

2011 IL App (2d) 110030-U
No. 2-11-0030
Order filed November 15, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LOIS F. BENEDICT,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff and Counterdefendant-)	
Appellee,)	
)	
v.)	No. 09-SR-2492
)	
COUNTY WIDE LANDSCAPING, INC.,)	
)	
Defendant and Counterplaintiff-)	
Appellant,)	Honorable
)	Bruce R. Kelsey,
(Brian Larson, Defendant-Appellant).)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: The trial court's findings that parties mutually agreed to rescind contract and that defendant County Wide agreed to return plaintiff's full deposit were not against the manifest weight of the evidence; defendant forfeited the issue of the sufficiency of plaintiff's complaint where the complaint stated a legally recognized cause of action against defendant Larson; defendant did not forfeit the issue of the sufficiency of the evidence to sustain the judgment against defendant Larson by failing to raise the issue before the trial court following a bench trial; trial court's finding that defendant Larson was personally liable for the judgment was against the manifest weight of the evidence.

¶ 1 Plaintiff, Lois Benedict, filed a small claims complaint against defendants, County Wide Landscaping, Inc. (County Wide) and Brian Larson, seeking the return of \$13,250 of a deposit plaintiff paid under a contract to have County Wide install a brick paver driveway at her home. County Wide filed a counterclaim for breach of the driveway paving contract. Defendants filed a motion for summary judgment as to plaintiff's complaint, and County Wide filed a motion for summary judgment as to its counterclaim, both of which the trial court denied. After a bench trial, the trial court entered judgment in favor of plaintiff and against defendants for \$13,250 on plaintiff's complaint, and entered judgment in favor of plaintiff on County Wide's counterclaim. Defendants appeal from the order denying the two motions for summary judgment and from the order entering judgment in plaintiff's favor. For the following reasons, we affirm in part and vacate in part.

¶ 2 **BACKGROUND**

¶ 3 Plaintiff originally filed a small claims complaint against County Wide and Larson in the circuit court of Du Page County. Plaintiff alleged that she had given defendants a \$15,000 deposit under a contract to have defendants install a brick paver driveway at her home. Plaintiff alleged that defendants had agreed to return plaintiff's deposit but had ceased making payments after refunding only \$1,750. Subsequently, County Wide filed a counterclaim against plaintiff alleging that plaintiff had breached the driveway paving contract by attempting to cancel. County Wide sought damages of more than \$25,000, representing its lost profits, plus costs and attorney fees. Following the filing of County Wide's counterclaim, the case was transferred from the small claims division of the trial court to the arbitration division.

¶ 4 Shortly thereafter, plaintiff filed a one-count amended complaint against County Wide and Larson. The complaint alleged that Larson was an individual "employed by County Wide Landscaping." The complaint further alleged: "On or about May 16, 2007, [p]laintiff and

[d]efendants entered into a [c]ontract for the installation of a custom brick driveway”; “[p]laintiff paid [d]efendants a deposit of \$15,000.00”; “[d]efendants were unable to provide brick pavers in a color acceptable to [p]laintiff and the parties agreed on or about July, 2007, to cancel the [c]ontract”; “[d]efendants further agreed to refund the \$15,000.00 deposit to [p]laintiff in monthly payments of \$750.00 each”; “[d]efendants made a total of three (3) payments of \$500.00, \$750.00 and \$500.00”; and “[d]efendants subsequently breached the repayment agreement by failing to make any further payments to [p]laintiff.” The amended complaint sought \$13,250, representing the unpaid balance of plaintiff’s deposit, plus interest and costs. The amended complaint contained no separate count against Larson individually.

¶ 5 On June 22, 2010, the case proceeded to an arbitration hearing. The arbitrators entered an award of \$13,250 plus costs in favor of plaintiff and against County Wide (but not Larson) on plaintiff’s amended complaint, and found for plaintiff on County Wide’s counterclaim. On June 28, 2010, defendants filed notice of their rejection of the arbitration award.

¶ 6 Motions for Summary Judgment

¶ 7 After they rejected the arbitration award, defendants filed a motions for summary judgment on plaintiff’s amended complaint, and County Wide filed a motion for summary judgment on its counterclaim. In defendants’ motion for summary judgment on plaintiff’s amended complaint, defendants argued that they were entitled to judgment as a matter of law because there was no genuine issue of material fact as to whether the driveway paving contract was ever cancelled. Defendants stated that, under the Illinois Home Repair and Remodeling Act (Act) (815 ILCS 513/1 *et seq.* (West 2006)), defendants were required to notify plaintiff that she had three business days in which she could cancel the contract. Defendants cited the contract’s cancellation provision, which stated, “YOU, THE CONSUMER, MAY CANCEL THIS TRANSACTION AT ANY TIME

PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION.” Defendants also cited a pamphlet entitled, “Home Repair: Know Your Consumer Rights,” which defendants provided to plaintiff at the time she signed the contract. The pamphlet stated, “Remember, you have 3 business days from the time you sign your contract to cancel any contract if the sale is made at your home.” Defendants argued that plaintiff’s attempts to cancel the contract—the first of which plaintiff admitted was on July 9, 2007—were ineffective because they occurred more than three days after the contract was signed. Defendants also argued that the parties never reached a valid agreement to refund plaintiff’s deposit, because there was no “meeting of the minds” on the amount to be refunded, and because plaintiff gave no consideration to defendants for their purported agreement to refund the deposit.

¶ 8 County Wide also filed a motion for summary judgment on its counterclaim. In the motion, County Wide repeated its argument that plaintiff’s attempts to cancel the driveway paving contract were ineffective. County Wide again urged that the terms of contract were unambiguous—the contract gave plaintiff only three days in which she could cancel. County Wide also argued that plaintiff breached the contract by attempting to cancel and by not permitting defendants to perform their obligations under the contract. County Wide further argued that it had been at all times ready and willing to perform. County Wide concluded that it was entitled to judgment as a matter of law on its counterclaim, because it could not be disputed that plaintiff had breached the contract. On October 14, 2010, the trial court denied both motions for summary judgment.

¶ 9 Bench Trial

¶ 10 On December 6, 2010, the case proceeded to a bench trial. The following undisputed facts are taken from the testimony and evidence introduced at trial.

¶ 11 On May 16, 2007, Larson, the owner of County Wide, met with plaintiff and her son-in-law at plaintiff's home to discuss replacing her driveway with a brick paver driveway. Larson showed plaintiff available pavers in the manufacturer's catalog. Based on plaintiff's specifications, Larson recommended granite-colored Holland Stone pavers for the driveway with charcoal-colored Holland Stone pavers for the soldier course and "Nevada"-colored Holland Stone pavers for a diamond inlay. Larson provided plaintiff with a signed estimate, in which he specified the particular pavers to be used. Plaintiff told Larson that she wanted to see samples of the pavers.

¶ 12 Plaintiff signed a contract the same day. The contract, which incorporated the estimate by reference, specified that County Wide would replace plaintiff's current driveway with a brick paver driveway at a cost of \$38,000. The contract also required plaintiff to give County Wide a \$15,000 deposit. On May 18, 2007, plaintiff tendered a check to County Wide for that amount.

¶ 13 On May 18, 2007, an employee of County Wide brought the paver samples to plaintiff's home. The employee told plaintiff that the pavers would change color when wet or sealed. Plaintiff poured water over one of the pavers and discovered that it turned "taupe," which did not match the "blue/gray" color of her home. Plaintiff expressed her dissatisfaction with the color of the paver to the employee.

¶ 14 On May 22, 2007, Larson returned to plaintiff's home with a different paver that he thought would better match the color of plaintiff's house. Plaintiff told Larson that she would not commit to any paver until she saw its color when sealed. Larson told her that sealed pavers would be more expensive, and that he would return the next week with a sealed sample.

¶ 15 An addendum to the contract dated May 22, 2007, and signed by plaintiff, changed the pavers that County Wide was to use for the driveway. The addendum indicated a switch to platinum

gray Unilock Series 3000 pavers for the driveway with onyx black Series 3000 pavers for the soldier course. The addendum increased the contract price by \$20,000.

¶ 16 A month passed before the parties discussed the paver samples again. On June 25, 2007, plaintiff called Larson to inquire into the status of the sealed samples. Larson said an employee must have dropped off the samples at the wrong house. Either Larson or another employee then brought the sealed samples to plaintiff's home. Again, plaintiff disliked the colors of the pavers.

¶ 17 On July 9, 2007, Larson returned to plaintiff's home. It was during this meeting that plaintiff first informed Larson that she wanted to cancel the contract. She told Larson that she thought he had not been "up front" with her when she signed the contract because Larson had failed to inform her that there were limited colors of pavers available. She also complained that the switch to a different color paver was to cost an additional \$20,000. She said she was not satisfied with the colors of any of the pavers and that she wished to cancel the contract. Larson did not agree to cancel the contract and asked plaintiff to have her son-in-law call him.

¶ 18 Plaintiff testified that, at some point following the July 9, 2007, meeting, Larson had a phone conversation with plaintiff's son-in-law. Plaintiff testified that her son-in-law offered Larson \$500 of the \$15,000 deposit to compensate Larson for the time he had spent on the project. During his testimony, Larson acknowledged that he had talked to plaintiff's son-in-law; however, Larson was not asked any questions about the contents of the conversation. Plaintiff's son-in-law was not called as a witness at trial.

¶ 19 It was at this point that plaintiff's testimony and Larson's testimony began to conflict. Plaintiff testified that, on August 14, 2007, she phoned Larson. According to plaintiff, Larson agreed during this conversation to cancel the contract. When asked at trial whether she discussed with Larson the amount of the deposit that Larson was to return to her, plaintiff responded, "I don't

think so.” Plaintiff testified that, given her son-in-law’s prior conversation with Larson, she was unsure whether Larson was to return \$14,500 or the full \$15,000 deposit.

¶ 20 Larson testified to a different version of the August 14, 2007, phone conversation. According to Larson, he never agreed to cancel the contract during the phone conversation, although he did agree to return \$5,000 to plaintiff. On cross-examination, Larson admitted that by agreeing to pay \$5,000 to plaintiff, he was agreeing to return a portion of plaintiff’s \$15,000 deposit. When asked whether plaintiff had asked for her full deposit back during the phone conversation, Larson stated, “I believe so.”

¶ 21 Plaintiff testified that, after her conversation with Larson on August 14, 2007, she wrote a letter to Larson that purported to recount the agreement she had reached with him. The letter was admitted into evidence at trial. The letter asked Larson to send written confirmation “of what you have told me in conversation here at my home and on the phone today.” The letter went on:

“You stated that you will be repaying me \$750.00 with a *certified* check at the end of each month for the next 8 months (August thru March) towards the \$15,000.00 you have of mine. That’s a total of \$6,000.00 which leaves a balance of \$9,000.00 that you said you will pay in *full* in *April*.

I’m looking forward to full payment since you must realize that by not paying me the total amount of \$15,000.00 *now*, in a lump sum, I’m losing money by not having it in my credit union where I would be collecting ‘interest’ for all these months ***. ***

I know that you spent time and effort but I feel justified in the full return, since you wanted to spread the payments out for several months and I’m losing money because it is not a total refund right now.” (Emphases in original.)

Plaintiff testified that she sent the letter to Larson via first-class mail on August 14, 2007, at the address for County Wide listed on the contract documents. While plaintiff did retain a copy of the letter, she did not retain a copy of the addressed envelope.

¶ 22 At trial, Larson denied receiving the letter; however, on cross-examination, he testified that the address listed on the contract documents was in fact County Wide’s place of business at the time. Larson also testified that he did not agree to pay exactly \$750 per month, as purported in the letter, but that he agreed to pay “some every month.” Larson testified that he agreed to pay “500, 750, somewhere in that area.”

¶ 23 Plaintiff testified that she received three checks from Larson, all of which were admitted into evidence. All of the checks were drawn on County Wide’s bank account and signed by Larson. During his testimony, Larson admitted sending the checks to plaintiff. Plaintiff testified that she received the first check from Larson on September 20, 2007. The check was dated September 14, 2007, and was for \$500. The words “Aug[.] payment” were written on the memo line. Plaintiff testified that, after receiving the check, she wrote a second letter to Larson, which was also admitted into evidence:

“Thank you—I finally today, Sept[.] 20, 2007 received your first check for \$500.00—you said the payments would be \$750.00 Aug. thru March 2008 (8 months) and then the balance (a total of \$15,000.00) in April. This check is three weeks late and not the correct amount.

Please—starting with your next check (due end of Sept[.]) for \$750.00 it has to be on time and the correct amount. ***” (Emphases in original.)

As with the first letter, plaintiff testified that she sent the letter to County Wide's office via first-class mail, but she did not retain a copy of the addressed envelope. Larson denied receiving the second letter.

¶ 24 Plaintiff testified that she received the second check from Larson on October 18, 2007. The check was dated October 1, 2007, and was for \$750. The words "Sept. Payment" were typed in the memo line. Plaintiff testified that, after she received the check, she wrote a third letter to Larson, which was also admitted into evidence:

"I received your second payment today in the amount of \$750.00 towards the \$15,000.00 that you have of mine. \$750.00 was the agreed amount for each month until April when the total balance is paid off.

\$500.00 was received Sept 20th (for Aug[.]) both

\$750.00 " " Oct 17th (for Sept[.] late

\$1250.00 (should be \$1500.00)." (Emphases in original.)

Plaintiff testified that she sent the third letter via first-class mail to the same address as the previous two letters. Larson denied receiving the third letter.

¶ 25 Plaintiff testified that she received the third and final check from Larson on November 14, 2007. The check was dated November 13, 2007, and was for \$500. The word "Oct." was written in the memo line.

¶ 26 Plaintiff testified that none of the three letters was returned to her. She testified that she received no correspondence or written confirmation from Larson, other than the three checks. The three checks totaled \$1,750. Plaintiff received no other payments from defendants.

¶ 27 At the close of the bench trial, the court found "[t]hat the question of credibility certainly falls on the side of [plaintiff]." The court also gave weight to plaintiff's three letters: "I find that the

credibility of the witnesses establishes that the original contract was in fact cancelled, was [*sic*] in fact entered into an agreement, and based upon the letters which confirm [plaintiff's] position, \$15,000 is awarded to plaintiff." After taking into account the \$1,750 defendants had already refunded to plaintiff, the court entered judgment of \$13,250 plus costs in favor of plaintiff and against County Wide and Larson. The court also entered judgment in favor of plaintiff on County Wide's counterclaim. This timely appeal followed.

¶ 28

ANALYSIS

¶ 29 Defendants raise three issues on appeal: (1) whether the trial court erred by denying defendants' two motions for summary judgment, (2) whether the trial court's finding that the defendants agreed to rescind the driveway paving contract and to refund the full \$15,000 deposit were against the manifest weight of the evidence, and (3) whether the trial court erred by entering judgment against Larson personally. We address each issue in turn.

¶ 30

Motions for Summary Judgment

¶ 31 Defendants appeal from the order denying their two motions for summary judgment, but they fail to make any arguments with respect to the motions in their brief. Regardless, we need not address the trial court's denial of defendants' motions for summary judgment. As counsel for defendants conceded at oral argument, the issues raised in defendants' motions were the same issues addressed at trial. Accordingly, the denied motions for summary judgment merge into the judgment entered at trial, making the order denying the motions not appealable. *Mull v. Kane County Forrest Preserve District*, 337 Ill. App. 3d 589, 591 (2003).

¶ 32

Mutual Agreement to Rescind

¶ 33 Defendants argue that the trial court erred in finding that defendants agreed to rescind the driveway paving contract and to refund plaintiff's full \$15,000 deposit. We will affirm the judgment following a bench trial unless the judgment was against the manifest weight of the evidence. *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 177 (2004). "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Dargis*, 354 Ill. App. 3d at 177.

¶ 34 "Rescission" can refer either to the equitable remedy of rescission or to contracting parties' mutual agreement to rescind a contract. *Mor-Wood Contractors, Inc. v. Ottinger*, 205 Ill. App. 3d 132, 142 (1990). In either case, "'[r]escission' means 'to restore the parties to their former position[;]***a termination of a contract with restitution.'" *Chicago Limousine Service, Inc. v. Hartigan Cadillac, Inc.*, 139 Ill. 2d 216, 227 (1990) (quoting 17A C.J.S. *Contracts* §385(2), at 458 (1963)). "In a mutual agreement to rescind, the parties may absolve themselves from their obligations under such terms as they choose." *Kirchhoff v. Rosen*, 227 Ill. App. 3d 870, 878 (1992). A mutual agreement to rescind a contract can either be express or implied. *Kirchhoff*, 227 Ill. App. 3d at 877. "An agreement to mutually rescind an existing contract can be found from circumstances or a course of conduct clearly evidencing such rescission." *Kirchhoff*, 227 Ill. App. 3d at 879. While one party's communication of intent to rescind a contract cannot give rise to a mutual agreement to rescind, if the other party acquiesces in the proposal to rescind, then a mutual agreement to rescind may be implied. *Mor-Wood Contractors*, 205 Ill. App. 3d at 142-43. The implication must be based on conduct that was positive, unequivocal, and inconsistent with the existence of the contract. *Kalman v. Bertacchi*, 80 Ill. App. 3d 530, 533 (1980).

¶ 35 Defendants argue that there can be no mutual agreement to rescind because there was no "meeting of the minds" on the terms of the agreement. Defendants point to Larson's testimony that,

although he agreed to return \$5,000 of plaintiff's deposit, he never agreed to cancel the contract. Defendants argue that Larson "agreed to pay the \$5,000 in an attempt to resolve all issues between the parties, since [p]laintiff clearly was not happy." Defendants also point to plaintiff's testimony that she was unsure whether Larson had agreed to return \$14,500 or the full \$15,000.

¶ 36 Our review of the record shows that it contains sufficient evidence to support the trial court's conclusion that defendants agreed to rescind the contract and to return the full \$15,000 deposit. Plaintiff testified that Larson agreed to cancel the contract during the August 14, 2007, phone conversation. Although Larson testified that he never agreed to cancel the contract, the trial court found plaintiff to be the more credible witness. The trial court is in the best position to assess the credibility of witnesses, and we will not substitute our judgment for that of the trial court. *Career Concepts, Inc. v. Synergy, Inc.*, 372 Ill. App. 3d 395, 405 (2007).

¶ 37 Although plaintiff's testimony regarding the exact amount Larson agreed to return was inconclusive, the trial court found plaintiff's three letters to be probative of the terms of the agreement the parties reached over the phone on August 14, 2007. Plaintiff testified that she wrote the first letter immediately following her August 14, 2007, phone conversation with Larson. The letter stated that Larson agreed to cancel the contract and to refund the full \$15,000 deposit. It also stated that Larson agreed to make eight monthly payments of \$750 from August 2007 through March 2008, when Larson would refund the remaining \$9,000. Moreover, although plaintiff testified that she was not sure whether she had discussed with Larson the amount of the deposit that he would refund, when Larson was asked whether plaintiff had requested her full deposit back during the phone conversation, Larson stated, "I believe so."

¶ 38 Although Larson denied receiving plaintiff's three letters, his conduct after August 14, 2007, conformed to the terms of the agreement as described in plaintiff's letters. He sent the first check

to plaintiff on September 20, 2007, with the words “Aug[.] payment” written in the memo line. Plaintiff complained in her second letter to Larson that the check was for only \$500, when it should have been for \$750. Consistent with this demand, Larson’s next check was for \$750, with the words “Sept. payment” typed in the memo line. Larson sent a third check on November 13, 2007. Larson’s conduct in sending the three checks to plaintiff was positive, unequivocal, and inconsistent with the continued existence of the driveway paving contract.

¶ 39 Based on the evidence contained in the record, we cannot say that the trial court’s finding that the defendants mutually agreed to rescind the driveway paving contract and to refund plaintiff’s full \$15,000 deposit was against the manifest weight of the evidence.

¶ 40 In their brief, defendants argue that the parties could not have reached a mutual agreement to rescind because the terms of the original contract limited the time period for cancellation to three days, which had passed when plaintiff purported to cancel the contract on August 14, 2007. However, at oral argument, counsel for defendants conceded that the contract’s cancellation provision concerned plaintiff’s unilateral right to rescind the contract, and that the parties were free mutually to agree to rescind the contract more than three days after the parties signed the contract. Defendants’ concession is supported by the case law, which places few limits on contracting parties’ ability mutually to agree to rescind a contract. *Chicago Limousine Service*, 139 Ill. 2d at 227 (“Generally, contracts—even fully executed ones [citations]—can be cancelled or rescinded by mutual consent of the parties or judicial decree.”). The terms of a contract do not limit parties’ ability to do so (*Deien Chevrolet, Inc. v. Reynolds and Reynolds Company*, 265 Ill. App. 3d 842, 844-45 (1994)), nor does the existence of an earlier contract (*Printing Machinery Maintenance, Inc. v. Carton Products Company*, 15 Ill. App. 2d 543, 553 (1957)), unless the earlier contract was for

the benefit of a third party whose rights under the contract have vested (*Pliley v. Phifer*, 1 Ill. App. 2d 398, 407 (1954)).

¶ 41 Similarly, contrary to defendants' contention in their brief, the parol evidence rule is inapplicable to mutual agreements to rescind an earlier bilateral executory contract. *Printing Machinery Maintenance*, 15 Ill. App. 2d at 553. Where applicable, the parol evidence rule prohibits the introduction into evidence of prior or contemporaneous oral agreements; however, it does not bar evidence of subsequent oral agreements that modify or rescind a prior agreement. *E.A. Cox Co. v. Road Savers International Corp.*, 271 Ill. App. 3d 144, 152 (1995). Therefore, the parol evidence rule did not limit the evidence admissible to prove the parties' agreement to rescind.

¶ 42 Defendants stated in their brief that they included the cancellation provision in the contract to comply with the Act (815 ILCS 513/1 *et seq.* (West 2006)). Section 20(a) of the Act requires contractors to provide its customers with a pamphlet entitled "Home Repair: Know Your Consumer Rights," informing consumers of their right to cancel any home repair or remodeling contract over \$1,000 within three business days. 815 ILCS 513/20(a) (West 2006). Again, the three-day cancellation period concerns a consumer's unilateral right to cancel any home repair or remodeling contract covered by the Act. The Act is silent as to the ability of consumers and contractors mutually to agree to rescind a home repair or remodeling contract; therefore, the Act has no bearing on the issue before us.

¶ 43 Defendants' final argument regarding rescission is that, even if there were a mutual agreement to rescind the contract, it was void because it was not supported by consideration. This argument is without merit. In a mutual agreement to rescind a contract, the parties' agreement to discharge each other from their contractual obligations is sufficient consideration for the agreement to rescind. *Printing Machinery Maintenance*, 15 Ill. App. 2d at 553; *Dickson v. Owens*, 134 Ill. App.

561, 564 (1907); see also 1 E. Alan Farnsworth, *Farnsworth on Contracts* 550 (3d ed. 2004) (“Under an agreement of rescission, consideration is provided by each party’s discharge of the other’s remaining duties, regardless of the fairness of this exchange.”).

¶ 44 In light of our conclusion, we need not address defendants’ arguments that plaintiff breached the original contract, that County Wide was “ready and willing” to perform the contract at all times, and that County Wide is entitled to lost profits, attorney fees, costs, and interest under the contract for plaintiff’s breach. *United City of Yorkville v. Village of Sugar Grove*, 376 Ill. App. 3d 9, 22 (2007) (“Where a contract is rescinded, the rights of the parties under that contract are vitiated or invalidated.”).

¶ 45 Larson’s Personal Liability

¶ 46 Larson argues that the trial court erred by entering judgment against him personally. He contends that the trial court could have held him personally liable only if plaintiff had pleaded and proved grounds for piercing County Wide’s corporate veil, and that plaintiff’s amended complaint alleged no cause of action that could have led to his personal liability. He further argues that plaintiff presented no evidence at trial to support finding him personally liable.

¶ 47 Plaintiff responds that Larson forfeited the issue of his personal liability on appeal because he never raised it before the trial court. Plaintiff also argues that, regardless of the forfeiture issue, the evidence presented at trial was sufficient to find Larson personally liable because plaintiff negotiated the agreement to rescind with Larson. In plaintiff’s words, “[n]othing establishes that [d]efendant Larson was not taking personal responsibility for repaying the deposit money.”

¶ 48 Ordinarily, a defendant must object to the sufficiency of a complaint before the trial court, or the issue is forfeited. 735 ILCS 5/2-612(c) (West 2006); *Fox v. Heimann*, 375 Ill. App. 3d 35, 42 (2007). However, there is an exception to the forfeiture rule. A defendant may challenge a

complaint for the first time on appeal where the complaint states no legally recognized cause of action. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 61-62 (1994). “Stated more succinctly, courts draw a distinction between a complaint that alleges no cause of action, which may be challenged at any time, and one which defectively or imperfectly alleges a cause of action.” *Adcock*, 164 Ill. 2d at 62.

¶ 49 Here, because Larson failed to file a 2-615 motion to dismiss the complaint or to challenge the sufficiency of the complaint in any other way before the trial court, we can review plaintiff’s complaint only to determine whether it alleges a legally recognized cause of action. If it alleges a legally recognized cause of action, then Larson will be deemed to have forfeited the issue. Our review is *de novo*. *Fox*, 375 Ill. App. 3d at 41.

¶ 50 We conclude that plaintiff’s amended complaint alleges a legally recognized cause of action, even though its statement of that cause of action is skeletal, and likely would have been subject to dismissal under section 2-615. The cause of action it alleges is breach of the “repayment agreement.” The complaint alleges that Larson, as one of the “defendants,” was a party to the “repayment agreement” contract. The complaint further alleges that “defendants”—including Larson—breached the “repayment agreement” by failing to refund plaintiff’s full \$15,000 deposit. Because plaintiff’s complaint alleges a legally recognized cause of action for breach of contract, Larson has forfeited any challenge to the complaint at this late stage.¹

¹As the owner of County Wide, a corporation, Larson ordinarily would not be personally liable on a contract he entered into on behalf of the corporation, unless he agreed to be personally bound by the contract (*Ameritech Publishing of Illinois, Inc. v. Hadyeh*, 362 Ill. App. 3d 56, 62 (2005)); however, the complaint’s failure specifically to allege that Larson entered into the

¶ 51 Larson next argues that plaintiff presented no evidence at trial to support finding him personally liable. Again, plaintiff argues that Larson has forfeited this issue on appeal by failing to raise it before the trial court. The issue here is whether, following a civil bench trial, the party against whom judgment is entered can forfeit on appeal an issue of the sufficiency of the evidence. We conclude that it cannot.

¶ 52 Supreme Court Rule 366(b)(3)(ii) (eff. Feb. 1, 1994) governs the preservation of issues following a bench trial. The rule provides that, in nonjury cases, “[n]either the filing of nor the failure to file a post-judgment motion limits the scope of review.” Ill. S. Ct. R. 366(b)(3)(ii) (eff. Feb. 1, 1994). In *In re Gail*, 365 Ill. App. 3d 439 (2006), this court held that, under the rule, a party against whom judgment is entered following a bench trial does not forfeit an issue of the sufficiency of the evidence merely because the party fails to raise the issue before the trial court. *Gail*, 365 Ill. App. 3d at 444-45. *Gail* was an involuntary admission proceeding in which an element of the State’s case required proof that the respondent had requested a discharge in writing from the mental health facility where she was located. *Gail*, 365 Ill. App. 3d at 444. At the bench trial, the State presented no evidence that the respondent had made such a request, but the trial court nonetheless granted the State’s petition for involuntary admission. *Gail*, 365 Ill. App. 3d at 444. The respondent appealed the trial court’s judgment without having raised before the trial court the issue of the State’s failure to present evidence of a written request for discharge. *Gail*, 365 Ill. App. 3d at 444-45.

“repayment agreement” with the intent to be personally bound by it goes to the factual sufficiency of the complaint, which cannot be challenged for the first time on appeal (*Adcock*, 164 Ill. 2d at 65).

¶ 53 On appeal, this court held that the respondent had not forfeited the issue of the sufficiency of the evidence by failing to raise it below. *Gail*, 365 Ill. App. 3d at 444-45. This court noted that “we are not fully convinced that forfeiture of an issue of this kind is even possible in a nonjury proceeding.” *Gail*, 365 Ill. App. 3d at 444-45. We stated that, even though the respondent likely would have prevailed on a posttrial motion for a directed verdict, “[w]e know of no authority that holds that failure to file such a motion impairs a party’s ability to raise the sufficiency of the evidence as an issue on appeal.” *Gail*, 365 Ill. App. 3d at 445. We concluded that “there is no point in a nonjury proceeding in which a party must either raise or forfeit an issue of the sufficiency of the evidence.” *Gail*, 365 Ill. App. 3d at 445; see also *In re Marriage of Henry*, 297 Ill. App. 3d 139, 142 (1998) (“Our reading of the plain language of Rule 366(b)(3)(ii) leads us to conclude that the appellant’s failure to raise procedural or substantive errors relating to the final judgment at the trial court level does not preclude him from raising the issue on appeal.”).

¶ 54 Other authority similarly underscores that Rule 366(b)(3)(ii) requires no formal action to preserve for appeal an issue of the sufficiency of the evidence. *In re Harper*, 191 Ill. App. 3d 245, 247 (1989); *Henry*, 297 Ill. App. 3d at 142. The court in *Harper* cited the committee comments to section 68.3(1) of the Civil Practice Act, which was the precursor to Rule 366(b)(3)(ii): The “comments speak of no formal action being necessary to preserve for appeal ‘the issue of the sufficiency of the evidence.’ ” *Harper*, 191 Ill. App. 3d at 247 (quoting Ill. Ann. Stat., ch. 110, sec. 68.3(1), Committee Comments, at 270 (Smith-Hurd 1968)).

¶ 55 Accordingly, we conclude that Larson has not forfeited the issue of whether the evidence presented at trial was sufficient to sustain the judgment against him personally. Again, we will affirm the judgment following a bench trial unless the judgment was against the manifest weight of the evidence. *Dargis*, 354 Ill. App. 3d at 177. “A judgment is against the manifest weight of the

evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence.” *Dargis*, 354 Ill. App. 3d at 177.

¶ 56 A corporate officer is an agent of the corporation. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 661 (2006). “The individual liability of a corporate officer purporting to act for a corporation is no different than that of any other agent.” *Laff v. Chapman Performance Products, Inc.*, 63 Ill. App. 3d 297, 311 (1978). Where a corporate officer enters into a contract on behalf of a corporation and discloses his or her corporate affiliation, the officer generally will not be personally liable on the contract. *Ameritech Publishing*, 362 Ill. App. 3d at 62. However, where a corporate officer executes a contract without making any mention of the corporation, the officer may be personally liable. *Zella Wahnon & Associates v. Bassman*, 79 Ill. App. 3d 719, 724 (1979). The key consideration is the parties’ intentions: “In determining whether it is the intentions of the parties to bind the corporate principal or to bind the purported agent individually, all of the facts and circumstances surrounding the making of the contract are properly considered by the court.” *Zella*, 79 Ill. App. 3d at 724 (quoting *M & J Diesel Corp. v. Nettleton*, 56 Ill. App. 2d 146, 151 (1965)). These rules apply equally where an officer is the sole shareholder of the corporation. *Zella*, 79 Ill. App. 3d at 724.

¶ 57 Because the parties’ agreement to rescind the driveway paving contract and to refund plaintiff’s deposit was an oral agreement, there was no written contract to establish the express intentions of the parties. Accordingly, any support for the trial court’s finding of personal liability must be found in the facts and circumstances surrounding the making of the agreement. *Zella*, 79 Ill. App. 3d at 724; *M & J Diesel*, 56 Ill. App. 2d at 151.

¶ 58 Our review of the record reveals that it contains no evidence to support finding Larson personally liable for repaying plaintiff’s deposit. The evidence presented at trial established that the parties intended to bind County Wide, not Larson individually, when they entered into the rescission

agreement. Each of the contract documents that was entered into evidence had the name “County Wide Landscaping, Inc.,” displayed prominently, either in the heading, at the bottom of the page, or as a watermark. The document entitled “Agreement” authorized County Wide to provide all labor, materials, and equipment necessary to install the driveway. Larson signed the agreement “[o]n behalf of County Wide Landscaping.” The document entitled “Contract” provided that County Wide agreed to complete the driveway in accordance with the attached proposal. Although the document was signed “Brian Larson/Contractor,” the document stated that County Wide would be referred to as “Contractor” throughout. In the document entitled “Proposal,” County Wide proposed to install a brick paver driveway. The document was signed, “County Wide Landscaping, By: Brian Larson/Owner.” The document entitled “Home Repair: Know Your Consumer Rights” was signed “Brian Larson, Owner/County Wide Landscaping, Inc.” Each of the documents disclosed County Wide as the principal and included some indication that Larson signed as an agent. Although we cannot conclude from the written contract documents alone that the parties did not intend for Larson to be bound by the oral rescission agreement, the documents supply the transactional context in which the parties were dealing with each other when they reached the rescission agreement.

¶ 59 It is also significant that all of the contract documents contained the full title “County Wide Landscaping, Inc.” Section 4.05(a)(1) of the Business Corporation Act of 1983 provides that a corporation’s name “[s]hall contain, separate and apart from any other word or abbreviation in such name, the word ‘corporation’, ‘company’, ‘incorporated’, or ‘limited’, or any abbreviation of one of such words ***.” 805 ILCS 5/4.05(a)(1) (West 2008). The abbreviation “Inc.” was sufficient to indicate to plaintiff that County Wide was a corporation, and that the corporate entity may provide an “umbrella against liability” to the individual contracting on behalf of it. See *Ameritech Publishing*, 362 Ill. App. 3d at 62 (“Obviously, a contracting party should be able to determine

whether it is dealing with an individual owner or with a corporate entity. The existence of a corporate entity may clearly provide an umbrella against liability for the individual who is actually the party in interest.”). Moreover, plaintiff alleged in her complaint that County Wide was a corporation.

¶ 60 With this transactional background in mind, the evidence at trial unequivocally established that plaintiff knew Larson was acting on behalf of County Wide. Her testimony that she was “working with Brian, as far as I’m concerned,” does not overcome this conclusion. Plaintiff made out her \$15,000 check to “County Wide Landscaping” to pay the deposit required under the driveway paving contract. Additionally, although plaintiff addressed her three letters to Larson, she sent the letters to the business address for County Wide, which she took from the contract documents. All three checks that plaintiff received in satisfaction of the rescission agreement were drawn on County Wide’s account. Plaintiff accepted the checks, acquiescing in the fact that County Wide was the true party in interest to the rescission agreement.

¶ 61 Consequently, plaintiff’s argument that “[n]othing establishes that [d]efendant Larson was not taking personal responsibility for repaying the deposit money” misses the mark. It was plaintiff’s burden to prove that Larson was personally liable for refunding plaintiff’s deposit. *Laff*, 63 Ill. App. 3d at 311. Not only did plaintiff fail to make a *prima facie* case that the parties intended the rescission agreement to bind Larson, plaintiff’s own conduct unequivocally established that she knew that Larson was working on behalf of County Wide, a corporation. Plaintiff presented no evidence that Larson agreed to be personally responsible for repaying plaintiff’s deposit.

¶ 62 Based on the absence of evidence in the record to support the trial court’s finding that Larson was personally liable for repaying plaintiff’s deposit, we conclude that the finding was against the

Supreme Court Rules regarding the form and content of their appellate briefs. “These rules are not merely suggestions.” *First National Bank of Marengo v. Loffelmacher*, 236 Ill. App. 3d 690, 691 (1992). Although it is within our authority to impose sanctions here, we decline to penalize defendants so severely for their failure to include the standards of review, since the omission did not significantly impair our ability to understand the issues presented on appeal. See *First National Bank of Marengo*, 236 Ill. App. 3d at 692.

¶ 69 With respect to plaintiff’s second ground for sanctions, we disagree that defendants’ appeal is frivolous. An appeal is frivolous and deserving of sanctions under Supreme Court Rule 375(b) (eff. Feb. 1, 1994) where the appeal “is not reasonably well-grounded in fact and not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, or if a reasonable and prudent attorney would not have brought the appeal.” *Goldberg v. Michael*, 328 Ill. App. 3d 593, 600 (2002). In this case, there was competing evidence on the issue of whether the parties mutually agreed to rescind the contract. Moreover, in light of our disposition vacating the trial court’s judgment in part, we cannot say this appeal is frivolous.

¶ 70 CONCLUSION

¶ 71 For the above reasons, we affirm the judgment against County Wide and vacate the judgment against Larson in his individual capacity.

¶ 72 Affirmed in part and vacated in part.