2019 IL App (1st) 181338-U

FOURTH DIVISION
October 31, 2019

No. 1-18-1338

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

GRAMAR LLC	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 15 L 10764
	)	
M&M OUTDOOR, INC., and DAVID MALEY,	)	Honorable
	)	Patrick J. Sherlock,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

Held: We affirm the trial court's entry of judgment for plaintiff in the amount of $67,000 and find no error in its calculation of rescission setoff damages. We also affirm the trial court's dismissal of Gramar's claim for rescission on a separate contract.

¶ 1 Following a bench trial on the issue of damages and setoff for rescission of a contract for the assignment of rights to a billboard, plaintiff Gramar LLC (Gramar) appeals the trial court's entry of judgment in the amount of $67,100 in its favor. Gramar also appeals the trial court's earlier order granting defendants' motion to dismiss pursuant to section 2-619.1 (735 ILCS 5/2-

619.1 (West 2016)) with respect to Gramar's claim for rescission of another contract for the assignment of rights to a different billboard. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 In its initial complaint filed on October 22, 2015, Gramar alleged breach of contract, fraud, unjust enrichment, rescission, repudiation, and indemnification against defendants M&M Outdoor, Inc. (M&M) and M&M's president Dave Maley (Maley) in connection with two written contracts that Gramar entered into with M&M on October 31, 2013. M&M was the original lessee of two separate exterior walls containing billboards, one at 324 West Chicago Avenue (Chicago Avenue sign) and 344 North Ogden Avenue (Ogden Avenue sign). Prior to contracting with Gramar, M&M had entered into a 60-month access agreement with YiaYia LLC (YiaYia) for access to the roof and air above YiaYia's property for maintenance of the Chicago Avenue sign which required payments of $1,300 per month (YiaYia access agreement). M&M also entered into a 60-month lease with 324 W. Chicago LLC (324 W. Chicago) for rights to the west face of the building for the Chicago Avenue sign at a cost of $2,300 per month (wall lease agreement). M&M also executed a 15-year lease with Cortland Property Corporation (Cortland), the landowner of 344 North Ogden Avenue, for the billboard space, and executed an air rights agreement with Ogden Property Services for the same time period in order to have ingress and egress to the billboard.

¶ 4 The contracts between Gramar and M&M were titled "Assignment and Assumption of Lease" (hereinafter respectively referred to as the Chicago Avenue assignment and the Ogden Avenue assignment) and provided for the assignment of the two separate billboards to Gramar. Billboards must be licensed by the City of Chicago. The contracts each contained a contingency clause that provided:

> "This Assignment is expressly contingent the City of Chicago authorizing Assignee to take assignment of Assignor's permit (a true and correct copy of which is attached hereto as Exhibit B) or Assignee obtaining its own permit and all necessary approvals from the City of Chicago and all governing authorities for the continued use of the Premises as billboard advertising ***."

¶ 5 Both parties attempted to transfer the existing permits or obtain new ones for the billboards. The City of Chicago ultimately granted a permit for the Chicago Avenue sign, but rejected the application for the Ogden Avenue sign in October 2015. As such, Gramar alleged in its complaint that defendants breached the above provision. Gramar also alleged that defendants breached other express warranties in the assignment agreements in that defendants represented that they were in full compliance with all terms and conditions of the associated leases and access agreements, that they were not in default, that no claims or other actions existed with regard to defendants' leases related to the billboards, that they had valid permits for the billboards.[1] Gramar alleged that defendants failed to pay rent for the underlying lease with the

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[1] Paragraph 5(c) reads:

> "The sign permit ('Permit') has previously been granted to Assignor and remains in full force and effect. Assignor has not received any notice and is no otherwise aware that any authority intends to cancel, terminate, modify amend, or revoke the Permit. Assignor is not aware of any event, circumstance or omission that could lead to the cancellation, termination, modification, amendment or revocation of the Permit. Other than the Permit, no other governmental permit, license, consent, approval or other authorization regarding the sign or usage as described in the Lease has been issued to Assignor, and, to Assignor's knowledge, no permit has been issued by any governmental authority to any other person or entity regarding the Premises."

Paragraph 5(d) states:

> "There are no pending or, to the knowledge of Assignor, threatened, claims, suits, actions, proceedings, investigations or orders or planned public improvements, annexations, special assessments, re-zonings, takings, or other adverse claims or proceedings, against or affecting any of the Lease, premises, Documents signage or Usage, which could prohibit, interfere with or delay the consummation of the usage contemplated in the Lease."

property owner of 324 West Chicago Avenue, that defendants were advised that the City had issued the Ogden Avenue sign permit in error, and that defendants failed to obtain the building owners' authorizations for assignments of the various leases to Gramar. Additionally, Gramar alleged that it entered into an oral agreement with Maley to market and sell advertising space on the billboards for Gramar in exchange for a commission, but Maley never provided any services and usurped opportunities for his own benefit. Gramar alleged that it transferred $275,000 to defendants, representing $137,500 for each assignment. Gramar sought return of the entire amount.

¶ 6 Defendants responded with a motion to dismiss under section 2-619.1 (735 ILCS 5/2-619.1 (West 2016)). Defendants argued that pursuant to section 2-615, Gramar failed to state a claim for breach of contract because the two assignment agreements must be viewed independently as separate contracts, and the failure to obtain a permit for the Ogden Avenue sign did not result in a breach of the assignment agreement related to the Chicago Avenue sign. Further, failure to obtain a permit for the Ogden Avenue sign did not constitute a breach; it was a failure to satisfy a condition subsequent, thus discharging contractual liability. Gramar obtained a permit for the Chicago Avenue sign and defendants otherwise fulfilled all obligations under the Chicago Avenue assignment and thus there was no breach of that assignment. Defendants argued that Gramar failed to state a claim of fraud because although the complaint claimed defendants made fraudulent warranties in the assignment agreements regarding the permits, *i.e.*, that the permits were "in full force and effect," Gramar failed to allege that defendants knew of any issue with its permits before making the warranties. Defendants asserted that Gramar's fraud claim against Maley must fail because the alleged oral agreement with Maley was terminable at will. Next, defendants argued that the unjust enrichment claim was insufficient because failure to

obtain a permit or termination of the alleged oral marketing agreement with Maley did not constitute unlawful, fraudulent, or improper conduct. Defendants also asserted that the rescission of a contract claim must fail because Gramar failed to plead sufficient facts to show breach, fraud, or mistake. Similarly, Gramar failed to sufficiently plead anticipatory repudiation, *i.e.*, Gramar failed to plead an event that led it to believe that the assignment agreements would be breached. Defendants also argued that they demonstrated that they performed all duties and obligations under the agreements and that the contingency clauses did not place a duty on defendants to obtain permits for Gramar, rather, the contingency simply stated that Gramar was to take assignment of the permits or obtain their own.

¶ 7 In addition, pursuant to section 2-619, defendants argued that they fully complied with the terms of the assignment agreements and there was no breach of the assignments or underlying access agreements/leases because they paid the rental amounts due and notified the lessors/owners of the assignments to Gramar. Defendants asserted that they notified YiaYia of the sale of the Chicago Avenue sign to Gramar on August 12, 2015, and notified 324 W. Chicago of the sale of the Chicago Avenue sign to Gramar on November 16, 2015. Defendants asserted that on October 23, 2015, they paid YiaYia for rent payments for June, July, August, September, and October 2015. Defendants also paid 324 W. Chicago LLC for November 2015 rent. Defendants also argued that the claim against Maley should be dismissed as defendants provided a detailed ten-month accounting of the sales and services Maley provided related to the billboards on Gramar's behalf. Defendants attached an affidavit from Maley, the assignment agreements, permit information from the City's website, letters notifying the lessors/owners of the assignment of the access/lease agreements at each property, the YiaYia access agreement, the wall lease agreement, a notification letter for past due rent for the Chicago Avenue sign, copies

of the checks M&M issued to YiaYia and 324 W. Chicago Avenue, and the letter from Maley to Gramar regarding the sales services he provided and the amount Gramar owed him.

¶ 8 The trial court entered an order on April 12, 2016, granting defendants' motion to dismiss with prejudice as to Gramar's claims of unjust enrichment and repudiation of contract under section 2-615. The trial court granted the motion to dismiss without prejudice as to breach of contract, fraud, rescission, and indemnification, and granted Gramar leave to file an amended complaint. The trial court granted Gramar leave to file an amended claim for rescission of the Ogden Avenue assignment only, not as to the Chicago Avenue assignment. The trial court reasoned that the correct ground for rescission was mutual agreement as the contingency clause in the Ogden Avenue assignment provided that it was "expressly contingent" on Gramar obtaining its own permit or being able to use defendants' permit for that billboard. Because this contingency did not occur, the Ogden Avenue assignment had no legal force or effect. The trial court rejected Gramar's argument that this should force rescission of both the Ogden Avenue and Chicago Avenue assignments. The trial court refused to construe the two assignments as one contract because they did not involve the same transaction or subject matter, they related to different billboards, different buildings owned by different entities, and different wall leases. Thus, the denial of the Ogden Avenue sign permit could not be used to rescind the Chicago Avenue assignment agreement.

¶ 9 Gramar thereafter filed a first amended complaint alleging (1) fraud/misrepresentation related to the Chicago Avenue assignment in that defendants failed to notify the original lessors prior to executing the Chicago Avenue assignment but made representations to the contrary, (2) breach of contract related to the Chicago Avenue assignment in failing to timely transfer the sign permit to Gramar and failing to obtain consent from the lessors until after the initial complaint

was filed, and (3) rescission of the Ogden Avenue assignment based on failure to obtain a permit pursuant to the contingency clause.

¶ 10 Defendants filed a motion to dismiss the first amended complaint pursuant to section 2-619.1. Defendants argued that the fraud and breach of contract claims must fail because Gramar did not show that defendants made any false statements that induced Gramar to sign the Chicago Avenue assignment, they notified the owners/lessors of the assignment to Gramar, and they communicated with the City regarding transfer of the sign permit in May 2014, although Gramar itself ultimately obtained the Chicago permit. Regarding rescission, defendants argued that Gramar took it upon itself to obtain the Ogden Avenue sign permit, but did not file an application for the permit until 18 months after the Ogden Avenue assignment was executed, and Gramar meanwhile enjoyed the benefits of the agreement. Additionally, defendants argued that all counts should be dismissed because Gramar failed to show any damages, Gramar was responsible for rent owed to the landlords of the Chicago Avenue sign, and Gramar failed to request rescission within a reasonable time.

¶ 11 The trial court granted defendants' motion to dismiss with prejudice the claims for fraud/misrepresentation and breach of contract under section 2-615. However, the trial court denied the motion to dismiss as to the claim for rescission of the Ogden Avenue assignment. The court observed that although Gramar directed this claim to both defendants, only M&M was a party to the contract and therefore any relief must be between Gramar and M&M and Maley was not a party to the contract.

¶ 12 M&M then filed an answer and a counterclaim for setoff. Thus, the only issues remaining for trial were rescission of the Ogden Avenue assignment and setoff and the only parties involved in the remaining claims were Gramar and M&M. However, before trial, M&M

conceded that the trial court had correctly found in its April 12, 2016, order granting defendants' first motion to dismiss that rescission should apply to the Ogden Avenue assignment. M&M asserted that it was entitled to a setoff for the rent it paid to the lessors/owners of the Ogden billboard property because Gramar was obligated to pay this pursuant to the Ogden Avenue assignment. M&M argued that although it paid the rent, it took instruction from Gramar as to what advertisements to place on the sign, including the rent-free placement of a sign for The Sugar Factory, an entity owned in part by one of the owners of Gramar. Gramar maintained that M&M was not entitled to any setoff. The parties disputed whether the date of rescission should be set at the time the complaint was filed, the permit was denied, or when M&M agreed to rescission.

¶ 13 At the bench trial, Thomas Walsh testified that he was retained by M&M to apply to transfer the permit for the Ogden Avenue sign from M&M to Gramar. Walsh testified that he received a "soft denial" from the City in October 2015. Walsh testified that the sign was in a planned manufacturing district (PMD) where no billboard signs were allowed and the City was enforcing its current zoning and not the legal nonconforming zoning. Walsh testified that he was told by city representatives that they were going to enact an ordinance in January 2016 to correct the zoning and allow for signs as either a matter of right or by special use, but to his knowledge, no ordinance had been passed as of the trial date. The denial of the permit transfer did not affect the validity of the existing permit. The Ogden Avenue billboard currently had an advertisement for The Sugar Factory. Walsh was not aware of any prohibition on one entity using another entity's sign permit although it was illegal to own or operate a billboard without a permit.

¶ 14 David Maley testified that M&M first acquired the Ogden Avenue billboard and permit in 2010. Maley testified that in the Ogden Avenue assignment agreement, M&M assigned its 15-

year leases with Cortland and Ogden Property Services to Gramar on October 31, 2013, for $137,500. Maley testified that it became Gramar's responsibility to pay the rent to the owners/landlords of the Ogden Avenue property, but M&M always paid it. Maley believed its permit could still be transferred because of the proposed ordinance change. Maley testified that he had an oral agreement to procure advertisements and Grammar would pay a 15% commission. Maley testified that the first advertisement was with H&R Block for $5,800 a month for two months. M&M paid for sign installation ($800) and for removal ($450), which M&M took out of the proceeds from the sale. M&M also paid for general sign maintenance in the amount of $1075. M&M next obtained an advertising contract with Real Restoration for $2,700 for four months. M&M paid for installation and removal of the sign, which M&M deducted from the proceeds. M&M used the proceeds from the sales of advertisements to pay the rent. Maley also deducted a 15% commission from the advertising contracts. Maley testified that Vincent Michael Rizzo, Jr., the manager of Gramar, informed him that he wanted to place an advertisement for his other company, The Sugar Factory. M&M paid for installation of the sign in September or October of 2014. Maley testified that M&M never received any money from Gramar for placing the advertisement and The Sugar Factory advertisement was still on the billboard. M&M continued paying rent because otherwise the leases would be canceled and the billboard removed. M&M paid a total of $131,650 in rent from October 2013 to the present. Maley testified that M&M has realized a total of $159,900 from the Ogden Avenue transaction, including the $137,500 from Gramar and the advertising contracts with H&R Block and Restore. Further, M&M spent a total of $134,815.96 on rent and sign creation, installation, removal, and improvements. Maley testified that M&M should pay a setoff amount of $25,804.04.

¶ 15 Rizzo testified that Gramar has never paid any rent payments since execution of the Ogden Avenue assignment in October 2013. He agreed that M&M used the advertisement money to pay rent. Rizzo acknowledged receiving letters from the landlord of 344 North Ogden regarding the back rent due of $11,000 and warning that eviction proceedings would be initiated, the lease would be terminated, and they would have no rights to the billboard. Rizzo testified Gramar was not obligated to pay rent because the permit was never transferred. Rizzo hired someone to attempt to transfer the permit. Rizzo acknowledged the contingency clause regarding the permit did not contain any time limit. Rizzo knew that Maley was still working on trying to obtain a permit after the denial. Rizzo testified that Grammar is owned by his parents and his father is co-owner of The Sugar Factory.

¶ 16 The trial court filed a written opinion on May 5, 2018, entering judgment in favor of Gramar against M&M on the rescission claim related to the Ogden Avenue assignment. The trial court found that the City denied M&M's application to transfer its permit to Gramar on approximately October 22, 2015. Regarding setoff, the trial court entered judgment in favor of Gramar and against M&M in the amount of $67,100, and entered judgment in favor of Maley as Gramar proved no liability against him.

¶ 17 Gramar filed a timely appeal from the trial court's order of May 5, 2018, and its prior orders dismissing Gramar's other claims with prejudice.

¶ 18 II. ANALYSIS

¶ 19 A. Motion to Dismiss

¶ 20 On appeal, Gramar's first two arguments challenge determinations made in the trial court's April 12, 2016, order regarding defendant's motion to dismiss Gramar's initial complaint.

Defendants filed the motion pursuant to section 2-619.1, raising grounds under both sections 2-615 and 2-619. However, the trial court ruled on the motion only under section 2-615.

¶ 21 This court reviews motions to dismiss under section 2-615 of the Code *de novo*. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). The question presented by a section 2-615 motion is "whether the allegations of the complaint, when taken as true and viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009). The court may consider only the allegations of the complaint and any exhibits attached thereto. *Lissner v. Michael Reese Hospital & Medical Center*, 182 Ill. App. 3d 196, 206 (1989). "[F]actual assertions contained in the exhibits which are inconsistent with the allegations of the complaint negate such allegations." *Id.* "Illinois is a fact-pleading jurisdiction. A plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted." *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997). "Mere conclusions of law or facts unsupported by specific factual allegations in a complaint are insufficient to withstand a section 2-615 motion to dismiss." *Ranjha v. BJBP Properties, Inc.*, 2013 IL App (1st) 122155, ¶ 9. However, "[a] cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover." *Vernon*, 179 Ill. 2d at 344.

¶ 22 Additionally, we review issues of contract interpretation *de novo*. *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill.2d 100, 129 (2005). Our primary aim in contract interpretation is to "give effect to the intent of the parties." *Dearborn Maple Venture, LLC v. SCI Illinois Services, Inc.*, 2012 IL App (1st) 103513, ¶ 31 (quoting *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007)). "The plain and ordinary meaning of the language of the contract is the best indication of the parties' intent." *Id.* We must construe a contract as a whole, viewing each part in

light of the others. *Id.* We must not assume the parties' intent based on detached provisions of a contract or any clause in isolation. *Id.*

¶ 23 Gramar first contends that the trial court erred in finding that the two assignments did not constitute one single contract. Gramar argued below that due to the failure to obtain a permit for the Ogden Avenue billboard, both assignment agreements should be rescinded because they formed one single contract. The trial court disagreed, finding the Chicago and Ogden Avenue were two separate, independent assignments, not a single transaction or contract.

¶ 24 In contract interpretation, "instruments executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction are regarded as one contract and will be construed together." (Internal quotation marks and emphasis omitted.) *Dearborn Maple Venture*, 2012 IL App (1st) 103513, ¶ 31. "However, such instruments must be construed as separate agreements when there is evidence that the parties intended for the documents to be read separately." *Id.*

¶ 25 For example, in *Bank of Chicago v. Park National Bank*, 266 Ill. App. 3d 890, 898-99 (1994), the court found that a loan participation agreement and subordination agreement should be construed together as one contract where they were executed by the same parties at the same time in the course of the same transaction to jointly participate in a loan to a corporation and one party insisted on the subordination agreement in order to participate in the loan. In *Community State Bank of Galva v. Hartford Insurance Co.*, 187 Ill. App. 3d 110, 114 (1989), the court construed a power of attorney and promissory note together where both were delivered to the bank at the same time as part of the same transaction in which the bank relied on them in extending credit; the power of attorney was necessary to grant the party authority to obtain said credit and the promissory note served as consideration for the line of credit. In the case of

International Supply Co. v. Campbell, 391 Ill. App. 3d 439, 448 (2009), the court construed four agreements (a personal guaranty, a loan assistance agreement, a unit pledge agreement, and an escrow agreement) together as one contract where they were entered into at the same time, by mostly the same parties, as part of their scheme to develop property into a convention center, the agreements referred to other agreements and some agreements described portions or all of the entire transaction, and there was no indication that the parties intended the documents to be read separately.

¶ 26 On the other hand, in *Dearborn Maple Venture*, the earnest money contract, the development agreement, and lease agreement were all executed by the parties at the same time as part of the same deal to redevelop a parcel of property. *Id.* ¶ 4. However, the court declined to construe the three agreements as a single contract because each agreement had its own purpose and had specific terms by which their unique purposes would be fulfilled, indicating that the parties intended the three agreements to be construed separately. *Id.* ¶ 32. The court came to this conclusion despite the fact that the development agreement referred to "the documents" as collectively constituting the entire agreement of the parties, and despite the plaintiff's assertion that the agreements were co-dependent, as this did not establish an intent by the parties to construe them as a unified contract even if the agreements comprised the parties' business venture. *Id.*

¶ 27 In the present case, Gramar argues that the two assignments were entered into on the same date and time, involved the same subject matter and purpose (purchasing property (billboards) owned by defendants, Gramar paid one lump payment of 275,000 to M&M for both billboards, and the assignments contained identical terms and did not conflict.

¶ 28 It is true that the Chicago and Ogden Avenue assignments were entered into at the same time by the same parties, M&M and Gramar. However, they were not for the same purpose or subject matter. They each involved separate billboards in different locations and entailed assignments of different leases and access agreements held by different lessors and landowners (324 W. Chicago and YiaYia for the Chicago Avenue assignment, and Cortland and Ogden Property Services for the Ogden Avenue assignment). Additionally, each assignment agreement entailed the transfer of separate, independent permits from the City. Moreover, the language of the assignment agreements provides no evidence that the two contracts are interrelated, dependent on each other, or that the parties intended them to be construed together as one agreement. Although Gramar transferred payment for the two assignment agreements as one lump sum, each assignment agreement set forth its own specific amount of $137,500 to be paid.

¶ 29 Thus, there was no over-arching deal or business venture that tied the two agreements together; rather, each stood independently on its own and one did not serve as an inducement for the other. Moreover, successful performance or execution of each assignment was not contingent upon the other. The assignments were capable of being executed separately and performance of each consisted of entirely distinct and separate items, *i.e.*, different billboards. Thus, rescission of the Ogden Avenue assignment did not necessitate rescission of the Chicago Avenue assignment. We find no error in the trial court's determination that they constituted separate, independent contracts. Accordingly, we find no error in dismissing with prejudice Gramar's claim of rescission as to the Chicago Avenue assignment. Failure of the permit contingency provision in the Ogden Avenue assignment did not affect the validity of the Chicago Avenue assignment, for which a valid permit was obtained.

¶ 30 In a related vein, Gramar contends that the trial court erred in granting with prejudice the motion to dismiss its claim for rescission as to the Chicago Avenue assignment set forth in its initial complaint, and only granting leave to file an amended complaint as to the rescission of the Ogden Avenue assignment. Gramar argues that it entered into the contracts on October 21, 2013, but it did not receive any permits for either billboard until almost two years later, after it filed the initial complaint, when it received the Chicago Avenue sign permit and the Ogden Avenue permit was denied in October 2015. Gramar asserted that the contingency provision required that the permit be obtained within a reasonable time. Gramar contends that M&M's two-year delay in obtaining a permit for the Chicago Avenue billboard constituted a material breach entitling it to rescission of the Chicago Avenue assignment agreement.

¶ 31 In dismissing Gramar's initial complaint, the trial court found that the failure to obtain a permit for the Ogden Avenue sign did not require rescission of the Chicago Avenue assignment and allowed Gramar to file an amended claim for rescission as to the Ogden Avenue assignment only. Gramar essentially argues on appeal that it should have been allowed to file an amended claim of rescission of the Chicago Avenue assignment because of the two-year permitting delay.[2]

¶ 32 Rescission of a contract is an equitable remedy which "refers to cancellation of the contract so as to restore the parties to the status quo *ante*, the status before the contract." *Newton*

[2] We observe that Gramar is challenging on appeal the trial court's April 12, 2016, order dismissing its initial complaint in which it dismissed the rescission claim involving the Chicago Avenue assignment. However, Gramar does not mention that it later raised a related claim in count II of its first amended complaint wherein it alleged breach of contract based, in part, on grounds that M&M failed to obtain transfer of the Chicago Avenue permit within a reasonable time because of the two-year delay in obtaining the permit. In its August 31, 2016, ruling on defendants' second motion to dismiss, the trial court dismissed this claim with prejudice for failure to state a claim. Gramar does not specifically address this ruling, instead focusing on the trial court's earlier ruling on defendants' first motion to dismiss. However, on appeal, "this court reviews the judgment, not the reasoning, of the trial court, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24. We note that both orders are listed in Gramar's notice of appeal.

v. Aitken, 260 Ill. App. 3d 717, 719 (1994). "A court may award rescission where there is material breach, fraud, or mutual agreement." *Id.* A material breach warranting rescission is "with regard to a matter 'of such a nature and of such importance that the contract would not have been made without it.'" *Id.* (quoting *Felde v. Chrysler Credit Corp.*, 219 Ill. App. 3d 530, 539 (1991)). "An equitable remedy is not available where there is an adequate remedy at law," and election of either rescission or damages as a remedy "is an abandonment of the other." *Id.* at 720.

¶ 33 In order to state a claim for breach of contract, a plaintiff must allege "(1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) resultant damages." *W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill. App. 3d 752, 759 (2004). "Only a duty imposed by the terms of a contract can give rise to a breach." *Id.* Under Illinois law, where a contract is silent as to when performance will be completed, the law implies a reasonable time for performance, which is generally a question of fact depending on the circumstances and conditions of a particular case. *Murphy v. Roppolo–Prendergast Builders, Inc.*, 117 Ill. App. 3d 415, 418 (1983).

¶ 34 We find that Gramar's claim for rescission of the Chicago Avenue assignment based on breach of contract because M&M failed to obtain a permit within a reasonable time must fail. Gramar has failed to show breach of any duty. The permit contingency clause in the Chicago Avenue assignment did not place M&M under a duty to provide the permit to Gramar for the Chicago Avenue billboard. Rather, the provision states as follows:

> "a. This Assignment is expressly contingent [*sic*] the City of Chicago authorizing Assignee to take assignment of Assignor's permit *** or Assignee obtaining its own permit and all necessary approvals from the City of Chicago

> and all governing authorities for the continued use of the Premises as billboard advertising ***."

¶ 35 The language of the contingency provision did not necessarily burden M&M with the duty of obtaining the permit from the City of Chicago. M&M could not be under such a duty as it could not control whether the City decided to approve a transfer of the permit. Even Gramar's complaint concedes as much in alleging actions that Gramar itself took to obtain the permit. In its initial complaint, Gramar alleged that M&M had not assigned the permits to Gramar, that the City had not assigned the permits to Gramar, and that Gramar had procured an individual to obtain the permits by application to the City, but the individual was not successful, and that Gramar "took other reasonable steps to obtain the permits and was unsuccessful."

¶ 36 Accordingly, Gramar has alleged no actions by M&M that constituted breach of the Chicago Avenue assignment to support its claim for rescission of that agreement. See *Aldrich v. Aldrich*, 260 Ill. App. 333, 361-62 (1931) (where time for performance is not fixed by the terms of the contract, the law implies an obligation to complete performance in a reasonable time, except where the contingency which must be performed is not within the control of the contracting party, then "the law would not imply any obligation on his part to bring it about within a reasonable time.") We additionally observe that although Gramar contends there was an approximately two-year delay in obtaining the permit, the record reflects that defendants took actions earlier in an attempt to have the permit transferred.

¶ 37 B. Bench Trial on the Setoff Amount

¶ 38 Gramar next contends that the trial court committed reversible error when it awarded $67,000 to Gramar on the rescission setoff amount following the bench trial.

¶ 39 We review a trial court's factual findings following a bench trial under a manifest weight of the evidence standard. *Dearborn Maple Venture,* 2012 IL App (1st) 103513, ¶ 34. "A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Eychaner v. Gross,* 202 Ill. 2d 228, 252 (2002). See *Majcher v. Laurel Motors, Inc.*, 287 Ill. App. 3d 719, 728-29 (1997) (applying manifest weight of the evidence standard to the trial court's setoff determination in a bench trial).

¶ 40 At trial, the court observed that M&M argued that it was entitled to a setoff of $134,815.96 and Gramar was entitled to a judgment of no more than $26,084.04 based on the following calculations:

"Defendant seeks a set off for the following:

a. Installation of billboard signage in May 2014	$750
b. Installation of billboard signage in Feb. 2014	$800
c. Removal of billboard signage and improvements	$1,075
d. Creation of signage for plaintiff	$540.96
e. Rental Payments	$131,650
	$134,815.96

Defendant also credits plaintiff with income received because of billboard sales:

a. H&R Block paid	$11,600
b. Real Restoration, Inc. paid	$10,800
	$22,400

Accordingly, defendant argues that the Court should order it to pay plaintiff no more than $26,084.04, determined as follows:

Rescission Amount	$137,500
Signage Income	$ 22,400
Subtotal	$160,900.00
Less:	$134,815.96
Total	$26,084.04"

¶ 41 However, the trial court concluded that a setoff amount of $67,100 was appropriate:

"Plaintiff is entitled to receive the return of its contract payment

	$137,500
	Less
a. Billboard income actually received	($0.00)
b. Billboard income defendant would have received from plaintiff to promote its other business ($2,700 x 32 months)	($70,400)
TOTAL	$67,100"

¶ 42 The trial court declined to award any offset for the $22,400 in signage income because M&M already technically "received" that money and also declined to award setoff for signage installation or removal or billboard maintenance because these constituted costs M&M would have incurred had it been the owner of the billboard all along. The trial court determined that Gramar asked M&M to install signage for Gramar's other business (The Sugar Factory), the billboard has been promoting that business interest rent-free, and this was chargeable for a reasonable rental value of $2,700 per month for 32 months. The trial court found that $2,700 was

a reasonable monthly rate for a local advertiser based on M&M's testimonial evidence and it was the amount that Real Restoration paid.

¶ 43 On appeal, Gramar argues that because rescission of the Ogden Avenue assignment was mutually agreed upon by both parties under the contingency clause, and the agreement does not expressly require Gramar to return any money to M&M, no setoff should have been granted to M&M. Gramar argues that the trial court had no authority to award M&M income it would have received from Gramar to promote its other business because these benefits were not received under or as part of the contract at issue, which was only regarding the assignment of the billboard. Further, Gramar contends that because the permit was denied through no fault of its own, and M&M received the benefit of possessing $137,500, no setoff should be allowed.

¶ 44 We disagree. Although there was no express provision set forth in the Ogden Avenue assignment, the remedy of rescission generally "requires the cancellation of the contract and the restoration of the parties to their status before contracting." *Majcher*, 287 Ill. App. 3d at 728. In terms of damages, this "requires not only a return of any consideration received by the rescinding party, but a setoff for any benefits received by the rescinding party because of the contract." *Felde v. Chrysler Credit Corp.*, 219 Ill. App. 3d 530, 542 (1991). See *Puskar v. Hughes*, 179 Ill. App. 3d 522, 528-29 (1989) ("Where rescission is awarded then, the proper measure of recovery is restitution of the consideration and other benefits received by the parties under the contract.") Thus, Gramar and M&M were obligated to return consideration and other benefits received because of the contract, regardless of fault or express provisions in the contract here.

¶ 45 In its findings of fact, the trial court reasoned that in order to return the parties as closely as possible to pre-contractual status, it must consider that Gramar asked M&M to install signage for its other business in September 2015, and the billboard has been promoting that business

since October 2015, for which Gramar had not paid any rent. The trial court thus determined that Gramar was entitled to receive the return of its $137,500 contract payment, with a setoff for billboard income that M&M would have received from Gramar to promote Gramar's other business at a rental rate of $2,700 per month ($2,700 x 32 months = $70,400). Accordingly, M&M was to pay Gramar a total of $67,100 ($137,500 - $70,400). The court found that $2,700 per month was a reasonable rental rate based on M&M's trial evidence, and Gramar has not presented contrary evidence in that respect. The trial court determined that, contrary to M&M's argument, no setoff for signage installation or improvements was required because these were costs M&M would have incurred if it had owned the billboard all along. The trial court further declined to award $22,400 as an offset because M&M already received this money.

¶ 46 We find that the trial court's determinations were not against the manifest weight of the evidence. When granting rescission, each party must return to the other the benefits received under the contract. *Felde*, 219 Ill. App. 3d at 542; *Newton*, 260 Ill. App. 3d at 719-20. Gramar has not paid any money for receiving the benefit of promoting its related business on the billboard.

¶ 47 Although Gramar maintains the signage promoting the Sugar Factory was entirely separate, we disagree. The evidence showed that the same owners were involved and placement of The Sugar Factory advertisement came about because of their contractual relationship under the Ogden Avenue assignment. Gramar would not have received this benefit if the parties had not entered into the contract. "Where rescission is awarded then, the proper measure of recovery is restitution of the consideration and other benefits received by the parties under the contract." (Internal quotation marks omitted.) *Puskar*, 179 Ill. App. 3d at 528-29 (in affirming the trial court's award of rescission, the reviewing court held that the trial court correctly ordered the counterplaintiff to return the rental value of the company's premises and equipment used, which

were benefits he had received); *Hassan v. Yusuf*, 408 Ill. App. 3d 327, 357 (2011) (same); *Felde*, 219 Ill. App. 3d at 541-42 (1991) (court ordered a setoff against the plaintiff's award for the benefit of driving the car purchased under the contract being rescinded).

¶ 48 Gramar also contends that the trial court failed to account for the benefit that M&M received in possessing the $137,500 for the Ogden Avenue assignment for the approximately three-year span of time between filing the complaint and obtaining judgment without having to pay interest. Gramar provides a string of cases following this assertion, but without pinpoint citations within these cases or any analysis of the holdings of the cases and how they apply here. See Ill.S.Ct.R. 341(h)(7) (eff. July 1, 2008) (an appellant's brief must contain "the contentions of the appellant and reasons therefore, with citation of authorities and the pages of the record relied on," and where a point is not argued, it is deemed forfeited). On appeal, a party is obligated to present well-reasoned argument which includes citation to authority, and "mere contention without argument or citation to authority do not merit consideration on appeal." *Vilardo v. Barrington Community School District 220*, 406 Ill. App. 3d 713, 720 (2010) (quoting *People v. Hood*, 210 Ill. App. 3d 743, 746 (1991)). Gramar has also failed to show where in the lower court it advanced this claim or presented evidence on it for the trial court to weigh. *Elsener v. Brown*, 2013 IL App (2d) 120209, ¶ 53 ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal.").

¶ 49 III. CONCLUSION

¶ 50 For the reasons above, we affirm the trial court's judgment granting defendants' motion to dismiss and its entry of judgment following the bench trial in favor of Gramar in the amount of $67,100 on the rescission of the Ogden Avenue assignment agreement.

Affirmed.