2018 IL App (1st) 170867-U
No. 1-17-0867

THIRD DIVISION
March 14, 2018

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JENNIFER BLUS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CH 30909
	)	
HARRY LOWRANCE,	)	
	)	The Honorable
Defendant-Appellant.	)	David B. Atkins,
	)	Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err by granting summary judgment in favor of plaintiff where defendant failed to raise a genuine issue of material fact regarding plaintiff's claim for unjust enrichment, and the court did not abuse its discretion in awarding prejudgment interest.

¶ 2 In this action in equity, filed in the circuit court of Cook County, defendant, Harry Lowrance, appeals from the circuit court's grant of summary judgment in favor of plaintiff, Jennifer Blus. On appeal, defendant contends that: (1) plaintiff's judicial admissions of an express agreement precluded the court's grant of summary judgment for unjust enrichment; and

(2) an award of $48,625 in prejudgment interest was inappropriate. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 This case arises out of an alleged scheme by defendant to defraud plaintiff. During the relevant time period defendant was a broker on the floor of the Chicago Mercantile Exchange (CME) and the president, majority shareholder, and registered agent of Hat Trading. Richard Lowrance, defendant's brother, was also a broker at the CME. Plaintiff was employed as a clerk on the floor of the CME. Plaintiff would sporadically perform contract work for the two brothers. In November 2005 defendant allegedly approached plaintiff with a proposal that she invest $100,000 in a business venture of defendant and Richard's. Defendant purportedly stated to plaintiff that this venture would generate 8% interest to plaintiff. Plaintiff would also share in the profits, but defendant did not specify what that share would be. Defendant also purportedly told plaintiff that the entirety of the funds would be repaid upon demand and that plaintiff would not be liable for any of the venture's losses. Plaintiff had no other information regarding the venture.

¶ 5 The undisputed facts established that on November 14, 2005, plaintiff gave defendant a personal check for $100,000 made payable to Hat Trading. The check contained the memo "RML invest." RML are Richard's initials, however, Richard had no involvement with soliciting the funds. Instead of using the funds for investment purposes, defendant gave $50,000 to Richard to pay a debt and used the remainder for his personal expenses. Defendant issued two checks to plaintiff in the amount of $1,875 in March and June of 2006, which according to plaintiff were interest payments. No additional payments were made to plaintiff. In January 2007 plaintiff made a written demand for return of the $100,000. Defendant was unable to pay her.

¶ 6 On August 28, 2009, plaintiff filed a complaint for equitable accounting. In January 2010 defendant filed his appearance and answer to the complaint *pro se*. Discovery then ensued. Over the course of the next several years plaintiff filed an amended complaint for accounting, breach of fiduciary duty and conversion; defendant was granted time to obtain an attorney; the case was set for status; and, the presiding judge retired. Some time thereafter, the case was given a trial date, however, after several case management conferences the date was stricken. In December 2013 plaintiff filed a second amended complaint adding counts for fraud and unjust enrichment. In response, defendant filed a motion to dismiss, which was granted as to the counts relating to breach of fiduciary duty and accounting. Plaintiff was granted leave to file an amended complaint on the fraud and unjust enrichment claims. On August 26, 2014, plaintiff filed her third amended complaint.

¶ 7 In September 2014 defendant filed an answer including eight affirmative defenses which was met with plaintiff's motion to strike the affirmative defenses. In October 2015 the court struck seven of the eight defenses with prejudice. Defendant's affirmative defense that plaintiff's unjust enrichment claim was barred based on the existence of a specific agreement between the parties, was stricken without prejudice. The court also granted defendant leave to file his claim for setoff in the amount of $3,750 as a counterclaim. Defendant followed with an amended affirmative defense, re-pleading the existence of a specific contract as a bar to plaintiff's unjust enrichment claim. Defendant also filed his counterclaim.

¶ 8 In June 2016 plaintiff filed her motion for summary judgment. Subsequently, defendant filed his response and cross-motion for summary judgment. On December 12, 2016, the court granted summary judgment for plaintiff and denied defendant's cross-motion for summary judgment on the claim for unjust enrichment. Defendant's motion for setoff was granted.

Judgment was entered for plaintiff in the amount of $96,250. The case was continued for status regarding plaintiff's count for fraud.[1] In January 2017 plaintiff filed a motion for prejudgment interest. Plaintiff's motion was granted on March 8, 2017, and the court awarded prejudgment interest in the amount of $48,625.

¶ 9 Defendant timely appeals. Additional pertinent facts will be discussed in the context of the issues raised on appeal.

¶ 10 ANALYSIS

¶ 11 I. Summary Judgment

¶ 12 Defendant argues that the circuit court erred in granting summary judgment in favor of plaintiff and in denying his cross-motion for summary judgment because: (A) plaintiff's pleadings and testimony are judicial admissions of an express agreement that precluded a claim for unjust enrichment; and (B) defendant's contradictory testimony created an issue of material fact regarding the amount of damages.

¶ 13 Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2016); *Jones v. Chicago HMO Ltd. of Illinois,* 191 Ill. 2d 278, 291 (2000). Our review of a grant of summary judgment is *de novo*. *Adams v. Northern Illinois Gas Company,* 211 Ill. 2d 32, 43 (2004). Where, as here, the parties have filed cross-motions for summary judgment, they agree that no genuine issue as to any material fact exists and that only a question of law is involved, and they invite the court to decide the issue based on the record. *Cordeck Sales, Inc. v. Construction Systems, Inc.,* 382 Ill. App. 3d 334, 343 (2008).

[1] Subsequently, plaintiff voluntarily dismissed this remaining count of her complaint pursuant to section 2-1009 of the Code of Civil Procedure. 735 ILCS 5/2-1009 (West 2016).

The mere filing of cross-motions for summary judgment does not require that the court grant the requested relief to one of the parties where genuine issues of fact exist precluding summary judgment in favor of either party. *Id.*; *State Farm Insurance Company v. American Insurance Company,* 332 Ill. App. 3d 31, 36 (2002). On appeal, in reviewing the circuit court's decision, we review the judgment and not the reasoning of the lower court, and we may affirm on any grounds found present in the record. *Coughlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24.

¶ 14 As an initial matter, we must address defendant's procedural default of his standing issue. Our review of the record and defendant's briefs on appeal reveal that defendant first argued in his reply brief that plaintiff had no standing because she filed for bankruptcy during the pendency of this action and failed to disclose the same to the court. Pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017), points not argued in an opening brief on appeal are waived and may not be raised in the reply brief. Ill. S. Ct. R. 341(h)(7); see *Richard v. Nederlander Palace Acquisition, LLC,* 2015 IL App (1st) 143492, ¶ 30. Accordingly, defendant, having first raised the issue of standing in his reply brief, has waived the issue and we strike any portions of the reply brief relating to this contention. We now turn to the merits of those issues properly preserved and presented on appeal.

¶ 15 A. Unjust Enrichment

¶ 16 Defendant contends plaintiff's unjust enrichment claim fails as a matter of law because according to her binding judicial admissions, there was an express agreement governing the subject transaction. To sustain a cause of action for unjust enrichment, a party must demonstrate that the defendant unjustly retained a benefit to the plaintiff's detriment and that the defendant's retention of that benefit violates the fundamental principles of justice, equality and good conscience. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.,* 131 Ill. 2d 145, 160

(1989). Because it is an equitable remedy, unjust enrichment is only available when there is no adequate remedy at law. *Season Comfort Corp. v. Ben A. Borenstein Company,* 281 Ill. App. 3d 648, 656 (1995). Where there is a specific contract that governs the relationship of the parties, the doctrine of unjust enrichment has no application. *People ex rel. Hartigan v. E & E Hauling, Inc*., 153 Ill. 2d 473, 497 (1992); *Karimi v. 401 North Wabash Venture, LLC,* 2011 IL App (1st) 102670, ¶ 14.

¶ 17 Defendant argues that plaintiff's allegations in her third amended complaint coupled with her deposition testimony are binding judicial admissions of an express agreement. He asserts that plaintiff, in her complaint, alleged that defendant approached plaintiff with a proposal that she invest $100,000 in a business venture of defendant and Richard's, and that defendant would manage it through Hat Trading. Also, plaintiff alleged that defendant stated to plaintiff that the venture would pay plaintiff 8% annual interest and that defendant and Richard would repay the entirety of the investment funds upon demand. Further, as alleged, plaintiff would not be responsible for any losses to the venture. And finally, as also alleged in the complaint, in January 2007, plaintiff made a written demand to defendant for return of the investment funds. Defendant additionally notes that in her deposition testimony, plaintiff acknowledged that it was "a simple investment, only 8 percent." The above recited allegations and testimony, defendant argues, constitute binding judicial admissions, which show that a "valid verbal contract" governed the parties' transaction. As such, defendant contends that the admissions preclude a finding of summary judgment in favor of plaintiff on her unjust enrichment claim. We disagree.

¶ 18 Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge. *In re Estate of Rennick*, 181 Ill. 2d 395, 406-07 (1998). The subject statement must not be an inference or unclear summary. *Serrano v.*

Rotman, 406 Ill. App. 3d 900, 907 (2011). What constitutes a judicial admission must be decided under the circumstances in each case. *Id.* Additionally, before a statement can be held to be such an admission, it must be given a meaning consistent with the context in which it is found, and it must be considered in relation to the other testimony and evidence presented. *Id.* Where made, a judicial admission may not be contradicted in a motion for summary judgment. *Rennick* at 406-407. Further, although statements made during a discovery deposition are normally treated as evidentiary admissions, which may be contradicted; such statements may * * * be held to be judicial admissions. *Rennick,* 181 Ill. 2d at 407. The purpose of these rules is to remove the temptation to commit perjury. *Id.*

¶ 19 When an admission is made in an unverified pleading signed by an attorney, it is binding on the client as a judicial admission unless the pleading is amended. *Kulchawik v. Durabla Manufacturing Co.,* 371 Ill. App. 3d 964, 970 (2007); *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 558 (2005). On amendment, the admission becomes evidentiary, not judicial. *Kulchawik*, 371 Ill. App. 3d at 970; *Knauerhaze*, 361 Ill. App. 3d at 559. In the case at bar, the allegations contained in plaintiff's complaints were unverified and signed by an attorney. However, any admissions, even if made, became evidentiary statements upon amendment of the complaints. Furthermore, we do not view the allegations referenced above, taken in context, to be so clear and unequivocal as to rise to the level of judicial admissions.

¶ 20 Here, the circuit court found that "even taking all of plaintiff's statements as to the terms of the agreement as true it would merely show that she subjectively believed that there was a specific contract. It would not be sufficient to establish that there was in fact the formation of a specific oral contract as a matter of law." The court explained that "in the formation of a valid contract are offer, and acceptance, consideration and definite and certain terms. * * *

Additionally, and more importantly in this instance, an enforceable contact must include a meeting of the minds or mutual assent as to the terms of the contract." The court stated that deposition testimony "shows that neither was there a meeting of the minds between the parties nor was there evidence of mutual assent. Accordingly, the precise terms of the agreement between plaintiff and defendant are neither definite nor certain and there cannot be any contract formation in this case." The court observed that defendant's deposition testimony consistently showed that he did not believe he was entering into a contract with plaintiff whereby he would invest her money with Richard's company and give her an 8% annual return as interest. In fact, he testified that he believed that the money was meant as a personal loan.

¶ 21 The court further found that:

> "Although there are several contradictions in the depositions between the parties, * * * deposition testimony does show that there is no issue of fact * * * [that]; (1) Blus wrote a check for $100,000 made payable to Hat Trading and tendered the check to Harry; (2) Both Blus and Harry understood that Blus, at a minimum, was entitled to full reimbursement of the $100,000. * * *; (3) The investment funds were never in fact invested in any company or security. Instead, Harry deposited the check and tendered $50,000 to Richard. He kept the other $50,000 for himself and spent at least part of it for personal expenses; and (4) Harry has tendered $3,750 back to Blus. Defendant has not tendered $96,250 of the Investment Funds back to Blus."

¶ 22 Plaintiff conferred a benefit upon defendant in that she delivered to him the funds at a value of $100,000. Based on testimony, plaintiff conferred this benefit for one of two reasons: (1) to invest in a company where she was promised an 8% annual return and her funds back upon demand; or (2) it was a personal loan that would be paid back at some point. Thus, whether

plaintiff's allegations and testimony were determined to be evidentiary or judicial admissions, they would be insufficient to establish an express agreement.

¶ 23 We have considered *Guinn v. Hoskins Chevrolet,* 361 Ill. App. 3d 575, 604 (2005); *Nesby v. Country Mutual Ins. Co*., 346 Ill. App. 3d 564, 567 (2004); and *Premier Electrical Construction Company v. LaSalle National Bank*, 132 Ill. App. 3d 485, 496 (1984), cases upon which defendant relies for the proposition that a claim of unjust enrichment cannot stand where there are allegations of an express contractual agreement. Notably, all of the above referenced cases involved written contracts. Accordingly, defendant's reliance is misplaced.

¶ 24 Here, defendant was unjustly enriched and plaintiff was entitled to the return of the funds. See *Fortech, L.L.C. v. R.W. Dunteman Company,* 366 Ill. App. 3d 804, 818 (2006) (holding a cause of action for unjust enrichment does not require fault or illegality on the part of the defendant, the essence of the cause of action is that one party is enriched and it would be unjust for that party to retain the enrichment). Consequently, the judgment in favor of plaintiff in the amount of $96,250 including defendant's setoff of $3,750 was just and equitable. We conclude that there is no genuine issue of material fact regarding plaintiff's claim for unjust enrichment, and that plaintiff was entitled to judgment as a matter of law. Accordingly the court did not err in granting summary judgment in favor of plaintiff and denying defendant's cross-motion for summary judgment.

¶ 25 B. Damages

¶ 26 Defendant next contends that the circuit court erred in granting summary judgment in favor of plaintiff regarding the amount of damages. He argues that there was contradictory testimony in his and Richard's depositions regarding precisely what happened to the $100,000, which at a minimum created genuine issues of material fact on the issue of damages. In this two-

paragraph summary argument, devoid of citation to any legal authority, defendant maintains that, at most, the trial court should have granted plaintiff only partial summary judgment.

¶ 27 Not only is defendant's argument violative of Supreme Court Rule 341(h)(7), it is entirely lacking in merit. See Ill. S. CT. R. 341(h)(7) (eff. Nov. 1, 2017). Even accepting contradictory deposition testimony in his and Richard's deposition, there is neither a dispute nor contradictory evidence that plaintiff was denied any benefit or the return of the $100,000 which she entrusted to defendant at his urging.

¶ 28 II. Prejudgment Interest

¶ 29 Defendant next assigns error to the circuit court's: (A) award of prejudgment interest; and (B) calculation of said prejudgment interest.

¶ 30 A. Award

¶ 31 Defendant contends that the award of prejudgment interest was not appropriate in this case. An award of prejudgment interest is appropriate where it is "authorized by statute, agreement of the parties[,] or warranted by equitable considerations." *National Union Fire Insurance Company of Pittsburgh v. DiMucci,* 2015 IL App (1st) 122725, ¶ 82 (quoting *Tully v. McLean*, 409 Ill. App. 3d 659, 684–85 (2011)). It has long been recognized that Illinois courts sitting in equity may award prejudgment interest even though not within the precise terms of the Interest Act (815 ILCS 205/2 (West 2016)); *Tri–G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 257 (2006). A trial court's determination that equitable considerations support an award of prejudgment interest is reviewed for an abuse of discretion. *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 100. The determination of the equities of the case is a matter lying within the sound discretion of the trial judge. *DiMucci,* 2015 IL App (1st) 122725, *¶* 83. A reviewing court

should not substitute its judgment for that of the trial court unless no reasonable person could adopt the trial court's position. *Id.*

¶ 32 Defendant argues that the circuit court erred in its reliance on *In re Estate of Wernick*, 127 Ill. 2d 61 (1989), when it awarded prejudgment interest because *Wernick's* holding is limited to claims involving breach of fiduciary duty, which is not an issue in the instant case. We disagree.

¶ 33 In *Wernick*, the respondent was found to have breached his fiduciary duty, and the petitioners were awarded prejudgment interest. 127 Ill. 2d at 86. The trial court allowed prejudgment interest at the statutory rate of 5% per year. Respondent appealed. According to the appellate court, the award of statutory interest standing alone fell far short of compensating the estate for the amount by which respondent was unjustly enriched and had profited. As a result, the appellate court concluded that an additional award of prime rate interest was necessary to adequately compensate petitioners for respondent's breach of fiduciary duty. Respondent appealed to the supreme court.

¶ 34 In upholding the prime rate award and not the statutory award, our supreme court stated that "the goal of proceedings sounding in equity is to make the injured party whole. The current trend being employed to accomplish this goal is to allow an award of interest on funds owing so that justice might be accomplished in each particular case." 127 Ill. 2d at 86 (citing *Lexington Insurance Co. v. Abington Co.* (E. D. Pa.), 621 F. Supp. 18, 21 (1985) quoting *Murray Hill Estates v. Bastin,* 442 Pa. 405, 410 (1971)). The *Wernick* court relied on *Finley v. Finley*, 81 Ill. 2d 317, 332 (1980), a divorce proceeding which was found to be in the nature of a chancery proceeding. The *Finley* court held that in a chancery proceeding, the allowance of interest lies within the sound discretion of the trial judge and is allowed if such an award would comport with

justice and equity. The *Wernick* court also relied on *Duncan v Dazey*, 318 Ill. 500, 527 (1925), which involved an equity proceeding where our supreme court held that the rule followed in equity is to allow or disallow interest as the equities of the case may demand. Although *Wernick,* was a case concerning breach of fiduciary duty, it was not so limited and also spoke to considerations of equity in general. 127 Ill. 2d at 87. Therefore, we find that the court did not err in its reliance on *Wernick,* in its March 8, 2017, order awarding prejudgment interest.

¶ 35 Defendant next asserts that the court erred when it concluded that "[t]he extensive 11-year history (and nearly 8-year procedural history) of this case, in addition to the defendant's conduct * * * are such that an award of prejudgment interest will serve the interests of justice and equity." Defendant maintains that the above shows that the court intended that the prejudgment interest was a punishment, which is not allowed under Illinois law. See *DiMucci,* 2015 IL App (1st) 122725, ¶ 86 (holding that an award of prejudgment interest is not meant as a punishment but, rather to compensate the injured party in equity for the deprivation of use of the funds). Defendant explains that the eleven year history of this case reveals numerous significant delays attributable to plaintiff and few delays attributable to himself. Defendant argues that equitable considerations are lacking in light of the fact that it took plaintiff five years to file a proper complaint, after which time plaintiff delayed the prosecution of this case for an additional 14 and one-half months. Again, we disagree.

¶ 36 In this case, the court concluded that in the absence of prejudgment interest, plaintiff would receive no compensation for being deprived of the judgment amount during the extensive factual and procedural history of this case. The court then awarded statutorily prescribed prejudgment interest from the date of plaintiff's demand through the date of its order granting damages and prejudgment interest, approximately 10 years. Furthermore, our review of the

record reveals that defendant continuously filed motions asserting that plaintiff's claim for unjust enrichment should be stricken, barred by an affirmative matter, unavailable due to an adequate remedy at law, and finally summary judgment based on the affirmative matter that plaintiff had an adequate remedy at law. Although this litigation was protracted, defendant nevertheless admitted that he received the funds, spent them for his own benefit and refused to repay them upon plaintiff's demand. At the risk of stating the obvious, had the demand for the return of the $100,000 been honored, litigation to secure that return would not have been necessary in the first place. Plaintiff was entitled to the return those funds from the date of her demand. We conclude that the award of statutorily prescribed prejudgment interest was not a punishment but was necessary to satisfy the equities of the case. See *Finley,* 81 Ill. 2d at 332; (holding prejudgment interest may be recovered when warranted by equitable considerations). Consequently, we hold that the court did not abuse its discretion in awarding prejudgment interest.

¶ 37 B. Calculation

¶ 38 Defendant also assigns error to the court's calculation of prejudgment interest for 10 years at 5% for an award of $48,625. He contends that the court's calculation of interest is excessive and unsupported under applicable law.

¶ 39 Defendant argues that plaintiff is not entitled to prejudgment interest for the five years during which she did not have a proper complaint on file and for the 14 and one-half month period during which plaintiff failed to prosecute her case. As earlier observed, prejudgment interest from the date of demand until judgment was necessary to compensate plaintiff for the deprivation of her funds over the protracted history of this case. Further, defendant has admitted to both receipt and liability. Thus, we find no error in calculating prejudgment interest for the

approximately 10 years in which defendant unjustly retained the funds for his own use and benefit. See *Duncan,* 318 Ill. at 527.

¶ 40 Finally, defendant, again relying on *Wernick*, contends that awards for prejudgment interest are to be calculated at the prime rate, which was during much of the time in question, significantly below 5%. 127 Ill. 2d at 88. Defendant argues that the court, in calculating prejudgment interest, should have used the prime rate. Defendant misapprehends *Wernick*.

¶ 41 In *Wernick,* the court noted that the statutory rate had not been changed to reflect the escalating interest rates in the market. *Id.* The court concluded that the statutory rate of 5% was not sufficient to make the petitioners whole, and the petitioners were entitled to an award of interest at the then higher prime rate. Thus, according to *Wernick*, the amount of interest should reflect the rate, either statutory or prime, so as to make the petitioner whole. Clearly, the *Wernick* court merely approved use of the prime rate as a measure for prejudgment interest. *Id*. at 89. This approach is consistent with, and certainly does not supersede, the specific authorization of 5% prejudgment interest in section 205/2 of the Interest Act (815 ILCS § 205/2). Section 205/2 states in pertinent part: "[C]reditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due * * *." 815 ILCS § 205/2.

¶ 42 Here, the court used the statutory authorization of 5% interest prescribed in the Interest Act to award plaintiff $48,625. We believe that the award of statutorily prescribed prejudgment interest was necessary to make plaintiff whole. Further, we find no error in the court's calculation of prejudgment interest from the date of demand through the date of its order awarding damages. Accordingly, we hold that the court did not abuse its discretion in awarding $48,625 in prejudgment interest to plaintiff.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 45 Affirmed.