; (c) the sum of \$20,000, plus interest computed at an annual rate of 1% on the remaining balance, on March 21, 2014.

6. Seller's Warranties: Seller represents, warrants[,] and agrees as follows:

A. That Danner 2000, Inc. is a corporation in the State of Illinois and is in good standing with the State of Illinois. The Seller has full authority to conduct its business and has the power to sell the assets provided for by the terms of this Agreement.

B. Seller has good title to all of the assets, rights[,] and interests to be sold, subject to no mortgage, pledge, lien charge[,] or encumbrance of any nature, except as herein provided otherwise.

* * *

11. Buyer's Option to Assume Seller's Franchise: Between September 21, 2012[,] and September 21, 2014, Seller agrees not to offer Seller's franchise agreement to any other party, but instead, hereby grants Buyer an option to assume Seller's franchise agreement effective September 21, 2014."

¶ 7 Under the terms of the contract, Byram was to make payments in installments, with one due at the time the contract was signed, the second due in March 2013, and the third due in March 2014. Byram made the first payment but failed to make the second payment on March 21, 2013. Byram attempted to make the second payment over the summer of 2013, but Danner refused the payment. In December 2013, Danner rescinded the 2012 contract and, later that month, the parties entered into a rescission and release agreement.

¶ 8 B. Rescission and Release Agreement

¶ 9 In December 2013, the parties signed a rescission and release agreement. The agreement acknowledged both parties had failed to fully perform the duties and obligations set forth in the original contract. The 2013 contract rescinded the original contract, included a mutual release of liability, and provided for an accounting as follows:

“RESCISSION. The Parties to the Original Contract, and to the Mutual Rescission and Release herein, hereby mutually

agree to rescind the Original Contract. The Original Contract is hereby terminated and deemed null and void as of the Effective Date [(December 20, 2013)] and[,] with the exception of the issue of **ACCOUNTING** set forth below[,] neither party shall have any further rights or legal obligations thereunder.

* * *

FREDDIE MAC/HOMESTEPS and FANNIE MAE.

DANNER agrees to relinquish all rights to the REMAX Freddie Mac/HomeSteps and Fannie Mae accounts established by BYRAM. DANNER agrees to sign a letter to that effect and cooperate fully to affect the transfer of said account back to BYRAM. DANNER and REMAX agree to release all Freddie Mac/HomeSteps and Fannie Mae listings currently with REMAX to BYRAM and LYNWOOD [*sic*]. DANNER and REMAX agree to pay to BYRAM any and all gross commissions they receive from Freddie Mac and/or Fannie Mae closings occurring after the Effective Date of this Agreement.

* * *

COMMISSION ON REMAX TRANSACTIONS.

DANNER agrees to pay BYRAM all of the gross commission on any transaction side procured by agents, including BYRAM, that choose to hang their licenses with BYRAM, for any REMAX transaction that closes. This paragraph shall apply to closings

occurring within the two-week period prior to the Effective Date of this Agreement as well as to closings occurring after the Effective Date of this Agreement.

* * *

MUTUAL RELEASE OF LIABILITY. Upon satisfactory completion of the Accounting required below (“ACCOUNTING”), the parties agree to execute Mutual Releases of Liability wherein each shall release, cancel, forgive[,] and forever discharge the other party and each of the party’s predecessors, heirs, successors[,] and assigns, and all of the party’s officers, directors[,] and employees from all actions, claims, demands, damages, obligations, liabilities, controversies[,] and executions of any kind or nature whatsoever, whether known or unknown or suspected or not, which have arisen, may have arisen, or may arise by reason of the initial Contract or rescission thereof.

NON-DISPARAGEMENT. BYRAM will not disparage DANNER or DANNER’S performance or otherwise take any action, which could reasonably be expected to adversely affect DANNER’S personal or professional reputation. Similarly, DANNER will not disparage BYRAM’S performance or otherwise take any action, which could reasonably be expected to adversely affect BYRAM’S personal or professional reputation.

ACCOUNTING. BYRAM and DANNER agree that in order to ensure each party is returned to their position prior to the execution of the [original] contract, subsequent to the signing of this contract, an accounting will be conducted on or before June 30, 2014. ***

Pursuant to the accounting, the parties may then enter into Mutual Rescission and Release Agreement Part B, which would set forth any monies that would need to be exchanged between the parties pursuant to the accounting, and would[] complete this agreement in its entirety. If the accounting is not conducted prior to June 30, 2014, and if neither party, prior to July 1, 2014, seeks judicial intervention to compel the accounting, both parties agree to waive the right to the accounting, and further agree that this agreement would be completed in its entirety, and that both parties would be precluded from pursuing a lawsuit with relation to the accounting. Upon the refusal of either party to cooperate in the accounting, the other party may apply to a court of competent jurisdiction to compel the accounting. The parties hereby consent to the court's jurisdiction in such event.

COVENANT NOT TO SUE. Upon satisfactory completion of the Accounting required above ("ACCOUNTING"), the Parties agree to execute a "Covenant Not to Sue" wherein each shall specifically waive any claim or right to assert any cause of

action, alleged cause of action, claim or demand that has, through oversight or error, intentionally, unintentionally, or through a mutual mistake, been omitted from this agreement or the contemplated Mutual Rescission and Release Agreement Part B.”

¶ 10 C. Plaintiffs’ Third-Amended Complaint

¶ 11 On June 30, 2014, plaintiffs filed the original complaint in this cause. Following the resolution of various motions and opportunities to replead, plaintiff filed a third-amended complaint.

¶ 12 1. *Counts I Through III—Common-Law Fraud*

¶ 13 Counts I through III alleged claims for common-law fraud. The claims alleged defendants had no authority to enter into the original contract, contrary to the warranty and representations made therein, because defendants were “prohibited, by previous agreement between themselves and ReMax, LLC of Denver, Colorado, from entering, without prior written approval from ReMax, LLC, into any agreement for the sale of any part of the ReMax franchise, name, book of business, goodwill, or option to assume the franchise.” The complaint alleged, despite this, defendants represented, in paragraph six of the original contract, they were “fully authorized” to sell their rights under a franchise agreement with ReMax Realty. The complaint further alleged plaintiffs only learned the truth regarding defendants’ alleged misrepresentation from a “confidential source” after the initial complaint was filed in June 2014.

¶ 14 According to the complaint, the misrepresentation was a material statement that induced plaintiffs to enter into the original contract, and defendants knew the representation was untrue. Finally, the complaint alleged damages of not less than \$715,000 for (1) the loss of a \$30,000 franchise fee to a third party in order for plaintiffs to enter the original contract and

associated legal fees; (2) \$15,000 for the first payment in consideration of the original contract; (3) expenses incurred pursuant to provisions of the original contract; (4) commissions owed to plaintiffs for transactions that occurred between August 2012 and December 2013; and (5) the loss of certain future commissions.

¶ 15 *2. Counts IV and V—Tortious Interference*

¶ 16 Count IV alleged a claim for tortious interference with prospective economic advantage. Specifically, the complaint alleged, “Over the summer of 2013, Mrs. Danner refused to accept Mr. Byram’s proffered payments under the August 2012 Contract.” Additionally, the complaint alleged Danner unilaterally rescinded the original contract on December 12, 2013. On that date, Danner allegedly spoke to Doc Pribble, an agent who worked for Byram both before and after the parties signed the original contract. Danner informed Pribble his job had been terminated and Pribble found employment with another real-estate agency. The complaint further alleged Danner “on or about December 7, 2013, told a second agent, Nancy Crowder, who had a long-standing and productive relationship with Mr. Byram, that Mr. Byram was in professional trouble and would ‘bring Ms. Crowder down with him’ if she continued to work for him.” Based on this, Danner enticed Crowder away from her employment with Byram and into employment with Sue Danner. According to the complaint, plaintiffs were deprived of receiving approximately \$130,000 in commission revenue from these two real-estate agents over the next five years.

¶ 17 Count V alleged that, upon Danner’s unilateral rescission of the original contract, Byram took steps to recover the Freddie Mac/HomeSteps account established in his name. In December 2013 and January 2014, the complaint alleged Danner sent e-mails and made phone calls to the area Freddie Mac/HomeSteps representative criticizing Byram, calling into question

his ability to manage Freddie Mac listings, and reporting problems with Freddie Mac listings transferred from ReMax 2000 to Byram. As a result of Danner's actions, the complaint alleged Byram was unable to recover his previously established book of business with Freddie Mac/HomeSteps and lost a profitable business relationship he cultivated for several years prior to entering into the original contract with defendants.

¶ 18 *3. Counts VI Through IX—Breach of Contract*

¶ 19 Counts VI through IX alleged claims for breach of contract based on the December 2013 rescission and release agreement. Count VI alleged Danner breached the 2013 rescission agreement by failing to fully cooperate in the transfer of the Freddie Mac/HomeSteps account established by Byram. Specifically, count VI alleged that, in December 2013 and January 2014, Danner sent e-mails and made phone calls to the area Freddie Mac/HomeSteps representative criticizing Byram, calling into question his ability to manage Freddie Mac listings, and reporting problems with Freddie Mac listings transferred from ReMax 2000 to Byram.

¶ 20 Count VII alleged Danner breached the 2013 rescission agreement's non-disparagement clause through her communications with the Freddie Mac/HomeSteps representative and Crowder. Additionally, count VII alleged Danner filed a frivolous complaint with the Illinois Department of Financial and Professional Regulation, which subjected Byram to an investigation for alleged violations of state law and called into question his professional abilities.

¶ 21 Count VIII alleged Danner breached the 2013 rescission agreement by failing to pay Byram commissions on closings that occurred within the two-week period prior to the "effective date" of the rescission agreement or after the effective date of the agreement. Count IX alleged Danner did not cooperate in the accounting provided for in the 2013 agreement.

¶ 22

4. *Counts X and XI—Unjust Enrichment*

¶ 23

Counts X and XI alleged claims for unjust enrichment, which plaintiffs included to preserve appellate review after the trial court dismissed these claims with prejudice in ruling on plaintiffs’ second-amended complaint. Plaintiffs’ second-amended complaint alleged in count X a claim for unjust enrichment brought on behalf of Byram and Linwood 2000, Inc., against all defendants. In count XI, the second-amended complaint alleged a claim for “unjust enrichment – *quantum meruit*” on behalf of Byram against all defendants. Both claims in the second-amended complaint included allegations of the express contract governing the relationship of the parties. The third-amended complaint alleged in count X a claim for unjust enrichment brought on behalf of Linwood 2000, Inc., against Danner. In count XI, the third-amended complaint alleged an unjust enrichment claim on behalf of Linwood 2000, Inc., against Danner 2000, Inc.

¶ 24

D. Defendants’ Motions to Dismiss

¶ 25

In February 2015, defendants filed a motion to dismiss plaintiffs’ second-amended complaint, which included two claims of unjust enrichment (counts X and XI in the third-amended complaint). In October 2015, defendants filed a motion to dismiss counts I through V, X, and XI of plaintiffs’ third-amended complaint pursuant to sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2016)).

¶ 26

In September 2016, defendants filed a motion to dismiss counts VI through IX. Defendants attached Danner’s affidavit as an exhibit to the September 2016 motion to dismiss. Danner’s affidavit described the application process to become an approved HomeSteps listing broker. According to the affidavit, ReMax 2000 was an approved HomeSteps broker and marketed Freddie Mac properties. In December 2013, Danner signed a letter “relinquishing any

rights owned by ReMax 2000 or [her]self in the Freddie Mac/HomeSteps listings and immediately ceasing the handling of future Freddie Mac/HomeSteps listings.” The affidavit also described e-mail correspondence with a HomeSteps representative regarding the Freddie Mac listings Danner held in her account. In one January 2014 e-mail, Danner informed the representative ReMax 2000 would not take additional HomeSteps listings. In February 2014, the HomeSteps representative informed Danner that agents working for Byram could not service HomeSteps listings because Byram had not registered his brokerage firm, Linwood 2000, as a prospective listing broker. According to the affidavit, the HomeSteps representative informed Danner that Linwood 2000 was not an approved listing broker and could not have HomeSteps listings transferred to it.

¶ 27 Also attached as exhibits were (1) copies of various e-mail correspondence with the HomeSteps representative, (2) defense counsel’s affidavit, and (3) e-mails plaintiffs’ counsel sent defense counsel. In January 2014, counsel for plaintiffs e-mailed defense counsel and stated Byram “agree[d] that the best course of action is for ReMax to service the existing listings from Freddie Mac/HomeSteps *** and to terminate the relationship as far as accepting any new listings.” The e-mail went on to state plaintiff “understands the possibility of new listings being given to another brokerage firm in the meantime while these current assets are dealt with and before his application can be processed.”

¶ 28 E. The Trial Court’s Rulings

¶ 29 In February 2016, the trial court ruled on defendants’ motion to dismiss counts I through V, X, and XI of plaintiffs’ third-amended complaint. The court dismissed counts I through III with prejudice pursuant to section 2-615 of the Code, finding the actual language of the original contract controlled and contradicted plaintiffs’ allegations. The court further noted,

“the allegations are based on a contract that [p]laintiff admittedly breached and [p]laintiff acknowledged the breach by signing a valid release of all claims under the breached 2012 contract before entering into another contract with [d]efendant’s [sic] in 2013.” Pursuant to section 2-615 of the Code, the court also dismissed counts IV and V with prejudice for the following reasons:

“Plaintiff is simply realleging the [d]efamation counts that were previously dismissed with prejudice as tortious interference counts and the elements of tortious interference cannot be met in this case because [p]laintiff has admitted that he breached the 2012 contract. As a result of that breach, [d]efendant, Mary Susan Danner, exercised her right to rescind the contract and then notified interested third parties that the contract had been rescinded. This all happened before the 2013 contract was entered into by these same parties. This constitutes an act of protecting [d]efendant’s own economic interests, not interfering with [p]laintiff’s interests. This is allowable under the law and does not state a cause of action for [t]ortious [i]nterference.”

Finally, the court noted counts X and XI were frivolously repleaded as they were previously dismissed with prejudice, and the court again dismissed counts X and XI with prejudice.

¶ 30 In December 2016, the trial court granted defendants’ motion to dismiss counts VI through IX of plaintiffs’ third-amended complaint. The court entered the following docket entry dismissing the remaining counts in the third-amended complaint:

“Defendant’s [m]otion to dismiss pursuant to 735 ILCS 5/2-619.1 is allowed in its entirety. Plaintiff’s [t]hird [a]mended [c]omplaint fails to state a cause of action for breach of contract. In addition, [d]efendant’s affidavit in support of her [m]otion to [d]ismiss is unrefuted by any type of counter-affidavit and the allegations therein are taken as true. The contract that was entered into between these parties, freely and voluntarily, is controlling in this case.”

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 Plaintiffs argue on appeal the trial court erred in dismissing the counts in the third-amended complaint based on section 2-615 and 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619.1 (West 2016)). Specifically, plaintiffs argue (1) counts I to III set forth facts that satisfied the elements for claims of common-law fraud; (2) counts IV and V set forth facts that satisfied the elements for claims of tortious interference; (3) counts VI to IX were properly pleaded, and were not subject to defeat by any affirmative matter; and (4) counts X and XI were repleaded to preserve plaintiffs’ right to appeal and set forth facts that satisfied the elements for claims to recover for unjust enrichment.

¶ 34 We initially note defendants filed a motion to strike plaintiffs’ brief, primarily arguing plaintiffs failed to cite to the record. Defendants’ motion to strike also alleged plaintiffs’ brief did not address, and therefore forfeited review of, one of the issues presented for review regarding plaintiffs’ request for Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) language following the dismissal with prejudice of three counts from the second-amended complaint. This

court granted defendants' motion to strike and gave plaintiffs 35 days to file a brief in compliance with Illinois Supreme Court Rules. Plaintiffs have filed an amended brief with citations to the record. However, the amended brief still does not address any argument on the issue of whether the trial court erred in denying plaintiffs' request for Rule 304(a) language. Accordingly, plaintiff has forfeited this issue and we decline to address it.

¶ 35 A. Standard of Review

¶ 36 “A motion to dismiss under section 2-615 challenges the legal sufficiency of a complaint.” *Kanerva v. Weems*, 2014 IL 115811, ¶ 33, 13 N.E.3d 1228. A court must accept as true all well-pleaded facts to determine whether the allegations of the complaint, construed in the light most favorable to the nonmoving party, are sufficient to establish a cause of action upon which relief can be granted. *Id.* We review *de novo* a trial court's ruling on a motion to dismiss. *Schweih's v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 27, 77 N.E.3d 50.

¶ 37 Section 2-619 of the Code provides for a motion to dismiss on the grounds “[t]hat the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.” 735 ILCS 5/2-619(a)(9) (West 2016). “Section 2-619(a)'s purpose is to provide litigants with a method of disposing of issues of law and easily proved issues of fact—*relating to the affirmative matter*—early in the litigation.” (Emphasis in original.) *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 30, 988 N.E.2d 984. A section 2-619 motion admits the legal sufficiency of a plaintiff's complaint but goes on to suggest the claim is barred by an affirmative matter. *Id.* ¶ 31. An affirmative matter is something that completely negates the cause of action, other than the defendant's version of the facts. *Clemons v. Nissan North America, Inc.*, 2013 IL App (4th) 120943, ¶ 36, 997 N.E.2d

307. We review *de novo* a dismissal pursuant to section 2-619. *Cochran v. Securitas Security Services USA, Inc.*, 2016 IL App (4th) 150791, ¶ 20, 59 N.E.3d 234.

¶ 38 B. Counts I Through III—Common-Law Fraud

¶ 39 Plaintiffs assert counts I to III set forth facts that satisfied the elements for claims of common-law fraud and the trial court erred in dismissing the counts based on section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)).

¶ 40 The elements of common-law fraud are “(1) a false representation of a material fact; (2) by a party who knows or believes it to be false; (3) with the intent to induce the plaintiff to act; (4) action by a plaintiff in reliance on the statement; and (5) injury to the plaintiff as a consequence of that reliance.” *Washington Courte Condominium Ass’n-Four v. Washington-Gold Corp.*, 267 Ill. App. 3d 790, 814-15, 643 N.E.2d 199, 216 (1994).

¶ 41 Plaintiffs argue paragraph six of the original contract contained a false representation that defendants had “the power to sell the assets provided for” and had “good title to all of the assets, rights[,] and interests to be sold, subject to no mortgage, pledge, lien charge[,] or encumbrance of any nature, except as herein provided otherwise.” Plaintiffs’ complaint alleged defendants did not have prior written approval from ReMax, LLC, of Denver, Colorado, which prohibited them from entering “into any agreement for the sale of any part of the ReMax franchise, name, book of business, goodwill, or option to assume the franchise.”

¶ 42 Defendants argue this claim is foreclosed by the language of the 2012 contract, which shows defendants never made a false representation that they were fully authorized to sell the ReMax franchise. Specifically, defendants point to the following language of the contract:

“1. Assets to be Sold: Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, the following assets of Seller:

A. Seller’s rights under her franchise agreement with Remax Realty, but only if Buyer exercises his option to assume Seller’s franchise agreement effective September 21, 2014, and *only if the franchisor, Remax, accepts Buyer as a franchisee.*

* * *

D. The name ‘Remax’, address and telephone number, i.e., good will, but only if Buyer exercises his option to assume Seller’s franchise agreement effective September 21, 2014, and *only if the franchisor, Remax, accepts Buyer as a franchisee.*

* * *

I. An option to assume Seller’s franchise, as provided in paragraph 11 herein.

* * *

6. Seller’s Warranties: Seller represents, warrants[,] and agrees as follows:

A. That Danner 2000, Inc. is a corporation in the State of Illinois and is in good standing with the State of Illinois. The Seller has full authority to conduct its business and has the power to sell the assets provided for by the terms of this Agreement.

B. Seller has good title to all of the assets, rights[,] and interests to be sold, subject to no mortgage, pledge, lien charge[,] or encumbrance of any nature, *except as herein provided otherwise.*

* * *

11. Buyer's Option to Assume Seller's Franchise: Between September 21, 2012[,] and September 21, 2014, Seller agrees not to offer Seller's franchise agreement to any other party, but instead, hereby grants Buyer an *option* to assume Seller's franchise agreement effective September 21, 2014." (Emphases added.)

¶ 43 The plain language of the contractual provisions relied on by defendants indicates Danner did not represent that she had unfettered authority to sell the ReMax franchise. "When a claim or defense is founded upon a written instrument, that instrument must be attached to the pleadings as an exhibit and that exhibit constitutes a part of the pleading for purposes of a motion to dismiss. [Citations.] Where inconsistent, the exhibit controls over the factual allegations in the pleading." *F.H. Prince & Co., Inc. v. Towers Financial Corp.*, 275 Ill. App. 3d 792, 797, 656 N.E.2d 142, 146 (1995). The plain language of the "seller's warranties" clause states defendants had "good title to all of the assets, rights[,] and interests to be sold, subject to no *** encumbrance of any nature, *except as herein provided otherwise.*" The provisions describing the assets to be sold clearly show the original contract gave Byram the *option* to purchase the franchise, but *only if* ReMax accepted Byram as a franchisee. These "encumbrances"—exceptions to the seller's warranties—were clearly laid out and contradict plaintiffs' allegations

in his complaint. Accordingly, we conclude the trial court properly dismissed counts I through III for failure to state a cause of action.

¶ 44 C. Counts IV and V—Tortious Interference

¶ 45 Plaintiffs argue counts IV and V set forth facts that satisfied the elements for claims of tortious interference.

¶ 46 To prevail on a claim of tortious interference with a prospective economic advantage, a plaintiff must plead and prove the following elements: “(1) his reasonable expectation of entering into a valid business relationship; (2) the defendant’s knowledge of the plaintiff’s expectancy; (3) purposeful interference by the defendant that prevents the plaintiff’s legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference.” *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 511, 568 N.E.2d 870, 878 (1991).

“To prevail on a claim [of tortious interference with a prospective economic advantage], it is insufficient for [the] plaintiff to merely show that [the] defendant interfered with a business expectancy. [Citation.] Instead, [the] plaintiff must show ‘purposeful’ or ‘intentional’ interference, which refers to some impropriety committed by the defendant in interfering with [the] plaintiff’s business expectancy. [Citations.] In other words, [the] plaintiff must show that [the] defendant acted intentionally with the purpose of injuring the plaintiff’s expectancy. [Citation.] As this court has stated, ‘[t]o the extent that a party acts to enhance its own business interests, it has a privilege to act in a way that may harm the

business expectancy of others[.]’ “ *Fidelity National Title Insurance Co. of New York v. Westhaven Properties Partnership*, 386 Ill. App. 3d 201, 219, 898 N.E.2d 1051, 1067-68 (2007) (quoting *Curt Bullock Builders, Inc., v. H.S.S. Development, Inc.*, 225 Ill. App. 3d 9, 16, 586 N.E.2d 1284, 1290 (1992)).

If the defendant’s conduct was privileged, “it is the plaintiff’s burden to plead and prove that the defendant’s conduct was unjustified or malicious.” (Internal quotation marks omitted.)

Fellhauer, 142 Ill. 2d at 512 (quoting *London Guarantee & Accident Co. v. Horn*, 206 Ill. 493, 507 (1903)).

¶ 47 Count IV alleged in pertinent part, (1) Danner refused to accept payment from Byram over the summer of 2013 (the original contract provided for the second payment to be made on March 21, 2013); (2) defendants unilaterally rescinded the contract on December 12, 2013; (3) that same date, Danner called an agent who worked for Byram and informed him his employment had been terminated; and (4) on December 7, 2013, Danner spoke with another agent who worked for Byram and told her that Byram was in professional trouble and would “bring Ms. Crowder down with him.” Count V alleged Danner sent e-mails and made phone calls to the local Freddie Mac/HomeSteps representative in which she criticized Byram, called into question Byram’s ability to manage Freddie Mac listings, and reported “problems” with Freddie Mac listings that had been transferred from ReMax 2000 to Byram.

¶ 48 Plaintiffs argue sufficient facts were pleaded to show Danner “took affirmative steps to destroy a business relationship she had agreed in writing to preserve.” However, this ignores the fact that all the allegations in count IV occurred *before* the parties entered into the 2013 rescission agreement (when Danner “agreed in writing to preserve” Byram’s Freddie Mac

listings). Plaintiffs argue the privilege to compete does not allow for the use of improper competitive strategies, including fraud, deceit, intimidation, or disparagement. However, defendants contend the privilege apparent from the face of the complaint was not a privilege to compete, but a privilege to take actions to protect Danner's own economic interests.

¶ 49 The actions alleged in counts IV and V were taken after Danner exercised her right to rescind the contract. Danner had an interest in the future success of her franchise and the Freddie Mac listings (which were associated with her franchise at the time) and took actions to protect her own economic interests. Moreover, the allegations are insufficient to show Danner acted out of a "desire to harm" independent and unrelated to actions protecting her interests. Plaintiffs have not pleaded any facts to show Danner intentionally acted *with the purpose of injuring plaintiffs' business expectancies*. Therefore, plaintiffs have failed to meet their burden to plead facts to show defendants' conduct was unjustified or malicious. *Fellhauer*, 142 Ill. 2d at 512. Accordingly, we conclude the trial court did not err in dismissing counts IV and V for failure to state a claim pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2016)).

¶ 50 D. Counts VI to IX—Breach of Contract

¶ 51 Count VI through IX alleged Danner breached the 2013 rescission agreement by (1) failing to "fully cooperate" in transferring the Freddie Mac/HomeSteps listings from ReMax 2000 to Byram (count VI); (2) communicating with third parties in a way that "could reasonably be expected to adversely affect Mr. Byram's personal or professional reputation," and by filing an allegedly frivolous complaint with the Illinois Department of Financial and Professional Regulation (count VII); (3) failing to pay Byram certain commissions he was owed (count VIII); and (4) failing to cooperate in an accounting (count IX).

¶ 52 Plaintiffs contend counts VI to IX for breach of contract were properly pleaded, and were not subject to defeat by any affirmative matter. Plaintiffs argue (1) the 2013 rescission agreement does not limit the available remedies to the contemplated accounting action; (2) the parties did not enter into a covenant not to sue; (3) legal impossibility was not a defense; (4) Danner did not fully cooperate to affect the transfer of the HomeSteps account; (5) Danner did not comply with the nondisparagement clause of the 2013 rescission agreement; and (6) defendants' motion and Danner's accompanying affidavit were more appropriate as an answer to the complaint rather than a section 2-619 motion to dismiss. We note plaintiffs' arguments only address counts VI and VII and do not address commissions Byram was allegedly owed (count VIII) or Danner's alleged failure to cooperate in an accounting (count IX). Accordingly, we find plaintiffs have forfeited appellate review of the trial court's dismissal of counts VIII and IX and we decline to address those counts. See, e.g., *Fleissner v. Fitzgerald*, 403 Ill. App. 3d 355, 359, 937 N.E.2d 1152, 1157 (2010).

¶ 53 As to count VI, plaintiffs contend Danner breached the 2013 rescission agreement by failing to fully cooperate to affect the transfer of the Freddie Mac listings to Byram. Specifically, plaintiffs allege Danner took steps to prevent the transfer by contacting the Freddie Mac representative and criticizing Byram, questioning his ability to manage the listings, and "reporting so-called 'problems' with Freddie Mac listings that had been transferred from ReMax 2000 to Mr. Byram." Defendants, in pertinent part, contend count VI was properly dismissed pursuant to section 2-619 of the Code because Danner's un rebutted affidavit established (1) she did not breach the 2013 rescission agreement; (2) affecting a transfer constituted a legal impossibility due to Byram not being a HomeSteps listing broker and failing to take steps to become one; (3) Byram did not suffer damages because he was not a HomeSteps listing broker;

and (4) the HomeSteps listings were transferred to other brokers due to the actions of Byram and his agents, not defendant Sue Danner.

¶ 54 In count VII, plaintiffs allege Danner breached the nondisparagement clause of the 2013 rescission agreement by (1) communicating with third parties in a way that “could reasonably be expected to adversely affect Mr. Byram’s personal or professional reputation” and (2) filing an allegedly frivolous complaint with the Illinois Department of Financial and Professional Regulation. Defendants argue count VII was properly dismissed pursuant to either section 2-619 or section 2-615 of the Code. Specifically, defendants contend (1) plaintiff did not allege a breach of the nondisparagement clause because Danner’s statement to a Freddie Mac representative that there were “problems” with the listings did not harm Byram’s reputation; (2) Byram breached the nondisparagement clause himself by filing his complaint and, therefore, cannot recover for Danner’s alleged breach of the same clause; and (3) Byram did not suffer damages because he was not a HomeSteps listing broker. Defendants note plaintiffs sought attorney fees incurred in responding to the complaint filed with the Illinois Department of Financial and Professional Regulation. Defendants contend plaintiffs are not entitled to those damages because the 2013 rescission agreement does not provide for attorney fees.

¶ 55 Counts VI and VII alleged damages based on the future commissions Byram expected to receive from the HomeSteps listings. Danner’s affidavit alleged Byram was not an approved HomeSteps listing broker. Defendants also attached to the affidavit an e-mail from plaintiffs’ counsel to defendants’ counsel which indicated Byram had not yet been approved as a HomeSteps listing broker. Danner points out that plaintiffs did not file a counteraffidavit rebutting this allegation and did not address the question of damages in their response to the motion to dismiss. According to Danner, this “ ‘failure to challenge or contradict supporting

affidavits filed with a section 2-619 motion results in an admission of the fact stated therein.’ ” *Fayez v. Illinois Casualty Co.*, 2016 IL App (1st) 150873, ¶ 44, 58 N.E.3d 830 (quoting *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 352, 938 N.E.2d 640, 653 (2010)). While we agree with this statement from *Fayez*, the proposition applies only when the content of the affidavit and any supporting documents constitute an affirmative matter. Here, it does not.

¶ 56 An affirmative matter is any defense other than a negation of the essential allegations of the cause of action. *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 34, 978 N.E.2d 1132. Stated otherwise, “an affirmative matter does not include evidence upon which defendant expects to contest an ultimate fact stated in the complaint.” (Internal quotation marks omitted.) *Reynolds*, 2013 IL App (4th) 120139, ¶ 34 (quoting *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 121, 896 N.E.2d 232, 238 (2008)). After all, “when making a 2-619(a) motion to dismiss, a defendant (for purposes of the motion) *admits* the legal sufficiency of the complaint, yet asserts the existence of an external defect or defense that defeats the cause of action.” (Emphasis in original.) *Howle*, 2012 IL App (4th) 120207, ¶ 35 (quoting *Winters v. Wangler*, 386 Ill. App. 3d 788, 792, 898 N.E.2d 776, 779 (2008)).

¶ 57 Regarding count VI, the affidavit and supporting materials filed in support of the motion to dismiss simply constitute a denial of plaintiffs’ allegations. Instead of asserting an affirmative matter, defendants respond that count VI is “not true” because by executing a letter and relinquishing any rights to HomeSteps listings, Danner did cooperate to affect the transfer of the HomeSteps accounts. See *Id.* at ¶ 36 (“[n]ot true,” a two-word description for a pleading that is essentially an answer denying an allegation set forth in the complaint). We have more of the same in Danner’s affidavit and supporting materials asserting that Byram (1) was not a

HomeSteps listing broker; (2) failed to take action to become one; and (3) caused the transfer of the listings to other brokers. Danner merely offers her version of the facts. Further, the complaint alleges Danner failed to cooperate to affect the transfer of the HomeSteps accounts, not that Danner failed to affect the transfer. Thus any suggestion that we should undertake, based on Danner lacking the authority to effectuate the transfer of the listings, an analysis of legal impossibility, is without merit.

¶ 58 Finally, as to count VII, we find Byram does allege damages. Specifically, Byram claims he lost a book of business which had on average produced around \$3,700 per month in commissions, as well as future commissions expected to generate in the neighborhood of \$220,000 over the next five years.

¶ 59 Defendants' section 2-619 motion as to count VII suffers from the same infirmities we detailed regarding count VI. Instead of offering an affirmative matter, defendant disputes Byram's account of the events in question. For example, Danner asserts, "Byram accuses me of breaching the non-disparagement agreement and that's 'not true' because I searched my email and didn't find any disparaging statements." Moreover, instead of admitting the well-pleaded factual allegations in the complaint, Danner disputes whether she owes Byram commissions, and offers her explanation (based on her version of the facts) of why she does not. Thus, in this instance, the trial court erred in dismissing counts VI and VII pursuant to section 2-619.

¶ 60 Defendants also argue the trial court properly dismissed count VII pursuant to section 2-615. According to plaintiff, his claim for breach of the nondisparagement clause is proper as it alleges facts showing Danner failed to comply with her agreement not to "disparage

Byram’s performance or otherwise take any action, which would reasonably be expected to adversely affect Byram’s personal or professional reputation.”

¶ 61 The thrust of a section 2-615(a) motion is to challenge the legal sufficiency of the complaint based on deficiencies apparent on its face. *Reynolds*, 2013 IL App (4th) 120139, ¶ 25. “A section 2-615(a) motion presents the question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief may be granted.” *Id.* In this matter, we answer the question posed by a section 2-615(a) motion in the affirmative.

¶ 62 Specifically, defendants assert count VII alleges Sue Danner made private statements of little or no consequence to one person, not a false statement harmful to plaintiff’s reputation. This argument fails to recognize the plain language of count VII, which contains allegations that Danner made statements to multiple individuals and entities in various contexts.

¶ 63 Moreover, defendants’ reliance on the *Lopez* case from Ohio fails to persuade. *Ohio Education Ass’n v. Lopez*, 10th Dist. No. 09AP-1165, 2010-OHIO-5079. First, *Lopez* is a nonbinding decision reached after a bench trial. Also, it is not necessarily helpful to defendants. *Lopez* involved the alleged breach of a nondisparagement agreement by the defendant, Christopher Lopez, who was the former assistant executive director and general counsel for the Ohio Education Association (OEA). *Id.* ¶ 1. According to the complaint, Lopez left a voicemail for outside counsel for the OEA, referring to OEA Executive Director, Dennis Reardon, as a “slimebag.” *Id.* ¶ 3.

¶ 64 We note the Ohio court did find a technical breach of the agreement. *Id.* ¶ 17. However, after determining Lopez left a private message for a friend, the court concluded the

breach did not constitute a material breach as required by Ohio law. *Id.* According to the *Lopez* court, Lopez’s opinion of Reardon was well known among OEA employees and outside counsel. *Id.* Thus, the court found no evidence of harm or detrimental effect to Reardon. *Id.* Given a section 2-615 motion challenges whether the allegations on the face of the complaint state a cause of action, we fail to see how the *Lopez* case, resolved by the receipt of evidence through a bench trial, is supportive of defendants’ position.

¶ 65 Next, defendants argue plaintiff cannot sue alleging the breach of a contractual provision he also breached. Plaintiff maintains his complaint adequately sets forth a claim for breach of contract and that the parties never executed a covenant not to sue. Defendants cite *Virendra S. Bisla, M.D., Ltd v. Parvaiz*, 379 Ill. App. 3d 567, 884 N.E.2d 790 (2008), for the proposition that a party who breaches a contractual provision cannot sue another party for breaching the same contractual provision. However, *Bisla* does not stand for this proposition. The plaintiff in *Bisla* sought a preliminary injunction to enforce a covenant not to compete and filed an interlocutory appeal when the trial court denied the request. *Id.* at 568. In *Bisla*, the appellate court upheld the denial of the preliminary injunction when it noted the plaintiff’s “breach of contract *can* operate to discharge the duties of a covenant not to compete[.]” (Emphasis added.) *Id.* at 572. The court went on to find that because the plaintiff materially breached the agreement of the parties, the agreement was no longer in force. *Id.* at 573. Thus, the plaintiff failed to establish the criteria necessary to secure an injunction. *Id.* While there eventually may be a finding that plaintiff materially breached the agreement, that factual issue is not appropriately resolved in a section 2-615 motion. Thus, at this juncture, *Bisla* is of no help to defendants.

¶ 66 Finally, defendants assert plaintiff is not a HomeSteps listing broker and count VII therefore fails to allege damages. Further, defendants contend the contract did not contain an attorney fee provision. Our resolution of defendants' section 2-619 motion to dismiss counts VI and VII shows disputed factual allegations. Accordingly, we decline to find plaintiffs failed to allege facts stating a cause of action pursuant to section 2-615 (735 ILCS 5/2-615 (West 2016)). As to defendants' assertion regarding attorney fees, we note in the prayer for relief that count VII lacks a specific request for attorney fees. In the event it becomes apparent that plaintiffs do seek attorney fees, any inability on their part to make the necessary showing to prove they are entitled to attorney fees will require denial of the request.

¶ 67 E. Counts X and XI—Unjust Enrichment

¶ 68 Plaintiffs assert counts X and XI properly alleged claims for unjust enrichment and *quantum meruit*. Plaintiffs argue counts X and XI were properly repleaded in the third-amended complaint to preserve the right to appeal after the trial court dismissed these counts with prejudice when it ruled on the motion to dismiss plaintiffs' second-amended complaint. Plaintiffs further argue the claims for unjust enrichment and *quantum meruit* were pleaded in the alternative to the claims based on the parties' contracts. Finally, plaintiffs argue the contracts at issue here were between Byram and the defendants and not Linwood 2000 and, therefore, the contracts have no bearing on the unjust enrichment claims brought by Linwood 2000 against defendants.

¶ 69 Although defendants do not dispute the propriety of our review of these claims and do not address plaintiffs' contention these claims were properly repleaded to preserve the right to appeal, we must address this argument to determine the scope of our review. "It is a well-settled rule that a party who files amended pleadings forfeits any objection to the trial

court's rulings on any former complaints.” *Jacobson v. Gimbel*, 2013 IL App (2d) 120478, ¶ 19, 986 N.E.2d 1262. There are, however, three ways a party can preserve claims for appellate review: the party can “(1) stand on the dismissed counts, take a voluntary dismissal of any remaining counts, and argue the matter at the appellate level; (2) file an amended pleading that realleges, incorporates by reference, or refers to the dismissed counts; or (3) perfect an appeal from the dismissal order prior to filing an amended pleading that does not refer to or adopt the dismissed counts.” *Id.* When a party chooses to take the second course of action, “[a] simple paragraph or footnote in the amended pleadings notifying defendants and the court that plaintiff was preserving the dismissed portions of his former complaints for appeal [is] sufficient to avoid” forfeiture. *Tabora v. Gottlieb Memorial Hospital*, 279 Ill. App. 3d 108, 114, 664 N.E.2d 267, 271 (1996).

¶ 70 Our review of the record shows plaintiffs’ second-amended complaint alleged in count X a claim for unjust enrichment brought on behalf of Byram and Linwood 2000 against all defendants. In count XI, the second-amended complaint alleged a claim for “unjust enrichment—*quantum meruit*” on behalf of Byram against all defendants. Both claims in the second-amended complaint included allegations of the express contract governing the relationship of the parties. The third-amended complaint alleged in count X a claim for unjust enrichment brought on behalf of Linwood 2000 against Danner. In count XI, the third-amended complaint alleged an unjust enrichment claim on behalf of Linwood 2000 against Danner 2000.

¶ 71 Clearly, plaintiffs’ third-amended complaint adequately referenced the dismissed (with prejudice) unjust enrichment claims for the purposes of preserving appellate review, as all that is required is a simple paragraph or footnote giving defendants and the trial court notice the claims are preserved for review. However, plaintiff fully repleaded the unjust enrichment claims

and made some changes—specifically, plaintiffs’ third-amended complaint alleged the unjust enrichment claims were brought on behalf of Linwood 2000 and did *not* bring the claims on behalf of Byram or include allegations of the express contract which governed the relationship of the parties. The third-amended complaint further alleged there was no contractual arrangement whatsoever between Danner and Linwood 2000.

¶ 72 Claims for unjust enrichment and *quantum meruit* are quasi-contractual equitable remedies. *Hayes Mechanical, Inc. v. First Industry, L.P.*, 351 Ill. App. 3d 1, 9, 812 N.E.2d 419, 426 (2004). “A quasi-contract, or contract implied in law, is one in which no actual agreement between the parties occurred, but a duty is imposed to prevent injustice.” *Id.* at 8. “Because unjust enrichment is based on an implied contract, ‘where there is a specific contract which governs the relationship of the parties, the doctrine of unjust enrichment has no application.’ “ *Ramirez v. Smart Corp.*, 371 Ill. App. 3d 797, 809, 863 N.E.2d 800, 814 (2007) (quoting *La Throp v. Bell Federal Savings & Loan Ass’n*, 68 Ill. 2d 375, 391, 370 N.E.2d 188, 195 (1977)). “[W]hile a plaintiff may plead breach of contract in one count and unjust enrichment *** in others, it may not include allegations of an express contract which governs the relationship of the parties[] in the counts for unjust enrichment[.]” (Internal quotation marks omitted.) *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604, 836 N.E.2d 681, 704 (2005).

¶ 73 The unjust enrichment counts in the second-amended complaint clearly run afoul of these rules, where both counts (1) were brought on behalf of Byram, who is a party to the contract which governed his relationship with defendants; and (2) included allegations regarding that express contract. Accordingly, the trial court’s judgment dismissing those counts was proper. The changes plaintiffs made in the unjust enrichment counts in the third-amended complaint appear to be an attempt to circumvent these rules. However, plaintiffs cite no

authority, and our research revealed no authority, that allows a plaintiff to make changes to counts dismissed with prejudice in order to circumvent the rules which caused those counts to be dismissed in the first place. Moreover, it would make no sense for this court to review the counts as alleged in the third-amended complaint, as they were realleged for the sole purpose of preserving appellate review of the dismissed counts from the second-amended complaint. Accordingly, we conclude the trial court's judgment dismissing the counts from the second-amended complaint was proper and we affirm that judgment.

¶ 74

III. CONCLUSION

¶ 75 For the reasons stated, we affirm in part and reverse in part the trial court's judgment.

¶ 76 Affirmed.