

No. 1-11-1005

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CYNDI DELDERFIELD,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 08 CH 10527
)	
PATRICK SCHOTT,)	Honorable
)	Carolyn Quinn,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court correctly granted summary judgment to the defendant where the plaintiff brought claims based on services and funds provided during the time of the parties' cohabitation.

¶ 2 Plaintiff Cyndi Delderfield and defendant Patrick Schott were never married, but were in a relationship for more than four years. After the relationship ended, plaintiff filed a complaint seeking the return of funds and compensation for labor and services she provided during the time the parties had lived together, a portion of the value of the property acquired by the parties, and a portion of the appreciation in the value of the building where the parties lived. The trial court

granted summary judgment for defendant on the complaint. Plaintiff appeals, arguing that (1) plaintiff's claims are substantially independent of her cohabitation with defendant; (2) plaintiff is entitled to a constructive trust over the gain in property value received by defendant as a result of plaintiff's monetary and "exceptional labor" contributions; (3) plaintiff is entitled to compensation for the "exceptional labor" she performed to improve the value of defendant's property; and (4) plaintiff is entitled to the return of funds that she gave defendant to pay down his mortgage. We affirm.

¶ 3 BACKGROUND

¶ 4 In 1999, plaintiff and defendant began a relationship. At that time, plaintiff was going through a separation or divorce and moving from her residence in Ohio. In January 2000, plaintiff and her three daughters and defendant began living together at 3650 N. Bernard in Chicago, Illinois, a two-flat building purchased by the defendant in 1991 (the "Building"). In 2004, the parties separated "without intention to continue their relationship."

¶ 5 According to the complaint, in making their plans to live together, the parties "first looked to purchase a separate residence for themselves, but in the course of events, the defendant convinced the plaintiff that she should use her personal funds towards paying for and improving" the Building, which was owned by defendant. The Building was to serve as their residence, and at some future time, the "improved value and/or rental income" from the Building would "provide the means for the parties to obtain a jointly owned residence."

¶ 6 The complaint further provided that "[a]s part of an oral agreement implied from the

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conduct of the parties" at the time the parties starting living together, plaintiff contributed her earnings and assets to the "financial betterment of the parties' financial status and upkeep," including funds that went "to the betterment" of the Building. Plaintiff believed such financial contributions exceeded \$70,000.

¶ 7 As "another part of said oral contract," plaintiff alleged that she devoted her efforts to maintaining the parties' household, performing housekeeping and related chores, maintaining social relationships with the parties' friends and acquaintances, and providing companionship to defendant. In addition, the plaintiff indicated that she "contributed time and substantial effort in performing various acts of building improvement" on the Building, causing it to appreciate in value.

¶ 8 The complaint provided that "[a]s part of the implied understanding between the parties, the defendant understood that as a result of the plaintiff contributing her financial assets, labor, skills and earnings to the parties' household, that the defendant would share equally the results of his skill, efforts and labor, namely that appreciation of property value, items of personal property, earnings and other income that accumulated while the parties lived together." The complaint also referenced an "implied understanding" between the parties that "all property, earnings, property appreciation, and income acquired while they lived together would become joint upon a possible marriage or would be divided equally on termination of cohabitation."

¶ 9 Plaintiff claimed that, during a four and one half year period, she entrusted defendant with the "right duty [sic] and obligation to manage and care for all the property, earnings and income

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acquired, developed and accumulated while they lived together and to account for it in the event that their cohabitation terminated." After the parties ceased living together, plaintiff requested that defendant account for and equally divide the wealth accumulated by the parties while they lived together, but the defendant "refused." Plaintiff alleged that "the items of property, property appreciation, earnings and income acquired and accumulated while the parties lived together are in excess of \$37,000."

¶ 10 In refusing to account for and divide the property, earnings, appreciation and income, plaintiff claimed that defendant violated the "confidence and trust" which plaintiff "justifiably placed in him" and, by so doing, "fraudulently repudiated the implied understanding that existed between the parties." Plaintiff asserts that defendant is an "involuntary trustee" holding property for plaintiff and that defendant "unjustly enriched himself at the plaintiff's expense" by violating plaintiff's trust and breaching the parties' "implied understanding."

¶ 11 Count I of the complaint sought, among other things, (a) an order equally dividing the property acquired and accumulated during the parties' cohabitation and any appreciation of the Building and income derived from the Building; (b) the imposition of a constructive trust over one-half of the property, income and appreciation, or, alternatively, (c) damages for breach of contract in such amount. The relief requested in Count II included a judgment in excess of \$26,000, the amount plaintiff alleged "on opinion and belief" by which the value of her labor and services exceeded the value of the support received from defendant during their cohabitation. Count III sought, among other things, a judgment of approximately \$58,600 – representing

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approximately \$55,000 in sale proceeds from the Ohio house and \$3,600 from other sources which plaintiff allegedly contributed – "plus the earnings and benefits she would have received had her funds been returned to her in a timely fashion." Plaintiff's counsel subsequently reduced the amount derived from the sale of the Ohio property to "[s]omewhere in the vicinity" of \$35,000.

¶ 12 Defendant answered the complaint and filed a counterclaim asserting an unjust enrichment count. In the counterclaim, defendant asserted that the rehabilitation of the Building was completed in 1994, five and one-half years before the parties' cohabitation began. Defendant contended that he added plaintiff's name to his existing checking account after plaintiff and her children moved in, and the contributions by defendant "far exceeded" any contributions plaintiff made to the checking account and the parties' household and living expenses. Defendant alleged that plaintiff and her daughters were unjustly enriched by having "most of their household and living expenses" paid by defendant while plaintiff and her children lived in the Building. Defendant also claimed that such additional expenses associated with the parties' cohabitation caused him to reduce the accelerated rate at which he had been paying his mortgage. After June 2000, plaintiff and her daughters occupied both floors of the two-flat Building; defendant further alleged he was damaged because he was not able to rent out his first floor apartment, as he had done previously.

¶ 13 Following limited discovery, defendant moved for summary judgment both on plaintiff's complaint and his counterclaim. The court granted defendant summary judgment on the

complaint and denied defendant summary judgment on his counterclaim. The trial court held that monetary compensation for the "non-financial contributions *** made [by plaintiff] to the parties' relationship" was not allowed because Illinois law is "clear that a cohabitating plaintiff cannot seek 'recovery based on rights closely resembling those arising from a conventional marriage.' *Ayala v. Fox*, 206 Ill. App. 3d 538, 542 (2d Dist. 1990)." The court also concluded that there was no evidence of any contract between the parties, no evidence of a fiduciary relationship or fraudulent conduct that would support a constructive trust theory, no maintainable "money had and received" claim under applicable case law, and no maintainable action for implied contract given that the defendant did not "unjustly retain[] any benefit from Plaintiff."

¶ 14 The trial court subsequently denied plaintiff's motion to reconsider. Plaintiff filed this appeal.

¶ 15 ANALYSIS

¶ 16 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c). In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions and affidavits strictly against the movant and liberally in favor of the opponent. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008).

¶ 17 A defendant who moves for summary judgment bears the initial burden of production, which may be met either "(1) by affirmatively showing that some element of the case must be

resolved in his favor [citation] or (2) by establishing that there is an absence of evidence to support the nonmoving party's case.' [Citation.]" *Parents United for Responsible Education v. Board of Education of the City of Chicago*, 2011 IL App (1st) 102901, ¶17 (citing *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007)). Once a defendant has met this initial burden, then the burden shifts to the plaintiff to demonstrate that there is an unresolved issue of material fact that precludes summary judgment. See *id.*; *Peregrine Financial Group, Inc. v. TradeMaven, L.L.C.*, 391 Ill. App. 3d 309, 313 (2009) ("While parties opposing a summary judgment motion are not required to prove their case, they are under a duty to present a factual basis that would arguably entitle them to judgment in their favor, based on applicable law").

¶ 18 In an appeal from the grant of summary judgment, our review proceeds *de novo*. *Williams v. Manchester*, 228 Ill. 2d at 417. "An order granting summary judgment should be reversed if the evidence shows that a genuine issue of material fact exists or if the judgment was incorrect as a matter of law." *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 31 (2005), citing *Carollo v. Al Warren Oil Co.*, 355 Ill. App. 3d 172, 178-79 (2004). "The trial court's summary judgment may be affirmed on any basis appearing in the record whether or not the court relied on that basis or its reasoning was correct." *Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶5.

¶ 19 A. *Property Rights of Unmarried Cohabitants*

¶ 20 Plaintiff contends on appeal that the trial court "was incorrect to include [the parties'] cohabitation in making its decision." Plaintiff acknowledges that "Illinois law has not allowed

for property interests to develop between unmarried cohabiting individuals." In *Hewitt v. Hewitt*, 77 Ill. 2d 49 (1979), a woman sued her long-time companion for half of the property accumulated during the fifteen years they lived together. The Illinois Supreme Court held that the plaintiff's claims were unenforceable because they contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution Act, 750 ILCS 5/101 *et seq.*, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants. Courts subsequently have cited *Hewitt* in denying property rights to unmarried cohabitants. For example, in *Ayala v. Fox*, 206 Ill. App. 3d 538 (1990), the court held that *Hewitt* barred the claims asserted by the plaintiff against her boyfriend with whom she lived for ten years, despite the fact that the plaintiff obligated herself to a mortgage and made mortgage payments but was not given ownership rights in their home. In *Costa v. Oliven*, 365 Ill. App. 3d 244 (2006), the plaintiff and defendant lived together, unmarried, for twenty-four years; the plaintiff served as a stay-at-home father and homeschooled their child. The appellate court affirmed the trial court's dismissal of certain claims of the plaintiff, citing *Hewitt* for the proposition that the property rights of unmarried cohabitants are "appropriately within the province of the legislature." *Id.* at 248, citing *Hewitt*, 77 Ill. 2d at 66.

¶ 21 Plaintiff invokes an "exception" to the *Hewitt* rule, however, arguing that her claims are not dependent on her cohabitation with defendant. As support, plaintiff primarily relies on *Kaiser v. Fleming*, 315 Ill. App. 3d 921 (2000). When the *Kaiser* parties began their relationship, the plaintiff was married to another man. The plaintiff alleged that the defendant

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advised her to accept the property from her dissolution in a lump sum payment instead of installment payments; plaintiff later received a lump sum payment of \$47,188.38. The defendant subsequently dissuaded plaintiff from purchasing another newly built home, instead suggesting that the plaintiff move in with him and use her money to pay off the balance of the defendant's mortgage, stating that they would both "be able to save more money" and "would have more 'gain' when the property was sold." *Id.* Within less than forty days of the plaintiff moving in, the defendant told the plaintiff that he needed \$47,188.38 to pay off the balance of his mortgage. The following day, the plaintiff gave the defendant a check for that amount, and the mortgage on the house was released. Shortly before the plaintiff moved out of the defendant's home, she asked the defendant for her money back. He responded that her payment was an investment and that she would not be paid until the house was sold. The *Kaiser* appellate court determined that the trial court erred by dismissing the plaintiff's "money had and received" count. Rejecting the defendant's argument that the complaint violated the Illinois public policy against granting mutual property rights expressed in *Ayala*, the court found that the plaintiff alleged rights "substantially independent" from her nonmarital relationship with the defendant, unlike the *Ayala* plaintiff. The *Kaiser* plaintiff believed the money to be a safe investment, and the defendant allegedly told her there would be "more gain" when the property was sold. The court further noted that the plaintiff's claim was based on a lump sum payment made to the defendant as an investment to pay off the mortgage on his home. The *Ayala* plaintiff's claim was based on mortgage payments the plaintiff made while she lived with the defendant for ten years. Finally,

the court found it noteworthy that the *Ayala* plaintiff sought additional relief akin to a marital relationship and based on the fact that she and the defendant "lived together as husband and wife." *Id.* at 926.

¶ 22 We disagree with plaintiff's position regarding the application of *Hewitt* and *Kaiser*. *Hewitt* acknowledged that unmarried cohabitants can form valid contracts independent of the cohabitation relationship. In this case, however, as stated by the trial court, "there is no evidence of any contract between the parties and Plaintiff has not alleged sufficient facts to show the existence of any contract" with respect to plaintiff's financial contribution to defendant's Building. Furthermore, with respect to other financial contributions by plaintiff to the parties' joint checking account, such contributions are not independent of the cohabitation relationship; in fact, such contributions are intrinsically tied to the cohabitation. Unlike in *Kaiser*, plaintiff's claims are not based on a one-time, easily traceable contribution of funds to pay off a mortgage; plaintiff's claims are based on continuing monetary- and non-monetary contributions. Indeed, plaintiff's case is more similar to *Ayala*, where the parties each made contributions over the course of years; the *Ayala* court rejected the promissory estoppel, equitable lien, breach of fiduciary duty, unjust enrichment, and constructive trust claims of the plaintiff.

¶ 23 We conclude that summary judgment for defendant with respect to the non-monetary and monetary contributions is correct. However, even if plaintiff's claims were sufficiently separate from her relationship with defendant, plaintiff's claims fail on other grounds.

¶ 24 B. *Breach of Contract*

¶ 25 In the complaint, plaintiff sought "alternative" relief in the form of an order "awarding the plaintiff damages for breach of contract in the amount of one half of the value of all the property acquired or accumulated by the parties, one half the appreciation of the value of the defendant's real estate while they lived together pursuant to their implied understanding and one half of the income generated by said property to date." As the trial court correctly noted, there are no allegations in the complaint that establish the existence of any contract between the parties to compensate plaintiff for her labor or for her financial contribution to the Building. Beyond the complaint's allegations, there was no evidence before the court of such an agreement.

¶ 26 C. *Constructive Trust Claim*

¶ 27 Plaintiff next contends that she is entitled to a constructive trust over the gain in the value of defendant's property due to the "substantial monetary lump sum contribution, which she made, which was to be devoted to the defendant's mortgage payments, as well as her exceptional labor on projects designed to enhance the value of the defendant's property." A constructive trust is "an equitable remedy that may be imposed to redress unjust enrichment caused by a party's wrongful conduct." *Eychaner v. Gross*, 202 Ill. 2d 228, 274 (2002). A constructive trust generally is imposed in two situations: first, where there is a breach of fiduciary duty, and second, where actual or constructive fraud is considered as an equitable grounds for raising the trust. *Frederickson v. Blumenthal*, 271 Ill. App. 3d 738, 740 (1995), citing *Suttles v. Vogel*, 126 Ill. 2d 186, 193 (1988). Plaintiff argues that a constructive trust should be imposed because defendant breached a fiduciary duty owed to her and because he acted fraudulently.

¶ 28 In order to establish a constructive trust based on the existence of a confidential or fiduciary relationship, the following factors must be taken into consideration: "the degree of kinship between the parties; the disparity in age, health, mental condition and education and business experience between the parties; and the extent to which the 'servient' party entrusted the handling of its business and financial affairs to the 'dominant' party and placed trust and confidence in it." *Ransom v. A.B. Dick Co.*, 289 Ill. App. 3d 663, 672 (1997). In this case, plaintiff has failed to show that defendant acted in a fiduciary capacity vis-a-vis plaintiff. In her affidavit, plaintiff merely stated that she "entrusted [defendant] with *** funds because of our relationship and plans. I felt he had the knowledge to be in charge of the overall course of our financial plans and I could trust him because of our relationship." Plaintiff did not allege any disparities between the parties in terms of age, health, mental condition, education or business experience. Defendant, on the other hand, presented evidence that plaintiff had equal access to the joint bank account and to the credit cards paid from the account, she issued checks and made charges throughout the relationship, and she had access to the accounting program used to track the cash flow in and out of the account. In sum, the defendant satisfied his initial burden of production with respect to the fiduciary duty question; plaintiff did not then meet her burden of presenting some factual basis that would arguably entitle her to judgment on this issue. Plaintiff's unsupported declaration regarding "entrusting" defendant is insufficient to carry plaintiff's burden.

¶ 29 Plaintiff next argues that a constructive trust should be imposed because of defendant's

fraudulent actions. In order to prove fraud, plaintiff must show: (1) defendant made a false statement of material fact; (2) he knew or believed to be untrue; (3) plaintiff had a right to rely on the statement; (4) plaintiff did rely on the statement; (5) the statement was made with the purpose of inducing plaintiff to act; and (6) plaintiff's reliance led to her injury. *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 538 (1997). Plaintiff's unsupported allegation regarding defendant's failure to return funds upon the breakdown of their relationship does not constitute evidence of any fraud committed by defendant.

¶ 30 Although not argued before the trial court, plaintiff notes on appeal that some courts have adopted a broader use of constructive trusts, imposing them in situations where there was neither a breach of fiduciary duty nor fraud. See *People Ex Rel Daley v. Warren Motors*, 136 Ill. App. 3d 505 (1985). Even assuming *arguendo* that there may be circumstances other than breach of fiduciary duty or fraud which may give rise to a constructive trust claim, in order to impose a constructive trust, the proceeds of the alleged wrongful conduct must exist as an "identifiable fund traceable to that conduct, such that it can become the *res* of the proposed trust." *Eychaner*, 202 Ill. 2d at 274. "[W]here the trustee commingles trust funds with his own and subsequently withdraws sums from the combined fund for his own use, the conclusive presumption is that trustee withdrew his own funds first." *Sadacca* at 128 Ill. App. 3d 250, 258 (1984). In her affidavit, plaintiff stated that she gave defendant the proceeds of a sale of her Ohio house, "plus addition [sic] money from bonds my daughter and I had for the specific purpose of aiding in the future purchase of a house." As defendant correctly observes, plaintiff's affidavit merely refers to

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the sale of her Ohio house in 2000, after her divorce, and the redemption of certain "bonds," but provides no showing that these amounts are traceable to defendant's benefit. Accordingly, plaintiff has not shown any identifiable, traceable funds that would constitute a "res" of any potential constructive trust. Summary judgment was appropriate with respect to the constructive trust count.

¶ 31 D. *Quantum Meruit Claim*

¶ 32 Plaintiff also seeks recovery for the value of her "work, labor and services to the defendant," an amount that plaintiff estimated to be in excess of \$26,000. In her affidavit, plaintiff lists home improvement projects she worked on with defendant "during the summer of 2000 and going forward" to "improve the condition and value of his property." The trial court correctly observed that it is unclear on what theory plaintiff seeks such damages; plaintiff's counsel suggested during the summary judgment hearing that the "quantum meruit claim is, actually, the alternative claim to the appreciation in property value during the time the parties lived there." Although plaintiff failed to state a quantum meruit claim in her complaint or amend her complaint to include such claim – thus precluding recovery on such claim – the trial court assumed a claim for quantum meruit had been properly pled for purposes of its analysis. We will do the same.

¶ 33 Quantum meruit describes "a cause of action which seeks to recover the reasonable value of services which have been nongratuitously rendered, but where no contract exists to prescribe exactly how much the renderer should have been paid." *In re Estate of Etherton*, 284 Ill. App. 3d

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64, 68 (1996) (internal citations omitted). To recover under a quantum meruit theory, the plaintiff must prove: "(1) he performed a service to benefit the defendant, (2) he did not perform this service gratuitously, (3) defendant accepted this service, and (4) no contract existed to prescribe payment for this service." *Installco v. Whiting Corporation*, 336 Ill. App. 3d 776, 781 (2002). The burden is on the provider, who "must show that valuable services" were furnished by him, that they were received by the defendant, and that "the circumstances are such that it would be unjust for the defendant to retain these without paying for them." *Bernstein and Grazian, P.C. v. Grazian and Volpe, P.C.*, 402 Ill. App. 3d 961, 979 (2010). The measure of recovery is the reasonable value of the work, and, in order to recover under this doctrine, the provider must prove that the services performed were "of some measurable benefit to the defendant." *Id.* (internal citations omitted).

¶ 34 It is a long-established principle that "no implied contract will arise to pay for services rendered by, and between members of the same family." *Ginders v. Ginders*, 21 Ill. App. 522, 523 (1886). "Where members of a family reside together and some of them render services for others, there is a presumption from the familial relationship that such services were rendered gratuitously without contemplation of wages or other compensation; however, *** this presumption may be overcome by proof of an express or implied contract." *In re Estate of Kucharski*, 3 Ill. App. 3d 32, 36 (1971); see also *Dempski v. Dempski*, 27 Ill. 2d 69, 75 (1963); *In re Estate of Etherton*, 284 Ill. App. 3d 64, 68-69 (1996).

¶ 35 Plaintiff has failed to overcome the presumption that her services were rendered gratuitously as a result of her relationship with defendant, without contemplation of wages or other compensation. We agree with the trial court's assessment that plaintiff and defendant were living together as a family and that she performed improvements on defendant's Building "so that they could purchase a home together and not based on any expectation of monetary compensation." Moreover, in his counteraffidavit, defendant addressed these projects, generally explaining that for each: (a) the work already had been performed prior to the parties' cohabitation; (b) a third party vendor performed the service; (c) defendant performed the service with no assistance; or (d) defendant performed the service and plaintiff assisted in a modest fashion (*e.g.*, handing bricks or tools). Defendant submitted the business cards from various employment positions, evidencing that he has worked in the construction trades for years. Defendant also provided the affidavit of Jose C. Diaz, Jr., defendant's next door neighbor for approximately 19 years; Mr. Diaz indicated that he regarded defendant as a "skilled tradesman" and that he observed defendant completing many home improvement projects over the course of years, usually without any assistance.

¶ 36 Furthermore, plaintiff has not submitted any evidence that she provided services that "benefitted" defendant nor has she provided any evidence regarding the value of her services. Finally, plaintiff's characterization of her home improvement services as "extraordinary" appears to be an attempt to avoid the application of *Hewitt*. We believe the trial court correctly granted summary judgment for the defendant with respect to any quantum meruit claim.

¶ 37 E. *Unjust Enrichment Claim*

¶ 38 On appeal, plaintiff seeks recovery under "quasi-contract," "implied contract" and "unjust enrichment" theories with respect to the funds she allegedly gave defendant to pay down his mortgage. Again, plaintiff did not plead any of these causes of action in her complaint, nor did she amend her complaint to include them. As the trial court did, we will assume for purposes of our analysis that such claims were properly pled.

¶ 39 To state a cause of action for unjust enrichment, "a plaintiff must allege the defendant unjustly retained a benefit to the plaintiff's detriment and that the defendant's retention violated the fundamental principles of justice, equity and good conscience." *Board of Managers of Hidden Lake Townhome Owners Association v. Green Trails Improvement Association*, 404 Ill. App. 3d 184, 193 (2010) (internal citations omitted); see also *Coy Chiropractic Health Center, Inc. v. Travelers Casualty and Surety Company*, 409 Ill. App. 3d, 1114, 1122-23 (2011); *Karimi v. 401 North Wabash Venture, LLC*, 2011 IL App (1st) 102670 at ¶14 ("plaintiffs must show that defendants 'voluntarily accepted a benefit which would be inequitable for [them] to retain without payment'" (internal citations omitted)).

¶ 40 Defendant stated in his affidavit that plaintiff contributed approximately \$20,234.22 less to the joint checking account than she expended on the living expenses of herself and her children during the time the parties lived together. Additionally, defendant stated in his affidavit that he made payments on behalf of plaintiff in 1999 totaling \$3,522.15, in 2004 totaling \$14,193.17 and in 2005 totaling \$2,394.17. Plaintiff did not submit any evidence contradicting

these statements. During the hearing on the summary judgment motion, the trial court asked questions about the funds contributed by plaintiff; counsel indicated that although he disputed the “nature of what [plaintiff’s] share should be,” he did not dispute defendant’s numbers.

¶ 41 As noted by the trial court, "the evidence shows that Plaintiff received significant financial contributions from Defendant and Defendant has not unjustly retained any benefit from Plaintiff." Summary judgment for the defendant is proper with respect to the plaintiff's unjust enrichment claim.

¶ 42 *F. Money Had and Received Claim*

¶ 43 Plaintiff asserts a "money had and received" claim with respect to her “lump sum contribution of funds,” although such claim was neither properly pled in her complaint nor included in an amended complaint. Again, the failure to include such a count precludes recovery; however, we will assume, as the trial court did, that such claim was properly pled for purposes of this analysis.

¶ 44 The trial court relied on *Butitta v. First Mortgage Corporation*, 218 Ill. App. 3d 12 (1991), as controlling authority from the Illinois Appellate Court for the First District. According to the First District in *Butitta*, "[i]n order to state a cause of action under Illinois law for money wrongfully had and received *in assumpsit*, a plaintiff must allege that (1) he was compelled to pay money to the defendant, (2) the defendant had no legal right to demand the money, and (3) payment was necessary in order to avoid an injury to his business, person or property. (*Peterson v. O'Neill* (1930), 255 Ill. App. 400, 402.)" *Id.* at 15.

¶ 45 Plaintiff urges the court to rely instead on the Second District's decision in *Kaiser v. Fleming*, 315 Ill. App. 3d 921 (2000). The *Kaiser* court stated that the *Butitta* court "erroneously cited *Peterson v. O'Neill*, 255 Ill. App. 400, 402 (1930), *** for the proposition that the plaintiff must establish that she was compelled to pay money to the defendant to establish a cause of action for money had and received." The Second District reasoned that "[n]othing in *Peterson* supports the defendant's assertion that one *must* allege compulsion." *Id.* at 925. The *Kaiser* court instead defined a money had and received action as "maintainable where defendant has received money which in equity and good conscience belongs to the plaintiff." *Id.*

¶ 46 The trial court correctly noted that it was bound by the First District's *Butitta* decision. *Rein v. State Farm Mutual Automobile Insurance Company*, 407 Ill. App. 3d 969, 978 (2011), citing *Aleckson v. Village of Round Lake Park*, 176 Ill. 2d 82, 92 (1997). The appellate court, however, is "not inescapably bound by our own previous decisions." *Schramer v. Tiger Athletic Association*, 351 Ill. App. 3d 1016, 1020 (2004). While we may one day need to address the apparent conflict between the First and Second District decisions, we need not do so in this case. Even if we assume that plaintiff is correct that the "compulsion" requirement may not be a necessary element of a money had and received claim, we nonetheless conclude that "equity" and "good conscience" do not dictate a different result from that provided for in the trial court. Although defendant does not contest that plaintiff contributed funds to their joint account, defendant has alleged that plaintiff contributed \$20,234.22 less to the account than she spent on living expenses for her and her children and that defendant made additional payments on behalf

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of plaintiff totaling \$20,109.49. When repeatedly questioned about these amounts during the summary judgment hearing, plaintiff's counsel stated that he was "not disputing the numbers." Counsel's only argument on this point was that, under the parties' alleged "two-track financial relationship," the funds from the Ohio house sale were to be separated from the day-to-day household expenses. But plaintiff did not present evidence of a "two-track financial relationship" between the parties. In fact, plaintiff did not present any evidence of the amount actually contributed to the checking account from the Ohio sale proceeds. Simply put, we do not believe that the plaintiff could maintain an action for money had and received in the absence of presenting any factual evidence that "equity" or "good conscience" dictates such a result.

¶ 47

CONCLUSION

¶ 48 The trial court correctly granted summary judgment for defendant with respect to the complaint.

¶ 49 Affirmed.