2019 IL App (5th) 180464-U

NO. 5-18-0464

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PHYLLIS ROBINSON-COMBS, Individually and on Behalf of Others Similarly Situated,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiff-Appellant,	)	
v.	)	No. 16-L-656
ST. CLAIR NISSAN, INC.,	)	Honorable Stephen P. McGlynn,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE BOIE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly granted defendant's motion to dismiss counts III and IV as plaintiff's complaint was insufficient to state a cause of action for unjust enrichment or a cause of action under the Consumer Fraud Act.

¶ 2 Plaintiff, Phyllis Robinson-Combs, brought an action against defendant, St. Clair Nissan, Inc., individually and on behalf of others similarly situated, alleging defendant violated 92 Ill. Adm. Code 1010.540 (2013), which regulates electronic registration and titling (ERT) of vehicles, and the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2016)). For the following reasons, we affirm the order of the circuit court.

¶ 3 BACKGROUND

¶ 4 Defendant is an automotive dealership. On October 28, 2016, plaintiff purchased a used 2010 Dodge automobile (vehicle) from defendant. According to the plaintiff, defendant represented that the vehicle was "operational, in good condition, and covered by a 'full' warranty." Shortly after the purchase, the vehicle began to have mechanical problems. Over the next 30 days, plaintiff brought the vehicle back to defendant for problems with "the transmission, multiple warning lights, failing to properly run or start, and other mechanical problems." Ultimately, the plaintiff returned the vehicle to the defendant and requested a refund of the purchase price. Defendant refused to provide plaintiff a refund.

¶ 5 Plaintiff also states that, after the vehicle began having mechanical difficulties, she "made a close examination of her vehicle purchase paperwork"[1] and noticed that she had paid an "Optional ERT Fee" of $25. The vehicle purchase document is signed by the plaintiff and the ERT fee is listed as follows:

[1]Plaintiff attached the front page of a single document to her complaint that indicated the ERT fee. She did not provide the reverse of the document or any additional documents executed at the time of the vehicle purchase. The parties refer to this page in various ways within the briefs. As such, for the purpose of this decision, we will refer to this document as "the vehicle purchase document."

VEHICLE SALE PRICE	$7,32[illegible]	.00
DEALER INSTALLED OPTIONS 1-4		
OPTIONAL ERT FEE	$25	00
TOTAL VALUE	$7,354	00
ALLOWANCE ON TRADE		
CASH PRICE OR TRADE DIFFERENCE	$7,354	00
DOC. FEE	$[illegible]	27
PLUS SALES TAX	$489	01
MASS TRANSIT FEE	$20	00
PLUS LICENSE FEE	$196	00
PLUS PAYOFF ON TRADE		
BALANCE DUE	$8,228	28
CASH SUBMITTED WITH ORDER	$300	00
DEALER _____ FACTORY _____ REBATE		
CASH TO BE PAID AT DELIVERY		
TOTAL BALANCE	$7,928	28

¶ 6 On December 9, 2016, plaintiff filed a four-count complaint against the defendant. Count I alleged a personal action for breach of warranty and count II alleged a personal action for violation of the Consumer Fraud Act. Counts III and IV were brought by the plaintiff individually and on behalf of others similarly situated.[2] Count III alleged that defendant violated 92 Ill. Adm. Code 1010.540 (2013), which regulates how a dealership must disclose the ERT fee. Count IV incorporated count III and alleged that defendant violated the Consumer Fraud Act by "cramming"[3] the ERT fee on the sales contract in a manner that "customers will unwittingly pay it and not notice or question the charge."

[2]The class was never certified by the court.

[3]" '[C]ramming'—the shady practice of putting bogus charges on a person's bill (usually a monthly credit card statement) in the hope that the consumer will pay the inflated balance without noticing that he has been duped." *Lakin Law Firm, P.C. v. Federal Trade Comm'n*, 352 F.3d 1122, 1123 (7th Cir. 2003).

¶ 7 Defendant filed a motion to dismiss plaintiff's complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)). On January 17, 2018, the circuit court heard arguments on defendant's motion to dismiss and dismissed counts I and II, without prejudice. The circuit court took that portion of defendant's motion to dismiss concerning counts III and IV under advisement.

¶ 8 On May 22, 2018, the circuit court issued an order dismissing counts III and IV. The circuit court found that 92 Ill. Adm. Code 1010.540 (2013) did not grant a private cause of action for a dealership's noncompliance and that, although defendant may not have strictly complied with 92 Ill. Adm. Code 1010.540 (2013), the manner in which defendant disclosed the ERT fee did not violate the Consumer Fraud Act. Pursuant to Illinois Supreme Court Rule 272 (eff. Nov. 1, 1990), the circuit court entered judgment on August 29, 2018. Plaintiff now appeals the circuit court's dismissal of counts III and IV.

¶ 9 ANALYSIS

¶ 10 The standards governing our review of the circuit court's order in this case are stated as follows:

> "A motion to dismiss filed pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) attacks the legal sufficiency of a complaint; its purpose is to raise defects apparent on the face of the pleadings. [Citation.] 'The standard of review for a section 2-615 motion to dismiss is whether the complaint sufficiently states a cause of action, and the merits of the case are not considered.' [Citation.] The question presented by a section 2-615 motion is whether the allegations of the complaint, taking all well-pleaded facts as

> true and considering them in a light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. [Citations.] When deciding a section 2-615 motion to dismiss, the court may not consider affidavits, the products of discovery, documentary evidence not incorporated into the pleadings as exhibits, testimonial evidence, or other evidentiary materials. [Citation.] The complaint must be construed liberally and should only be dismissed when it appears that the plaintiff cannot recover under any set of facts. [Citation.] However, the plaintiff must allege sufficient facts to bring a claim within a legally recognized cause of action. [Citation.] Our standard of review is *de novo.* [Citation.]" *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 14 (quoting *Jackson v. Michael Reese Hospital & Medical Center*, 294 Ill. App. 3d 1, 9 (1997)).

¶ 11 As an initial matter, defendant asserts that plaintiff has waived any argument on appeal that 92 Ill. Adm. Code 1010.540 (2013) allows for a private right of action by failing to develop an argument concerning that issue in her appellate brief. We agree.

¶ 12 Plaintiff states in her brief that, "[o]n the other hand, if the [t]rial [c]ourt was wrong, and this [c]ourt finds that the regulation does indeed [allow] a private right of action, the case should still be reversed and remanded, as [p]laintiff is substantively entitled to proceed." However, the circuit court's ruling on whether 92 Ill. Adm. Code 1010.540 (2013) allows a private action is not listed as an issue in plaintiff's appeal and plaintiff has failed to articulate any legal argument which would allow a meaningful review of that portion of the circuit court's decision.

¶ 13 A reviewing court is entitled to have all the issues clearly defined and to be provided with meaningful, coherent argument and citation to pertinent authority. Facts and arguments in support of an issue on appeal are required by Illinois Supreme Court Rule 341(h) (eff. Feb. 6, 2013) and are to be included in plaintiff's brief in the order set forth in Rule 341(h). Plaintiff has failed to provide this court with any articulated legal argument supported by citation to pertinent authority concerning that portion of the circuit court's order finding that 92 Ill. Adm. Code 1010.540 (2013) does not provide a private right of action. As such, we find that plaintiff has forfeited this issue on appeal.

¶ 14 A. ERT Fee and Unjust Enrichment

¶ 15 The circuit court dismissed count III upon a finding that 92 Ill. Adm. Code 1010.540 (2013) did not grant a private right of action; however, plaintiff argues that "the [t]rial [c]ourt did not even discuss the unjust enrichment arguments in its order." In her response to defendant's motion to dismiss, plaintiff listed the requirements for an unjust enrichment claim and then stated that she had "pleaded that [d]efendant took and obtained, unlawfully, a benefit and ask[ed] that it be disgorged." Plaintiff now argues that her pleadings were enough for the circuit court to allow count III to proceed on a claim for unjust enrichment even with a finding of no private right of action under 92 Ill. Adm. Code 1010.540 (2013).

¶ 16 Our standard of review is *de novo*. Therefore, the question we must determine is whether the allegations contained in count III of plaintiff's complaint, when interpreted in the light most favorable to the plaintiff, are enough to allege a cause of action on a theory of unjust enrichment.

¶ 17 "To 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." *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989). "The theory of unjust enrichment is an equitable remedy based upon a contract implied in law. [Citation.] The basis for the unjust-enrichment doctrine is that no one ought to enrich himself unjustly at the expense of another. [Citation.] Because it is an equitable remedy, unjust enrichment is only available when there is no adequate remedy at law." *Nesby v. Country Mutual Insurance Co.*, 346 Ill. App. 3d 564, 566-67 (2004).

¶ 18 Plaintiff alleged in count III that defendant placed the ERT fee into its sales contract "automatically, and without consultation *** in the hopes that the customer will unwittingly pay it and not notice or question the charge." Plaintiff further alleged that "the fee itself it [*sic*] for services that do not actually benefit most of the consumers, and even those that obtain some arguable benefit for the fee are not provided proper notice of the charge or the opportunity to opt out of the charge." Plaintiff bases these allegations on defendant's failure to comply with 92 Ill. Adm. Code 1010.540 (2013) in distinguishing the ERT fee from other language on the form. Because defendant did not disclose the ERT fee in compliance with 92 Ill. Adm. Code 1010.540 (2013), plaintiff argues that customers were not aware that the fee could be refused.

¶ 19 92 Ill. Adm. Code 1010.540 (2013) provides in relevant part:

> "Vendors participating in the Electronic Registration and Titling (ERT) program may charge customers a fee for the optional service of electronically processing their vehicle titling and registration or data and for providing registration plates or sticker. The maximum fee to be imposed upon a customer utilizing the ERT services shall be $25[.] ***
>
> A) the fee shall be identified on the bill of sale, receipt or any other sales documents as " 'Optional ERT Fee'. The 'Optional ERT Fee' language shall be distinguished from other language with the use of bold, colored, italic or underscored type or by using a larger font, but in no case may the font size be smaller than that required by the Motor Vehicle Retail Installment Sales Act [815 ILCS 375]. If this method is used, not later than July 1, 2006, all pre-printed bills of sale, receipts or other sales documents shall identify the fee as 'Optional ERT Fee' in bold type; or
>
> B) the fee shall be identified on a separate document, including the phrase 'Optional Electronic Registration Fee', using a font size not smaller than that required by the Motor Vehicle Retail Installment Sales Act and with a signature line indicating the customer's acceptance or rejection of the option of paying the fee."

¶ 20 Plaintiff does not allege that defendant failed to disclose the ERT fee or that defendant failed to provide the services for which the ERT fee was charged. There is also

no allegation that defendant charged an ERT fee in excess of the $25 amount that is statutorily permissible. Plaintiff's theory of unjust enrichment is based on the allegation that the ERT fee "was typed onto the single pre-printed form using the exact same color, font and size as the other typewritten information contained on the form, that in no way complied with the regulation."

¶ 21 Plaintiff argues that "[i]t does not take Clarence Darrow[4] to make a convincing argument that a fee paid, without disclosing the legal requirements showing the fee to be 'optional' should not be retained by the person or entity that failed to make the proper disclosure." However, as demonstrated above, the ERT fee was listed as "OPTIONAL" and is the only fee listed on that section of the document. The document is signed by the plaintiff and there is nothing to indicate that the plaintiff was not given an opportunity to review the document prior to signing it. There are also no indications that plaintiff failed to read the document before signing it or that defendant made any misleading statements concerning the document or the ERT fee. Finally, there is nothing to indicate that the plaintiff did not understand "OPTIONAL ERT FEE" due to a mental or physical defect.

¶ 22 Even taking as true that the ERT fee disclosure did not comply with 92 Ill. Adm. Code 1010.540 (2013), we cannot determine that a fee, charged for services that were performed, and that was disclosed as optional on a written document signed by the plaintiff

[4]Clarence Darrow was an attorney and a leading member of the American Civil Liberties Union who became famous in the early twentieth century for his involvement in several high-profile cases. https://en.wikipedia.org/wiki/Clarence_Darrow (last visited Aug. 26, 2019).

prior to the performance of the service, is a benefit unjustly retained by defendant to the plaintiff's detriment.

¶ 23 Having found that plaintiff's complaint fails to meet the first element for an unjust enrichment cause of action, there is no necessity for this court to address the second element of whether defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience. Based on the above, we find count III of plaintiff's complaint insufficient to state a cause of action for unjust enrichment.

¶ 24 This court would note that plaintiff attached the front page of a single vehicle purchase document to her complaint and did not attach the reverse side of that document or any additional documents concerning the purchase of the vehicle. As stated earlier, an appeal from a ruling on a section 2-615 (735 ILCS 5/2-615 (West 2016)) motion to dismiss limits this court to the legal sufficiency of the complaint and defects apparent on the face of the pleadings. However, if a contract exists (and it would be highly unlikely that a contract does not exist for the purchase of an automobile), then "[i]t is the unambiguous contract language that controls, not equitable considerations." *Nesby*, 346 Ill. App. 3d at 567. "Where there is a specific contract that governs the relationship of the parties, the doctrine of unjust enrichment has no application." *Id.*

¶ 25 B. ERT Fee and the Consumer Fraud Act

¶ 26 Plaintiff argues that the circuit court dismissed count IV and "simply ignored the 'unfairness' prong, and focused exclusively on the 'misleading or deceptive' prong of the Consumer Fraud Act." Plaintiff states that defendant's violation of 92 Ill. Adm. Code 1010.540 (2013) took away from the plaintiff and other consumers "the opportunity to

make an informed decision on whether this $25 ERT fee provided them any benefit and whether they wanted to pay it. Taking that legally required option away is, in fact, unfair at its core."

¶ 27 "The Consumer Fraud Act is a regulatory and remedial statute intended to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices. It is to be liberally construed to effectuate its purpose. [Citation.] Unfair or deceptive practices are described in the Act as:

> 'including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact *** in the conduct of any trade or commerce ***.' 815 ILCS 505/2 (West 1992)." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 416-17 (2002).

¶ 28 The elements of a claim under the Consumer Fraud Act are (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, and (3) the occurrence of the deception during a course of conduct involving trade or commerce. Recovery may be had for unfair as well as deceptive conduct. *Id.* at 417.

¶ 29 "In determining whether a given course of conduct or act is unfair, we observe the Consumer Fraud Act mandates that 'consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.' 815 ILCS 505/2 (West 1992). The United States Supreme Court in *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 31 L. Ed. 2d 170,

92 S. Ct. 898 (1972), cited with approval the published statement of factors considered by the Federal Trade Commission in measuring unfairness. [Citation.] These factors are (1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers." *Id.* at 417-18.

¶ 30 Here, plaintiff is alleging defendant's violation of 92 Ill. Adm. Code 1010.540 (2013) is "unfair at its core" because plaintiff and others similarly situated were denied the option of whether to pay the optional ERT fee. However, as discussed above, plaintiff was informed in writing of the ERT fee. The ERT fee was listed as "OPTIONAL" on the vehicle purchase document, and the document is signed by the plaintiff.

¶ 31 "To survive a motion to dismiss for the failure to state a cause of action, a complaint must be both legally and factually sufficient. A liberal construction of pleadings will not allow a litigant to resort to notice pleading, and conclusions of fact will not suffice to state a cause of action regardless of whether they generally inform the defendant of the nature of the claim against him." *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 434 (2007).

¶ 32 Plaintiff's complaint alleges that defendant placed the ERT fee on the vehicle purchase agreement "in the hopes that the customer will unwittingly pay it and not notice or question the charge." However, plaintiff never alleges that she did not notice the ERT fee or that she unwittingly paid the ERT fee. In her pleadings, plaintiff does not allege that defendant's failure in strictly complying with 92 Ill. Adm. Code 1010.540 (2013) was against public policy or that it was "immoral, unethical, oppressive, or unscrupulous."

Plaintiff alleges that she was injured in the amount of $25 but does not allege that the defendant failed to provide the services for which the ERT fee was paid or that she was unaware of the optional nature of the ERT fee. Finally, and most notably, plaintiff does not allege in count IV that the defendant violated the Consumer Fraud Act—only that the Act exists. As such, count IV of plaintiff's complaint fails to state a cause of action under the Consumer Fraud Act.

¶ 33 Therefore, the circuit court properly granted defendant's motion to dismiss counts III and IV as plaintiff's complaint was insufficient to state a cause of action for unjust enrichment or a cause of action under the Consumer Fraud Act.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we affirm the order of the circuit court dismissing counts III and IV of plaintiff's complaint.

¶ 36 Affirmed.