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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

NUHA NAZY,) Appeal from the Circuit Court
) of Cook County.
 Plaintiff-Appellant,)
)
 v.) No. 11 CH 37054
)
 DOMINIQUE LEONARDI and KELLY) Honorable
 GLEASON-GROSSE,) Leroy K. Martin, Jr.,
) Judge Presiding.
 Defendants-Appellees.)

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Rochford specially concurred in the judgment.
Justice Delort specially concurred.

ORDER

¶ 1 *Held:* This court affirmed the circuit court's grant of summary judgment to defendant Dominique Leonardi on the plaintiff's claim of unjust enrichment where there was no genuine issue of material fact that the defendant's receipt of funds from the plaintiff was a gift. We affirmed the court's dismissal of the plaintiff's cause of action for breach of a

fiduciary relationship for failure to state a cause of action against defendant Kelly Gleason-Grosse. We denied defendant Dominique Leonardi's motion to dismiss the appeal.

¶ 2 The plaintiff, Nuha Nazy, appeals from an order of the circuit court of Cook County granting summary judgment to defendant Dominique Leonardi (Ms. Leonardi) on the plaintiff's claim of unjust enrichment and dismissing the plaintiff's breach of fiduciary duty claim against defendant Kelly Gleason-Grosse (Ms. Gleason-Grosse).¹ The plaintiff contends that: (1) her unjust enrichment claim was not barred by the two gift letters or the Statute of Frauds, and (2) she pleaded sufficient facts to establish her claim of breach of fiduciary duty against Ms. Gleason-Grosse. We disagree. The circuit court's rulings were proper, and we affirm the judgment of the circuit court.

¶ 3 **BACKGROUND**

¶ 4 **I. Uncontested Facts**

¶ 5 The plaintiff and Ms. Leonardi met in 2005. They began dating shortly thereafter, and in 2006, the plaintiff moved into Ms. Leonardi's apartment. In 2008, Ms. Leonardi and the plaintiff began looking for a residence to purchase together. After locating a condominium unit they wished to purchase, Ms. Leonardi obtained financing through Flagstar Bank. The plaintiff deposited \$80,000 into Ms. Leonardi's checking account for the down payment and closing costs. The plaintiff executed two letters stating that the \$80,000 was a gift, and no repayment was expected. The closing on the purchase of the condominium took place on May 23, 2008. From that date, the plaintiff and Ms. Leonardi resided together in the condominium until August 8, 2010, at which time, the plaintiff moved out of the condominium.

¹When appropriate, Ms. Leonardi and Ms. Gleason-Grosse shall be referred to collectively as "the defendants."

¶ 6

II. The Complaint

¶ 7

On October 25, 2011, the plaintiff filed a three-count complaint against the defendants.² Count II of the complaint alleged unjust enrichment against Ms. Leonardi, and count III alleged breach of fiduciary duty against Ms. Gleason-Grosse. In addition to the uncontested facts above, the plaintiff alleged the following facts common to both counts II and III.

¶ 8

The plaintiff and Ms. Leonardi "jointly retained " Ms. Gleason-Grosse to "serve as their mortgage broker to assist them in finding***reasonable financing for the purchase of their home." While Ms. Gleason-Grosse was a very close personal friend of Ms. Leonardi's, the plaintiff had no personal relationship with her. "Upon information and belief," Ms. Gleason-Grosse was a "registered professional with the Illinois Department of Financial and Professional Regulation." With Ms. Gleason-Grosse's assistance and recommendation, the plaintiff and Ms. Leonardi jointly applied at Flagstar Bank for a pre-approved home loan, which they received and which identified them both as borrowers.

¶ 9

In putting together the formal joint application for a loan from Flagstar, Ms. Gleason-Grosse sent Ms. Leonardi and the plaintiff a document request list, which included the plaintiff's income tax returns. Ms. Gleason-Grosse informed the plaintiff that based on the business losses disclosed in her tax returns, Flagstar would not qualify her to purchase the condominium. On information and belief, Ms. Gleason-Grosse never disclosed the plaintiff's business losses to any representative of Flagstar Bank to determine the plaintiff's credit worthiness, and no joint application for financing for the purchase of the condominium was ever submitted to Flagstar Bank. The loan application was submitted only in Ms. Leonardi's

²Count I set forth a conversion count against Ms. Leonardi and remains pending in the circuit court.

name. Flagstar Bank approved Ms. Leonardi's application for the loan to purchase the condominium.

¶ 10 It was "the understanding" of the plaintiff, Ms. Leonardi and Ms. Gleason-Grosse that the plaintiff would deposit \$80,000 to Ms. Leonardi's checking account for the down payment and closing costs for the condominium purchase. Ms. Gleason-Grosse had the plaintiff execute two gift letters totaling \$80,000 to explain the large amount of money in Ms. Leonardi's checking account. However, Ms. Gleason-Grosse knew that the \$80,000 was not intended as a gift to Ms. Leonardi but was only to provide the down payment and closing costs for what was to be their joint purchase of the condominium.

¶ 11 While the plaintiff and Ms. Leonardi lived together, they used a single joint checking account to pay all their expenses, including the mortgage, dues for the condominium association and the real estate taxes. Following her move from the condominium, on December 3, 2010, the plaintiff sent a demand to Ms. Leonardi for repayment of the \$80,000 used for the purchase of the condominium. Ms. Leonardi refused to return the \$80,000.

¶ 12 A. Unjust Enrichment

¶ 13 The following additional allegations are pertinent to the unjust enrichment claim against Ms. Leonardi in count II of the complaint.

¶ 14 The plaintiff provided \$80,000 for the purchase of the condominium which Ms. Leonardi used as the down payment and closing costs for the purchase of the condominium. Ms. Leonardi accepted the \$80,000 with the understanding that the plaintiff and she were going to live together in the condominium. Ms. Leonardi placed the \$80,000 in her checking account with the understanding that the plaintiff and she were joint owners of the condominium.

Between, May 2008 and August 2010, the plaintiff provided two-thirds of funds used to pay the mortgage, insurance and condominium assessments.

¶ 15 The plaintiff never intended to provide the \$80,000 to Ms. Leonardi as a gift. Ms. Gleason-Grosse informed the plaintiff that providing funds as gifts was common, and the plaintiff was not doing anything improper as to Flagstar Bank. Ms. Leonardi's retention of the \$80,000 under these facts was not equitable and constituted unjust enrichment.

¶ 16 In her prayer for relief, the plaintiff requested the return of the \$80,000 and of the funds she provided to pay down the principal on the mortgage.

¶ 17 **B. Breach of Fiduciary Relationship**

¶ 18 The following additional allegations are pertinent to the breach of fiduciary relationship claim against Ms. Gleason-Grosse in count III of the complaint.

¶ 19 Ms. Gleason-Grosse was the plaintiff's "mortgage broker and agent." As her mortgage broker and agent, Ms. Gleason-Grosse owed the plaintiff the duty to treat the plaintiff with utmost candor, rectitude, care, loyalty good faith, honesty and fairness, and to provide her with complete disclosure. The plaintiff placed her trust in Ms. Gleason-Grosse because Ms. Gleason-Grosse had accepted and agreed to carry out the specific instructions from the plaintiff and Ms. Leonardi that they wished to purchase real property jointly. Because she had provided \$80,000 in the purchase of the condominium and subsequently provided two-thirds of the mortgage, condominium expenses and insurance, it was of material importance to the plaintiff that she had a protectable legal interest in the condominium.

¶ 20 On information and belief, Ms. Gleason violated her fiduciary duties by not informing the plaintiff that she had no protectable interest in the condominium despite her financial contributions prior to and after the purchase of the condominium. Ms. Gleason-Grosse's

actions caused harm to the plaintiff and gave an undue benefit to Ms. Leonardi, a long-time personal friend of Ms. Gleason-Grosse. As a result, the plaintiff was deprived of the loyal and faithful service owed to her by her agent, Ms. Gleason-Grosse and suffered damages in that the plaintiff's name does not appear on the title to the condominium, and Ms. Leonardi refused to acknowledge the plaintiff's interest in the condominium and refused to repay the funds the plaintiff provided prior to and following the purchase of the condominium.

¶ 21 In her prayer for relief, the plaintiff sought an award of damages in the amount of \$80,000 and the amount of money she provided to pay down the principal on the mortgage.

¶ 22 III. Circuit Court Proceedings

¶ 23 Ms. Leonardi filed an answer and raised the affirmative defenses of waiver and unclean hands. She requested an offset of the \$80,000 gift she received from the plaintiff and the sums she paid toward the reduction of the principal of the mortgage against any award to the plaintiff. Ms. Leonardi then moved for summary judgment. Ms. Gleason-Grosse filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010) (Code)). The plaintiff filed a combined response to the summary judgment and dismissal motions.

¶ 24 On October 25, 2013, the circuit court granted summary judgment to Ms. Leonardi on the plaintiff's unjust enrichment claim and dismissed the plaintiff's breach of fiduciary duty claim against Ms. Gleason-Grosse. Pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016), the court found no reason to delay enforcement or appeal of its order. This appeal followed.

¶ 25 ANALYSIS

¶ 26 I. Jurisdictional Challenge

¶ 27 During the pendency of this appeal, Ms. Leonardi filed a motion to dismiss the plaintiff's appeal for lack of jurisdiction and for want of prosecution. Ms. Leonardi contends that the notice of appeal was not filed within 30 days of the entry of the final judgment as required by Illinois Supreme Court Rule 303(a)(1) (eff. Jan. 1, 2015). She further contends that the plaintiff's appeal should be dismissed for want of prosecution because the plaintiff failed to file a docketing statement within 14 days of filing her notice of appeal in violation of Illinois Supreme Court Rule 312 (eff. Mar. 8, 2016). The plaintiff filed a response to the motion. We ordered the motion taken with the case.

¶ 28 For purposes of this appeal from a Rule 304(a) finding, the final judgment was entered on October 25, 2013, and the plaintiff filed her notice of appeal on November 22, 2013, clearly within 30 days of the entry of the final order. However, Ms. Leonardi maintains that the notice of appeal was filed with the "Circuit Court of Cook County, Chancery Division," which she maintains does not comply with Rule 303(a)(1), which requires that the notice of appeal be filed with "the Circuit Court of Cook County."

¶ 29 We disagree. The file stamp on the plaintiff's notice of appeal states in full, "Dorothy Brown, Clerk of the Circuit Court, Chancery Division." "[T]he circuit court is a court of general jurisdiction. [Citation.] The divisions into which its activities are divided exist solely for administrative efficiency and are not jurisdictional." *In re Lehmann*, 186 Ill. App. 3d 592, 595 (1989). The fact that the file stamp refers to the chancery division of the circuit court does not bear on the timeliness of the plaintiff's notice of appeal. Ms. Leonardi does not dispute the fact that Dorothy Brown is the Clerk of the Circuit Court. The record clearly supports the fact that plaintiff's notice of appeal was filed with the clerk of the circuit court

on November 22, 2013. The notice of appeal was filed within 30 days of the October 25, 2013, final judgment and therefore complied with Rule 303(a)(1).

¶ 30 In her response to the motion to dismiss the appeal, the plaintiff explained that the late filing of the docketing statement and her request for preparation of the record was due to a delay in the transmittal of the notice of appeal from the circuit court to the clerk of the appellate court. The explanation was supported with the affidavit of the plaintiff's attorney. Ms. Leonardi did not file a response challenging the plaintiff's explanation.

¶ 31 While violations of our supreme court rules governing appellate procedures can result in the dismissal of an appeal, it is a severe sanction and only appropriate where the violations interfere with or preclude our review. *In re Detention of Powell*, 217 Ill. 2d 123, 132 (2005); see *Tekansky v. Pearson*, 263 Ill. App. 3d 759, 762 (1994) (the 14-day delay in the filing of the docketing statement was not an appropriate basis to dismiss the appeal). Because the late filing of the docketing statement did not interfere with or preclude our review of this appeal and the plaintiff provided an explanation for her noncompliance, the validity of which was not challenged by Ms. Leonardi, we decline to dismiss the appeal for want of prosecution.

¶ 32 Ms. Leonardi's motion to dismiss this appeal is denied.

¶ 33 II. Summary Judgment

¶ 34 The plaintiff contends that there are material questions of fact precluding summary judgment on her unjust enrichment claim against Ms. Leonardi.

¶ 35 A. Standard of Review

¶ 36 This court applies the *de novo* standard of review to the disposition of a motion for summary judgment. *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 48. We will affirm the grant of summary judgment, if and only if, the pleadings, depositions, admissions,

affidavits and other relevant matters demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Wolinsky*, 2013 IL App (1st) 111186, ¶ 48.

¶ 37 "Summary judgment is precluded where the material facts are disputed or where reasonable people might draw different conclusions from undisputed facts." *Wolinsky*, 2013 IL App (1st) 111186, ¶ 48. The existence of factual disputes will not preclude summary judgment where the disputed facts are not material to the essential elements of the cause of action or defense. *Wolinsky*, 2013 IL App (1st) 111186, ¶ 52. To determine the existence of a genuine issue of material fact, the pleadings, affidavits, depositions and other relevant materials submitted in connection with the motion must be construed against the movant and liberally in favor of the nonmovant. *Wolinsky*, 2013 IL App (1st) 111186, ¶ 48.

¶ 38 We consider the entire record in ruling on the circuit court's grant of summary judgment. *Makowski v. City of Naperville*, 249 Ill. App. 3d 110, 115 (1993).

¶ 39 B. Discussion

¶ 40 The plaintiff maintains that the circuit court erred when, based on *Gagnon v. Schickel*, 2012 IL App (1st) 120645, it ruled that the plaintiff's unjust enrichment claim was barred by the two gift letters she executed. In *Gagnon*, the plaintiff alleged a claim for unjust enrichment against the defendant based on their quasi-contractual agreement whereby the plaintiff would supply the funds for the purchase of real property and the defendant would convey him an interest in the property, but she failed to do so. Attached to the complaint as exhibits were gift letters, executed by the plaintiff, which stated that there was no obligation for repayment of the funds. This court determined that the gift letters contradicted the plaintiff's claim of a conditional gift of the funds and affirmed the dismissal of the unjust

enrichment count. *Gagnon*, 2012 IL App (1st) 120645, ¶ 26. The plaintiff maintains that *Gagnon* is inapplicable to the present case because the dismissal of the complaint was pursuant to section 2-615 of the Code, where the court may consider only the allegations of the complaint and matters of which the court can take judicial notice. *Kahn v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 41 We agree that the dismissal at the pleading stage distinguishes *Gagnon* procedurally from the grant of summary judgment in the present case. Nonetheless, we review the court's judgment, not the reasoning employed, and we may rely on any grounds called for by the record to affirm the court's judgment. *Lane v. Kalcheim*, 394 Ill. App. 3d 324, 331 (2009).

¶ 42 "Under the doctrine of unjust enrichment, a plaintiff must show 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.' "*Chicago Title Insurance Co. v. Teachers' Retirement System of the State of Illinois*, 2014 IL App (1st) 131452, ¶ 17 (quoting *HPI Health care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989)). A plaintiff is not required to prove fault or illegality on the part of the defendant, only that one party is enriched and that it would be unjust for that party to retain the enrichment. *National Union Fire Insurance Co. v. DiMucci*, 2015 IL App (1st) 122725, ¶ 67.

¶ 43 The party moving for summary judgment bears the initial burden of production. *Doe v. Brouillette*, 389 Ill. App. 3d 595, 604 (2009). "That burden may be met by either affirmatively showing that some element of the case must be resolved in the defendant's favor or by establishing that there is no evidence to support the nonmovant's case." *Brouillette*, 389 Ill. App. 3d at 604. Once that initial burden is satisfied by the defendant, the

burden shifts to the nonmovant to present a factual basis entitling it to a favorable judgment. *Brouillette*, 389 Ill. App. 3d at 605. We must determine if a genuine question of material fact exists as to whether Ms. Leonardi's retention of the \$80,000 violates the principles of justice, equity and good conscience.

¶ 44 According to her deposition testimony, the plaintiff claimed that in exchange for providing \$80,000 for the down payment and closing costs for the purchase of the condominium, the plaintiff was to be placed on the deed as an owner or be repaid the \$80,000. However, unlike the exhibits to the complaint, the copies of the gift letters attached to the plaintiff's combined response to the defendants' motions for summary judgment and dismissal were signed by the plaintiff. Each gift letter stated in pertinent part as follows: "I/We state that no repayment of this gift is expected." The language of the gift letters demonstrate that the plaintiff did not expect or require repayment of the \$80,000 by Ms. Leonardi and that her payment was not in exchange for placing her on the title to the condominium. Therefore, the gift letters affirmatively establish that the plaintiff cannot show the "gift" was conditioned on Ms. Leonardi's agreement to give the plaintiff an ownership interest in the condominium or for the repayment of the \$80,000.

¶ 45 The plaintiff points to Ms. Leonardi's deposition testimony that she never considered the \$80,000 a gift. Ms. Leonardi testified that she "did not think of [the \$80,000] as a gift. I thought of it as a form. I did not think of it as a loan *** we were buying a house and we were going to spend our lives together." Ms. Leonardi further testified that "it was not my understanding that it was a loan or repayment." The plaintiff's own deposition testimony established that she never used the words "loan" or "gift" in referring to the \$80,000.

¶ 46 "Even when a person has received a benefit from another, he or she is liable for payment, 'only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits is not of itself sufficient to require the other to make restitution therefor.' (Internal quotation marks omitted.)" *Saletech, LLC, v. East Balt, Inc.*, 2014 IL App (1st) 132639, ¶ 36 (quoting *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 9 (2004)).

¶ 47 The existence of the gift letters established that the plaintiff provided an unconditional gift of the \$80,000 to Ms. Leonardi. The burden shifted to the plaintiff to establish a factual basis that would entitle her to judgment on her unjust enrichment claim. However, the plaintiff demonstrated only that Ms. Leonardi benefited from the plaintiff's gift of \$80,000, not that it was unjust for her to retain it under the circumstances in this case. After the May 2008 closing, the plaintiff and Ms. Leonardi resided in the condominium until August 8, 2010, when the two separated. According to plaintiff's deposition testimony, during that time, there were some discussions about placing the plaintiff on the title, but the plaintiff took no affirmative steps to assert any claim to the \$80,000 or to disclaim that it was a gift until more than two years later when Ms. Leonardi and she separated.

¶ 48 We conclude that no genuine question of fact exists pertaining to Ms. Leonardi's retention of the \$80,000 or the use of the plaintiff's funds for the reduction of the principal on the mortgage. The grant of summary judgment to Ms. Leonardi on the plaintiff's claim for unjust enrichment was proper.

¶ 49 III. Breach of Fiduciary Duty

¶ 50 The plaintiff contends that the circuit court erred in dismissing count III of the plaintiff's complaint alleging breach of fiduciary duty against Ms. Gleason-Grosse for failure to state a

cause of action. 735 ILCS 5/2-615 (West 2012). Ms. Gleason-Grosse has not filed an appellee's brief. Nonetheless, we will address the plaintiff's claim of error since the record is simple, and we can easily decide the issue without the aid of an appellee's brief. *GPS USA, Inc. v. Performance Powercoating*, 2015 IL App (2d) 131190, ¶ 3.

¶ 51 A. Standard of Review

¶ 52 We apply the *de novo* standard of review to the granting of a motion to dismiss pursuant to section 2-615 of the Code. *Carroll v. Faust*, 311 Ill. App. 3d 679 (2000).

¶ 53 B. Discussion

¶ 54 A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint based upon defects appearing on the face of the complaint. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 586 (2005). In determining the sufficiency of the complaint, the court must accept as true all well-pleaded facts and all reasonable inferences that can be drawn from those facts. *Guinn*, 361 Ill. App. 3d at 586. Legal and factual conclusions that are unsupported by allegations of fact may be disregarded. *Guinn*, 361 Ill. App. 3d at 586. Taking the allegations of the complaint in the light most favorable to the nonmovant, the court determines whether the allegations are sufficient to state a cause of action upon which relief should be granted. *Guinn*, 361 Ill. App. 3d at 586. A dismissal for failure to state a cause of action should be affirmed only if it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief. *Guinn*, 361 Ill. App. 3d at 586.

¶ 55 To state a claim for breach of fiduciary duty, the plaintiff must allege the following: the existence of a fiduciary duty, a breach of that duty, and damages proximately caused by the breach. *Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303, ¶ 21. The plaintiff alleged that Ms. Gleason-Grosse was her mortgage broker and agent in the

procurement of financing for the condominium and therefore, Ms. Gleason-Grosse and she had a fiduciary relationship. See *Citicorp Savings v. Rucker*, 295 Ill. App. 3d 801, 809 (1998) (a fiduciary relationship arises as a matter of law from an agency relationship).³

¶ 56 In Illinois, a plaintiff relying on a theory of agency must plead specific facts establishing a principal-agent relationship and not merely plead the legal conclusion that such a relationship exists. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 498 (1996). The plaintiff maintains that the existence of an agency relationship is generally a question of fact reserved to the trier of fact. However, a plaintiff must still plead facts which, if proved, could establish the existence of an agency relationship and the scope of its authority. *Saletech, LLC*, 2014 IL App (1st) 132639, ¶ 15.

¶ 57 In this case, the plaintiff pleaded the legal conclusion that Ms. Gleason-Grosse was her agent, and therefore, she owed the plaintiff the duties of a fiduciary. The plaintiff pleaded no facts, which, if proved, established an agency relationship, *i.e.*, that she had the right to control the manner in which Ms. Gleason-Grosse obtained financing for the plaintiff and Ms. Leonardi for the condominium purchase. See *Saletech, LLC*, 2014 IL App (1st) 132639, ¶ 15 (a principal-agent relationship exists when the principal has the right to control the manner in which the agent performs his work and the agent can subject the principal to liability). The plaintiff's allegations that Ms. Gleason-Grosse required her to execute documents, such as the gift letters, and that she never submitted an application for financing in the plaintiff's name, contradict the plaintiff's claim that Ms. Gleason-Grosse was her agent. These facts demonstrate that it was Ms. Gleason-Grosse who controlled the mortgage application process, not the plaintiff. Therefore, the absence of factual allegations

³At her deposition, Ms. Gleason-Grosse testified that in 2008, she was an employee of Flagstar Bank. Flagstar Bank controlled her work and could reprimand her. However, for purposes of a motion to dismiss under section 2-615, the court may not look beyond the allegations of the complaint.

establishing that Ms. Gleason-Grosse was the plaintiff's agent is fatal to the plaintiff's claim for breach of fiduciary duty against Ms. Gleason-Grosse.

¶ 58 The plaintiff asserts that additional facts revealed during discovery established that Ms. Leonardi's relationship with Ms. Gleason-Grosse went beyond that of a typical borrower-lender. *Teachers Insurance & Annuity Ass'n of America v. La Salle National Bank*, 295 Ill. App. 3d 61, 71 (1998) ("A mortgagor-mortgagee relationship does not create a fiduciary relationship as a matter of law"); see *Benson v. Stafford*, 407 Ill. App. 3d 902, 912 (2010) (where the plaintiff's relationship with the defendant is not a fiduciary one by law, the plaintiff must show that the relationship existed based on the particular circumstances of the case). In deciding whether the plaintiff has pleaded sufficient facts to constitute a cause of action, the court must confine itself to the allegations in the complaint and matters of which the court may take judicial notice. *Khan*, 408 Ill. App. 3d at 578. Therefore, we may not consider facts revealed in discovery in our determination of the correctness of the circuit court's dismissal of the plaintiff's breach of fiduciary duty claim against Ms. Gleason-Grosse.

¶ 59 Finally, the plaintiff failed to allege sufficient facts, which if proven, established that Ms. Gleason-Grosse's conduct was the proximate cause of her damages. The plaintiff alleged that Ms. Gleason-Grosse was her mortgage broker and agent solely for the purposes of obtaining financing for the purchase of the condominium. The plaintiff failed to allege any facts, which if believed, established that it was Ms. Gleason-Grosse's failure to submit a joint mortgage application and/or her failure to inform the plaintiff that she had no protectable interest in the condominium that was the proximate cause of the loss of the plaintiff's \$80,000 and her principal payments.

¶ 60 The dismissal of count III alleging breach of fiduciary duty by Ms. Gleason-Grosse for failure to state a cause of action was proper.

¶ 61 CONCLUSION

¶ 62 The judgment of the circuit court is affirmed. The motion to dismiss the appeal is denied.

¶ 63 Motion denied.

¶ 64 Affirmed.

¶ 65 PRESIDING JUSTICE ROCHFORD specially concurring:

¶ 66 I respectfully concur in the result only.

¶ 67 JUSTICE DELORT specially concurring:

¶ 68 I concur with ¶¶ 1-32 of Justice Hall’s Rule 23 order. I write separately to set forth my own analysis with respect to the two substantive issues.

¶ 69 I would affirm the trial court’s granting of summary judgment on the unjust enrichment claim on the simple basis that unjust enrichment is not an available remedy when there is an underlying contract. Under the doctrine of unjust enrichment, a plaintiff must show 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). Unjust enrichment is not an independent cause of action. *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1024 (2009). Rather, it is a remedy for “unlawful or improper conduct as defined by law, such as fraud, duress or undue influence” (internal quotation marks omitted) (*Alliance Acceptance Co. v. Yale Insurance Agency, Inc.*, 271 Ill. App. 3d 483, 492 (1995)), or, alternatively, it may be based on contracts which are implied in law (*Perez v. Citicorp Mortgage, Inc.*, 301 Ill. App. 3d 413, 425 (1998)).

However, this theory is inapplicable when an express contract, oral or written, governs the parties' relationship. *Id.*

¶ 70 Here, undisputed facts demonstrate there was an express contract between the parties, embodied by the gift letters and the deed. The gift letters demonstrate that the money was being given as a condition that plaintiff was to have an ownership interest in the condominium. Therefore, the remedy of unjust enrichment was not available under these circumstances.

¶ 71 I would also affirm the trial court's dismissal of the breach of fiduciary duty claim against Gleason-Grosse. The complaint and its exhibits demonstrate Gleason-Grosse was an employee of Flagstar Bank and acting as its agent. Her loyalty was to Flagstar, not to the plaintiff or Leonardi. She was not functioning as a mortgage broker in the sense that the borrowers retained her for a fee to obtain a loan for them with some lender operating in the general marketplace. As such, she owed no fiduciary duty to the plaintiff. In Illinois, a mortgagor-mortgagee relationship does not create a fiduciary relationship as a matter of law. *Teachers Insurance and Annuity Ass'n of America v. LaSalle National Bank*, 295 Ill. App. 3d 61 (1998).