2019 IL App (1st) 190343-U

THIRD DIVISION
September 30, 2019

Nos. 1-19-0343 and 1-19-0630, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

D-B CARTAGE, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 5078
	)	
OLYMPIC OIL, LTD.; GREIF PACKAGING, LLC, d/b/a Delta Companies Group—Chicago; CHICAGO PETROLEUM OIL, LLC; PLASTIPAK PACKAGING, INC.; OLD WORLD INDUSTRIES, LLC; and HOWARD SAMUELS, as Trustee of the Assets of Olympic Oil, Ltd.;	)	Honorable
	)	Brigid Mary McGrath,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County is affirmed; defendant's conduct in the litigation was not inconsistent with exercising its contractual rights, therefore, defendant did not waive enforcement of the arbitration clause in its contract with plaintiff by failing to raise it sooner; plaintiff was not allowed to sue on an implied contract theory in the face of an express contract on the same subject matter; defendants did not entice plaintiff's performance or guarantee payment under an express contract with another party to make defendants' retention of any benefit conferred on defendants by plaintiff's performance under the express contract unjust.

¶ 2 Plaintiff, D-B Cartage, Inc. (D-B), filed its second-amended complaint against defendants, Olympic Oil, Ltd.; Greif Packaging, LLC d/b/a Delta Companies Group Chicago; Chicago Petroleum Oil, LLC; Plastipak Packaging, Inc.; Old World Industries, LLC; and Howard B. Samuels, as trustee of the assets of Olympic Oil, Ltd, seeking damages for an alleged failure to pay for motor carrier services provided by D-B. Greif filed a motion to compel arbitration and dismiss the complaint based on a written contract between D-B and Greif containing an arbitration and venue selection clause. Plastipak and Chicago Petroleum filed motions for summary judgment on the basis that neither had a contract with D-B and neither benefitted from D-B's motor carrier services. Following a hearing the circuit court of Cook County granted Grief's motion to dismiss the complaint and entered an order that D-B was compelled to arbitrate its claim against Greif. The trial court also granted Plastipak and Chicago Petroleum's motions for summary judgment.

¶ 3 For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 We will confine our discussion to those matters pertinent to the issues raised on appeal. On appeal, D-B argues (1) the trial court erred in enforcing the arbitration and venue selection clauses of the contract between D-B and Greif because Grief waived both provisions by its conduct in this litigation and; (2) the trial court erred in granting summary judgment in favor of Plastipak and Chicago Petroleum because each received a benefit from D-B's shipping resulting in a contract implied in law.

¶ 6 D-B's second amended complaint alleged, in pertinent part, that Greif does business in the name of Delta, and in January 2010 D-B entered into a written contract with Greif "pursuant to which D-B agreed to provide motor carrier services to Greif and Delta." The complaint alleged that in June 2015 "D-B was advised that Olympic had taken on the business of Greif/Delta in the Chicago area, as its successor in interest." D-B and Olympic made an agreement for D-B to continue to provide motor

carrier services directly to Olympic "on the same terms and conditions as D-B provided services to Greif/Delta pursuant to the Contact [between D-B and Greif]." D-B alleged Olympic has failed to pay for all of those services. D-B's services to Olympic included transporting bulk petroleum products belonging to Old World between facilities Olympic operated. Olympic billed Old World and Old World prepaid for, among other things, transportation of Old World's products between Olympic's facilities.

¶ 7 The second amended complaint also alleged D-B transported products owned by Plastipak and Chicago Petroleum between Olympic's facilities but it "is not known whether Plastipak and Chicago Petroleum prepaid freight charges to Olympic."

¶ 8 According to the second amended complaint, in July 2016, Olympic made an assignment for the benefit of creditors to Samuels.

¶ 9 Relevant to this appeal, Count III of the second amended complaint was originally titled "Breach of Implied Contract Against Greif and Delta." This "original Count III" alleged that pursuant to D-B's January 2010 contract with Greif, "D-B acted as the carrier for shipments made by Greif/Delta, as the shipper, to [Olympic]" and those shipments were made pursuant to "bills of lading that listed Delta as the shipper." "In particular, shipments reflected on invoices 7864, 74950 and 75005 totaling $17,992.00 were made by Delta, as the shipper, to Olympic." Count III originally alleged D-B billed Olympic for those particular shipments and Olympic failed to pay, and "[a]s a matter of law and pursuant to the language of the Contract and the bills of lading, Greif/Delta is legally responsible to pay D-B the amount due on invoices 74864, 74950 and 75005." Count III originally concluded "Greif/Delta breached this contract implied by law by failing to pay D-B $17,992.00 for its carrier charges when Olympic failed to do so."

¶ 10 Count IV of the original count III of the second amended complaint was titled "Breach of Implied Contract Against Chicago Petroleum." Count IV alleged Chicago Petroleum was the shipper

and the recipient of products shipped pursuant to certain bills of lading attached to the second amended complaint, D-B acted as the carrier for those shipments, and D-B billed Olympic for each shipment. Count IV originally alleged Olympic failed to pay D-B's invoices for these shipments and, "[a]s a matter of law, Chicago Petroleum, as the shipper and recipient of the products shipped, is legally responsible to pay D-B the amount due on the invoices." D-B alleged Chicago Petroleum "breached this contract implied by law by failing to pay D-B" when Olympic failed to do so.

¶ 11 Count V of the second amended complaint was titled "Breach of Implied Contract Against Plastipak." Count V alleged Plastipak directed D-B to carry certain products for Olympic pursuant to bills of lading, D-B did so, and D-B "billed either Delta or Olympic for carrying the products, but neither has paid." Count V alleged "Plastipak, as the shipper of the products shipped, is legally responsible to pay D-B the amount due on the invoices" and Plastipak "breached this contract implied by law by failing to pay *** when Delta and Olympic failed to do so."

¶ 12 Greif filed a motion to dismiss the original Count III of D-B's second amended complaint. Greif's motion to dismiss pointed out that D-B attached "a contract between Greif and D-B Cartage for transportation services" and argued that an implied contract cannot coexist with an express contract on the same subject. Greif also argued D-B failed to plead that Greif unjustly retained a benefit to D-B's detriment or that retention of the benefit violates fundamental principles of justice, equity, and good conscience as required to support an implied contract claim.

¶ 13 Greif's memorandum of law in support of its motion argued that D-B's allegation against Greif with regard to the allegedly unpaid invoices at issue is inconsistent with D-B's acknowledgement that it had "reached a separate and independent agreement with Olympic and then demanded payment for these invoices from Olympic." Greif further argued D-B failed to state a claim for an implied-in-fact contract because the second amended complaint contains no allegations to support finding the elements of that

claim. Greif's memorandum further argued that the fact D-B alleged there was an express contract between D-B and Greif or Delta "that governs the terms of services performed during the time that the services at issue in Count III were provided negates the existence of a implied in fact contract." Greif's memorandum of law argued D-B failed to allege the existence of a contract implied-in-law because D-B did not allege that Greif or Delta received any unjust benefit. Rather, Greif argued, "any transportation services provided in September 2015, the dates of the invoices *** at issue in Count III, were provided to Olympic—not Greif or Delta." (Emphasis omitted.) Greif asserted that by September 2015 it "had no affiliation with Olympic and could not have received any benefit from the carrier services covered by the three invoices;" therefore, Count III should be dismissed. Finally, Greif argued Count III of the second amended complaint alleged "not one, but two, express contracts for transportation services: a written contract between Greif and [D-B,] and an oral express contract with Olympic;" and, therefore, D-B's claim based on a contract implied in law cannot stand.

¶ 14 Chicago Petroleum also filed a motion to dismiss original Count IV of the second amended complaint.

¶ 15 Following a hearing, the trial court granted Greif's and Chicago Petroleum's motions to dismiss Counts III and IV of the second amended complaint without prejudice and granted D-B leave to replead those counts. D-B's repled Count III of the second amended complaint was titled "Breach of Contact against Greif/Delta." The amended Count III alleged D-B and Greif—allegedly doing business in the name Delta—entered into a written contract in 2010 and extended the contract twice. Amended Count III alleged that "[a]s the Contract's initial extended term was coming to an end, D-B and Greif/Delta negotiated another extension, this time through December 2015." D-B alleged it continued to perform under its contract with Greif in 2015. Amended Count III alleged specifically that "in 2015, shipments reflected on invoices 7864, 74950 and 75005 totaling $17,992.00 sent to Greif/Delta were made by

Delta, as the shipper, to Olympic." D-B alleged it performed pursuant to the contact as extended "and the bills of lading." D-B alleged Greif breached the contract, as extended, by failing to pay those invoices.

¶ 16 D-B's amended Count IV was titled "Breach of Implied Contract/Unjust Enrichment Against Chicago Petroleum" and alleged Chicago Petroleum is listed as both the shipper and the recipient of products shipped pursuant to certain bills of lading. D-B allegedly sent invoices to Olympic as the carrier for each shipment listing Chicago Petroleum as the shipper and the recipient, and Olympic failed to pay the invoices. D-B alleged that "[a]s both the shipper and the recipient of the products reflected on the invoices *** sent to Olympic, Chicago Petroleum benefitted from the services provided by D-B by having products shipped by it and to it." D-B alleged it would be unjust and unfair for Chicago Petroleum to receive the benefit provided by D-B without having to pay for those services, therefore, the court should find there is an implied contract between D-B and Chicago Petroleum to "pay D-B the reasonable value of the services D-B provided for Chicago Petroleum's benefit." D-B alleged Chicago Petroleum "breached its contact implied by law with D-B by failing to pay ***."

¶ 17 Greif filed a motion to dismiss amended Count III of the second amended complaint. Greif asserted, for the first time, that the contract between Greif and D-B contains an arbitration clause, a choice-of-law clause, and a forum selection clause. Greif's motion to dismiss amended Count III acknowledged that at the time Greif entered a contract with D-B, Olympic was "an indirect wholly-owned subsidiary of Greif" but that Olympic was no longer part of the Greif group. Greif's motion stated that D-B's original second amended complaint alleged Greif breached an implied contract when it refused to pay for shipments "made by Delta, as the shipper, to Olympic" but argued that allegation was inconsistent with D-B's acknowledgement that D-B "had reached a separate and independent agreement with Olympic and then demanded payment for these invoices from Olympic." Greif also agreed the

parties extended the contract through December 2015. The arbitration clause in the contract between D-B and Greif read as follows:

> "Any claim, dispute or controversy arising out of or relating to this Agreement, the relationship of the parties, or the breach of this Agreement, shall be determined by arbitration by a single arbitrator pursuant to the applicable Rules of Practice and Procedure of the Transportation ADR Council, Inc. in effect at the time the demand for arbitration is filed."

The venue selection clause read as follows:

> "This Agreement shall be interpreted in accordance with the laws of the State of Ohio relating to the formation, execution and performance of contracts except that any statute or period of limitation applicable to interstate transportation shall apply. All judicial actions or arbitration proceedings affecting this agreement shall be conducted in Delaware County, Ohio, or such other location as mutually agreed to, in writing, by the parties."

¶ 18 Greif argued amended Count III "should be dismissed based on the forum selection and arbitration clauses requiring any judicial or arbitration proceedings between the parties to take place in Delaware County, Ohio, absent a written agreement otherwise." Greif asserted it never agreed to a different forum and D-B did not allege the parties agreed to waive the forum selection clause and as such "the proper forum to raise a breach of contract claim is arbitration in Delaware County, Ohio and the Court should dismiss [amended] Count III of [D-B's] Second Amended Complaint." Greif separately filed a motion to compel arbitration and dismiss or stay the litigation pending arbitration. That motion asserted that amended Count III falls within the scope of the arbitration clause in the contract because it is a "claim, dispute or controversy arising out of or relating to" the contract.

¶ 19 D-B filed a response to Greif's motion to dismiss or stay amended Count III pending arbitration in which D-B argued Greif waived the arbitration and venue selection clauses of the parties' contract. D-B argued the issues of whether Greif was responsible to pay the disputed invoices because it had already sold its business and whether "Greif was liable under the contract" could have been arbitrated and by submitting those issues to the trial court for resolution Greif waived the arbitration clause. D-B also argued Greif waived the venue selection clause in the contract pursuant to section 2-104(b) of the Code of Civil Procedure (Code) (735 ILCS 5/2-104(b) (West 2016)) by failing to file a motion to transfer venue "on or before the date upon which [Greif was] required to appear." 735 ILCS 5/2-104(b) (West 2016).

¶ 20 Chicago Petroleum also filed a motion to dismiss amended Count IV of the second amended complaint on the grounds (1) amended Count IV "attempts to allege a cause of action for an implied contract even though a written contract already exists on the same subject matter" and (2) "Chicago Petroleum only leased employees in the transaction, and not shipping product [*sic*], as [D-B] incorrectly believes." Chicago Petroleum argued the contract between D-B and Greif "is the governing agreement," it was not a party to the contract, and it "cannot be a defendant in a lawsuit alleging its breach." Chicago Petroleum also argued D-B failed to state a claim for breach of a contract implied in fact because it failed to plead the elements of an express contract. Alternatively, Chicago Petroleum argued amended Count IV should be dismissed because Chicago Petroleum leased certain of its employees to Olympic Oil, it had no products being shipped between Olympic's facilities, and it did not utilize D-B for such purpose. Chicago Petroleum attached an affidavit to its motion to dismiss amended Count IV in support of its argument it did not have any products shipped between Olympic's facilities.

¶ 21 D-B responded to Chicago Petroleum's motion to dismiss amended Count IV. D-B responded that it carried shipments by Chicago Petroleum after its contract with Greif expired and those later

shipments are the subject of its complaint against Chicago Petroleum. Therefore, according to D-B, the contract "has nothing to do with the implied contractual claim [D-B] asserts against Chicago Petroleum and does not bar any and all claims *** against Chicago Petroleum." In response to Chicago Petroleum's argument it only leased employees to Olympic, D-B attacked the affidavit Chicago Petroleum attached in support of that argument and further argued that regardless, Chicago Petroleum "issued hundreds" of bills of lading calling for D-B to ship products. D-B attached its own affidavit stating those bills of lading list Chicago Petroleum as both the shipper and recipient of the shipments, and that goods were being shipped "from one Chicago Petroleum location to another by Chicago Petroleum." D-B argued questions of fact remain as to Chicago Petroleum's role in the shipment of products by D-B, "particularly given the hundreds of Bills of Lading Chicago Petroleum issued as both the shipper and the recipient pursuant to which [D-B] provided carrier services to Chicago Petroleum."

¶ 22 Following a hearing the trial court granted Greif's motion to dismiss and compel arbitration and denied Chicago Petroleum's motion to dismiss.

¶ 23 D-B, Chicago Petroleum, and Plastipak engaged in discovery. Following discovery, Chicago Petroleum and Plastipak filed separate motions for summary judgment. Chicago Petroleum's motion for summary judgment argued D-B did not have an implied contract with Chicago Petroleum and repeated its argument that the written contract between D-B and Grief was the "governing agreement" and therefore no claim on an implied contract could be established.

¶ 24 Alternatively, Chicago Petroleum's motion for summary judgment argued the undisputed facts show that D-B and Chicago Petroleum did not form a contract implied in fact or implied in law. First, Chicago Petroleum asserted there was no evidence of an offer by D-B to provide transportation services to Chicago Petroleum and no evidence of an acceptance by Chicago Petroleum, therefore, no contract implied in fact existed. Chicago Petroleum relied upon the deposition testimony of Paul Busse, who is

the president and sole shareholder of D-B; David Green, who was the chief financial officer of Olympic, and Ning Yan, Chicago Petroleum's president. Chicago Petroleum argued Busse never testified in his deposition that D-B ever had a contract with Chicago Petroleum, and documents attached to Busse's deposition as exhibits do not list Chicago Petroleum as a customer. According to Chicago Petroleum a customer statement attached to Busse's deposition lists Olympic as the customer for the deliveries at issue. Green testified Chicago Petroleum did not ship any products between Olympic facilities, and Chicago Petroleum "did not manufacture, produce, consumer [*sic*], receive or deliver any product." Yan testified Chicago Petroleum was not doing any business in 2015. Chicago Petroleum argued the "sole reason D-B issued invoices to Chicago Petroleum was because Chicago Petroleum's name was listed on certain bills of lading." Chicago Petroleum claimed, relying on Yan's testimony, that someone at Olympic "erred by printing bills of lading with Chicago Petroleum's name on them instead of Olympic Oil's name." Chicago Petroleum also stated it received no benefit from the subject transportation services. Finally, Chicago Petroleum asked that if the trial court does not enter summary judgment in its favor it should find that "to the extent invoices are not based upon bills of lading with Chicago Petroleum's name on them that D-B is barred from seeking recovery from Chicago Petroleum on these invoices."

¶ 25 Plastipak's motion for summary judgment also argued that it did not have an implied contract with D-B. Plastipak's motion argued "D-B did not carry anything owned by Plastipak, there was never any contract entered between Plastipak and D-B and Plastipak has no commercial relationship with D-B, other than being a pick up point for products owned by Old World Industries [(OWI).]" Plastipak's motion asserted that Plastipak manufactures bottles for OWI and that those bottles are sold to OWI "immediately off the assembly line." Plastipak loads OWI's bottles onto a trailer for pickup by D-B and issues a bill of lading for D-B. (Those bottles were taken to an Olympic facility to be filled.) Plastipak

asserted the purpose of the bill of lading "is solely to represent what is in the truck as per Department of Transportation regulations." Plastipak argued the bills of lading do not form an agreement between it and D-B for payment but rather they are "noting but an indication of what is carried." Plastipak argued "there are no facts indicating that Plastipak directed D-B *** to carry certain products to Olympic Oil for storage, processing or packaging."

¶ 26 Plastipak also argued D-B had express contracts with Greif and Olympic with respect to the transactions at issue and that it had no involvement in the shipments. Plastipak argued D-B "admits that it had a contract with Greif and Olympic for payment. It is only because those entities did not pay what they owed, D-B is pursuing Plastipak." Plastipak argued it was entitled to summary judgment because an express contract existed for the same services at issue in D-B's complaint against Plastipak and there is no evidence implicating Plastipak in that transaction. Plastipak further argued no evidence supported the existence of a contract implied in law because the complaint does not allege the benefit D-B allegedly conferred on Plastipak and there is no evidence establishing Plastipak received a benefit from D-B. According to Plastipak, D-B carried products OWI owned at the direction of Olympic through a contract with Greif; thus, any benefit was to those parties and not Plastipak. Plastipak's motion for summary judgment argued the pleadings and the evidence do not establish an unjust benefit to Plastipak that would allow D-B to recover against it or what the value of any alleged benefit is. Plastipak also argued there is no evidence of an implied promise to D-B that Plastipak would pay the unpaid carrier costs and D-B has provided no facts or legal justification that Plastipak's role as the manufacturer of the product at issue results in such an implied promise.

¶ 27 Following full briefing of the motions and argument the trial court granted Plastipak's motion for summary judgment and denied Chicago Petroleum's motion. Subsequently, based on the reasons for the trial court's ruling in favor of Plastipak, D-B and Chicago Petroleum stipulated that (1) there are bills of

lading in this case showing Chicago Petroleum as both the shipper and recipient of the products listed in the bills of lading, (2) D-B invoiced Olympic for those shipments, (3) D-B will not be able to prove that Chicago Petroleum owned the products that are the subject of the bills of lading, and (4) D-B will not be able to prove that Chicago Petroleum was reimbursed for the shipments covered by the pertinent bills of lading. Based on the stipulation the trial court reconsidered its order denying Chicago Petroleum's motion for summary judgment. The trial court granted that motion and entered summary judgment in favor of Chicago Petroleum.

¶ 28 This appeal followed.

¶ 29 ANALYSIS

¶ 30 On appeal, D-B argues (1) the trial court erred in enforcing the arbitration and venue selection clauses of the contract because Greif waived both provisions; (2) the trial court erred in granting summary judgment in favor of Plastipak and Chicago Petroleum because each received a benefit from D-B's shipping resulting in a contract implied in law, and D-B's contract with Greif was not a bar to its claims where Plastipak and Chicago Petroleum "enticed" D-B to perform by issuing bills of lading. The parties do not dispute the standard of review applicable to the trial court's judgment granting summary judgment in favor of Plastipak and Chicago Petroleum.[1]

> "Summary judgment should be granted where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] Summary judgment is not the means to try a question of fact, but to determine if one exists. [Citation.] The trial court may grant summary judgment after considering the

[1] Chicago Petroleum did not file a brief in this appeal. "Generally, we will not act as an advocate for an appellee who fails to file a brief. [Citation.] However, when a record is simple and the claimed error can easily be decided without the aid of an appellee's brief, as is the case here, we should decide the appeal's merits. [Citation.]" *First National Bank of Ottawa v. Dillinger*, 386 Ill. App. 3d 393, 395 (2008).

> pleadings, depositions, admissions, exhibits, and affidavits on file in the case and construing that evidence in favor of the nonmoving party. [Citation.] Summary judgment aids in the expeditious disposition of a lawsuit, but should be allowed only when the right of the moving party is clear and free from doubt. [Citation.] If the plaintiff fails to establish any element of his or her claim, summary judgment should enter. [Citation.]" (Internal quotation marks omitted.) *Storino, Ramello & Durkin v. Rackow*, 2015 IL App (1st) 142961, ¶ 16.

Moreover, "where reasonable persons could draw divergent inferences from the undisputed material facts or where there is a dispute as to a material fact, summary judgment should be denied and the issue decided by the trier of fact." *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 424 (1998). We apply a *de novo* standard of review to the trial court's decision to grant summary judgment. *Rackow*, 2015 IL App (1st) 142961, ¶ 16.

¶ 31 D-B and Greif dispute the standard of review applicable to the trial court's judgment enforcing the arbitration and venue clauses of their contract over D-B's argument Greif waived those provisions. D-B argues given that the facts of Greif's participation in the underlying litigation are not in dispute "and that the trial court heard no testimony and made no credibility findings, this Court should review the trial court's dismissal order using a *de novo* standard." D-B cites *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 342 Ill. App. 3d 997, 1001 (2003), in which the court held as follows:

> "In the instant case the facts simply are not in dispute, and the only issue presented to the trial court was whether those facts established a waiver of the defendant's right to arbitration as a matter of law. The trial court made no factual or credibility determinations. A reviewing court determines a legal question independently of the trial

> court's judgment, using a *de novo* standard of review." *LAS, Inc.*, 342 Ill. App. 3d at 1001.

Greif argues the First District has determined that the proper standard of review is for an abuse of the trial court's discretion, regardless of whether the trial court held an evidentiary hearing, because the trial court must "necessarily engage in a factual inquiry to determine if a party's actions constitute waiver." *Schroeder Murchie Laya Associates, Ltd. v. 1000 W. Lofts, LLC*, 319 Ill. App. 3d 1089, 1093 (2001). Greif also relies on *Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill. App. 3d 411, 423 (2007), in which the court found as follows:

> "The Second, Third, and Fifth Districts of this court have determined that a *de novo* review is appropriate where the circuit court has determined the issue of waiver of the right to arbitration because the circuit court in such instances reviews undisputed facts and makes a waiver determination as a matter of law. [Citations.]
>
> In contrast, a number of decisions from the First District of this court have determined that an abuse of discretion standard applies to a review of the circuit court's decision regarding waiver of arbitration rights. [Citations.]
>
> * * *
>
> After having carefully reviewed the aforementioned decisions, we agree with *Schroeder* and the similarly decided cases. In accordance with that authority, we will review the circuit court's decision that Glazer's waived its right to arbitration under an abuse of discretion standard. Under that standard, we must determine whether there is a sufficient showing in the record to sustain the circuit court's decision." *NWS-Illinois, LLC*, 376 Ill. App. 3d at 423-24.

¶ 32 This court has more recently held that "[w]hen reviewing a circuit court's ruling on whether a party has waived its right to arbitrate, we review findings of fact for an abuse of discretion and questions of law *de novo*." *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 22 citing *Bovay v. Sears, Roebuck & Co.*, 2013 IL App (1st) 120789, ¶¶ 24-26. This court has recognized that "[t]his approach is generally consistent with the standards of review applied by federal courts in cases involving the waiver of the right to arbitrate. *Bovay*, 2013 IL App (1st) 120789, ¶ 26 citing *LAS, Inc.*, 342 Ill. App. 3d at 1001 (and cases cited therein). We agree with this approach and we will review any findings of fact by the trial court for an abuse of discretion and we will review the question of whether the properly established facts amount to waiver of Greif's right to arbitrate *de novo*. See *Ernst & Young LLP v. Baker O'Neal Holdings, Inc.*, 304 F.3d 753, 756 (7th Cir. 2002) ("The factual determinations that a district court predicates a finding of waiver upon are reviewed for clear error, while the legal question of whether the conduct amounts to waiver is reviewed *de novo*.").

¶ 33 D-B argues Greif waived the arbitration and venue provisions in the contract by failing to raise them promptly after D-B filed its original complaint. D-B asserts the "undisputed facts" are that "Greif clearly understood from the day it entered the proceedings before the trial court that the Contract was implicated" and that the arbitration clause is broader than only a claim for breach of the express contract between the parties. D-B argues that because the contract and the arbitration clause were implicated by the original pleading Greif was required to assert its rights under the arbitration and venue selection clauses of that contract sooner. D-B further argues that Greif waived the venue selection clause under section 2-104(b) of the Code which by its express terms requires that "[a]ll objections of improper venue are waived by a defendant unless a motion to transfer to a proper venue is made by the defendant on or before the date upon which he or she is required to appear ***." 735 ILCS 5/2-104(b) (West 2016).

¶ 34 Greif responds it was not required to assert its rights under the arbitration and venue clauses before D-B filed amended Count III to the second amended complaint because: (1) D-B's original claim for breach of implied contract did not fall within the scope of the arbitration or venue clauses where that claim did not and could not "relate to, arise under or allege breach of" the contract as required by the arbitration clause. (2) Greif did not act inconsistently with its contractual rights where the only issue Greif submitted to the trial court was the question of whether a written agreement existed between the parties on the same subject matter which would have precluded D-B's claim of an implied contract. Grief argues it did not submit to the court for decision any issue which contractually is the subject of arbitration; therefore, it did not waive its arbitration rights under the contract. Here, the face of the original second amended complaint and Greif's response—which did not rely on the substance of the contract to attack the implied contract claim but simply pointed out that the existence of the written contract invalidated the implied contract claim—including a letter from Greif's attorney to D-B's attorney, both indicated that the contract between Greif and D-B was not implicated by D-B's claim for breach of an implied contract for services provided under an express oral contract between D-B and Olympic. (3) "[A]s soon as [D-B] amended Count III to assert a claim under the [contract,] Greif timely filed a motion to dismiss under the venue selection clause and a motion to compel arbitration, thus affirming its intention to invoke those rights." Greif argued the rule that where an amended complaint raises new issues the defendant is allowed to assert new defenses without being deemed to have waived them applies in this case. See *Pecoraro v. Balkonis*, 383 Ill. App. 3d 1028, 1034 (2008).

¶ 35 "A contractual right to arbitrate can be waived like any other contractual right. [Citation.] Waiver may occur when a party's conduct is inconsistent with its right to arbitrate, indicating an abandonment of that right." *Jenkins v. Trinity Evangelical Lutheran Church*, 356 Ill. App. 3d 504, 507 (2005). Courts disfavor finding a party waived a right to arbitrate. *Id.*

> "Illinois courts have used several factors to determine whether a party's conduct is inconsistent with an agreement to arbitrate and an abandonment of its rights. Factors indicating waiver include filing an answer without asserting the right to arbitrate, instituting legal proceedings and participating in a trial on the merits, and moving for summary judgment. A party does not waive its rights when it files a complaint, contests venue, or includes an affirmative defense of arbitration in its answer along with a counterclaim in the alternative." *Id*. at 507–08.

Abandonment of the right to arbitrate is not determined by time passing or by the papers filed but by the types of issues submitted to the court for decision. *Id*. at 508, citing *Kostakos v. KSN Joint Venture No. 1*, 142 Ill. App. 3d 533, 536-37 (1986). "A party's conduct amounts to waiver when the party submits arbitrable issues to a court for decision." *Kostakos*, 142 Ill. App. 3d at 536, citing *Brennan v. Kenwick*, 97 Ill. App. 3d 1040, 1042-43 (1981). The relevant question is whether the party asserting a right to arbitration (1) admitted the existence of a contract for arbitration, (2) submitted any arbitrable issues under the contract to a court of law for decision, and (3) participated extensively in the trial court proceedings. *Brennan*, 97 Ill. App. 3d at 1042-43, see also *Watkins v. Mellen*, 2016 IL App (3d) 140570, ¶ 15. For purposes of this analysis, a party participates extensively in the proceedings when, for example, the party's "participation in the litigation [is] not merely responsive and its motions [are] not filed solely to protect its rights from litigation." *Feldheim v. Sims*, 326 Ill. App. 3d 302, 311 (2001). Under a general provision for arbitration of all disputes arising in connection with a contract arbitrable issues are "just those disputes which the parties by 'crystal clear language' agree to arbitrate." *CAC Graphics, Inc. v. Taylor Corp.*, 154 Ill. App. 3d 283, 286 (1987). "[A]rbitration agreements will not be extended by construction or implication." *Id*.

¶ 36 In *Watkins*, the trustee of a land trust and partnership filed a complaint for declaratory judgment against certain beneficiaries/partners seeking authorization from the court to sell the assets of the trust. *Watkins*, 2016 IL App (3d) 140570, ¶ 6. The trust included a partnership agreement that variously gave the trustee the authority to sell any portion of the property and directed the trustee to "act or omit to act upon the written direction of the Partnership." (Internal quotation marks omitted.) *Id*. ¶ 4. The partnership agreement also contained an arbitration clause. *Id*. ¶ 5. Three of 26 beneficiaries/partners objected to the proposed sale. *Id*. ¶ 6. After the trustee filed a declaratory judgment action the three dissenting partners filed a motion to dismiss the complaint on the ground the trustee lacked standing to bring the complaint because the partnership agreement required the trustee to have the prior unanimous consent of all of the partners before taking any action to sell the trust property. *Id*. ¶ 7. The trial court denied the motion to dismiss. *Id*. Approximately two months later the defendants raised the arbitration clause for the first time. *Id*. ¶ 8. The trustee responded that the defendants had waived enforcement of the arbitration clause by filing the aforementioned motion to dismiss. *Id*.

¶ 37 On appeal, the court found that the "dispositive issue [was] whether the defendants' filing of a motion to dismiss *** and litigating the merits of that motion waived their right to file a subsequent motion to compel arbitration. *Id*. ¶ 10. Specifically, whether the motion "calling upon the trial court to determine whether the provisions of the trust/partnership agreement required unanimous shareholder approval[] amounted to conduct inconsistent with the right to arbitrate such that it constituted a waiver of that right." *Id*. ¶ 13. The court held that it did. *Id*. The *Watkins* court found that the defendants' motion to dismiss relied upon the terms of the agreement and by raising issues based on the agreement in the motion to dismiss "the defendants submitted the issue of the contract provisions *** to the court for resolution." *Id*. ¶ 16. "That was the very substantive issue that would have been submitted to arbitration." *Id*. ¶ 17. Thus, it was clear the defendants waived the right to compel arbitration by

litigating a motion to dismiss "which placed substantive issues of contractual interpretation before the [trial] court." *Id*.

¶ 38 In this case, despite D-B's citation to *Watkins*, it has failed to identify a "substantive issue of contractual interpretation" (see *id*.) which Greif placed before the trial court for resolution. D-B has not argued that any matters raised in Greif's pleadings prior to seeking to enforce the arbitration clause were "substantive issue[s] that would have been submitted to arbitration." See *id*. The issue is not, as D-B asserts, simply whether any claim asserted by D-B "was in any way related to the Agreement." Rather, the question is whether Greif's conduct was "inconsistent with its right to arbitrate, indicating an abandonment of that right." *Jenkins*, 356 Ill. App. 3d at 507. D-B has failed to demonstrate that Greif's "participation in the judicial forum was *** so inconsistent with the contractual right to arbitrate as to indicate an abandonment of that right." *Kostakos*, 142 Ill. App. 3d at 536-37 ("In the present case, [the] defendants filed an answer containing no counterclaims, and participated in numerous procedural motions and some discovery proceedings. *They did not, however, submit any substantive questions to the court for determination.* *** Additionally, [the] defendants did not file interrogatories or take depositions, procedures not available in arbitration." (Emphasis added.)).

¶ 39 *Jenkins*, also cited by D-B, does not compel a finding that Greif waived its right to arbitration. There, the plaintiff filed a complaint against a church and the pastor of the church where the plaintiff had been employed. *Jenkins*, 356 Ill. App. 3d at 506. The plaintiff's employment included his agreement to be bound by the church's bylaws which required disputes to be resolved through arbitration. *Id*. The defendants answered the complaint and filed several motions including "a motion for summary judgment requesting that 'the plaintiff's cause of action be dismissed', asserting among other things, that the *** dispute resolution procedure was the exclusive remedy" for this controversy. *Id*. at 508. The trial court denied that motion and the defendants answered "specifically raising the

affirmative defense of *** [the] dispute resolution procedure." *Id*. After the defendants answered they filed several additional motions to dismiss and motions for summary judgment and participated in extensive discovery before filing their second motion for involuntary dismissal based on the arbitration agreement "some three and one-half years after the original complaint" was filed. *Id*. at 507-08. The *Jenkins* court held the defendants in that case did not waive their right to arbitrate despite the passage of three and one-half years. *Id*. at 508. The court held the defendants "raised the issue twice within a reasonable period after the fling of the complaint," first in their motion for summary judgment and again in their answer. *Id*. The court concluded that the defendants' actions participating in the litigation and filing pleadings "were consistent with their right to arbitrate and did not indicate an abandonment of that right." *Id*.

¶ 40 In this case, although Greif did not move to dismiss the complaint based specifically on the arbitration clause of the contract with D-B, its conduct was nonetheless consistent with its right to arbitrate a dispute over payment under the contract. A party's conduct is inconsistent with its right to arbitrate a dispute when the party submits substantive arbitrable questions to the court for determination or participates in procedures not available in arbitration. *Kostakos*, 142 Ill. App. 3d at 536-37; *Watkins*, 2016 IL App (3d) 14570, ¶ 14. Greif did not ask the court to make a substantive determination under the terms of the contract. *Cf. Watkins*, 2016 IL App (3d) 140570. ¶ 13 ("Under the facts of this case, we must decide whether the defendants' conduct in filing the motion to dismiss Watkins' complaint for declaratory judgment, *calling upon the trial court to determine whether the provisions of the trust/partnership agreement required unanimous shareholder approval*, amounted to conduct inconsistent with the right to arbitrate such that it constituted a waiver of that right. We hold that it did." (Emphasis added.)). D-B relies on Greif's acknowledgment of a written contract between the parties as a basis of its argument Greif was required to attempt to enforce the arbitration clause sooner. However,

it is "when [the] defendant admits the existence of the contract *while submitting the issues which contractually are the subject of arbitration*[] to a court of law for decision [that] he has waived his right to arbitration." (Emphasis added.) *Epstein v. Yoder*, 72 Ill. App. 3d 966, 972 (1979).

¶ 41 In this case, D-B has failed to identify any "issues which contractually are the subject of arbitration" under the parties' contract that Greif submitted to the trial court for decision. Here, the only issue Greif submitted to the trial court was the question of whether a written agreement existed between the parties on the same subject matter which would have precluded D-B's claim of an implied contract (*supra*, ¶ 11). *Archon Construction Co., Inc. v. U.S. Shelter, L.L.C.*, 2017 IL App (1st) 153409, ¶ 45 ("If the work for which a plaintiff seeks remuneration under a *quantum meruit* theory concerned the same subject matter of the express contract, then the *quantum meruit* claim is barred as a matter of law."). The existence of the contract was not arbitrable under the parties' express contract. "Prior to the determination of a contract, the issue of whether one was in existence is not and could not be a claim, dispute or other matter within the meaning of those terms as set forth in the arbitration clause. Thus, the question of whether there was a contract was not arbitrable; but, rather, was an issue of law determinable only by the court." *People ex rel. Delisi Construction Co. v. Board of Education, Willow Springs School Dist. 108*, 26 Ill. App. 3d 893, 895-96 (1975). Additionally, the legal effect of the parties' express contract on D-B's implied contract claim was not arbitrable under the contract but a question of law for the court. See *U.S. Shelter, L.L.C.*, 2017 IL App (1st) 153409, ¶ 45.

¶ 42 We hold Greif's conduct was not inconsistent with its contractual right to arbitration; therefore, Greif did not waive enforcement of the arbitration clause. In light of this holding, the question of whether the trial court erred in failing to hold that Greif waived enforcement of the venue selection clause is not ripe for adjudication. In this case, while paragraph 15 of the parties' agreement contains the bulk of the arbitration clause, paragraph 16, which also contains the venue selection clause, clearly

states that "arbitration proceedings affecting this agreement shall be conducted in Delaware County, Ohio, or such other location as mutually agreed to, in writing, by the parties." We note that "[a] contract must be read as a whole, and all parts construed together. [Citation.]" *BMO Harris Bank, N.A., v. Porter*, 2018 IL App (1st) 171308, ¶ 61. When interpreting a contract, this court will "consider the document as a whole rather than focus on isolated portions." *Id*. "In construing a contract, our primary objective is to give effect to the parties' intent. [Citation.] The parties' intent is not determined by viewing a clause or provision in isolation, or in looking at detached portions of the contract. [Citation.]" *My Baps Construction Corp. v. City of Chicago*, 2017 IL App (1st) 161020, ¶ 71. Reading the contract as a whole, the intent of the parties was that if there was to be arbitration—which we have found there must be—the arbitration was to take place in Ohio unless the parties agreed otherwise. D-B may choose to pursue any remedies it has following arbitration in a different venue. We note that D-B did not argue that should this court find that Greif did not waive the arbitration clause the arbitration should take place in Illinois based on the alleged waiver of the venue selection clause. This court refrains from addressing unbriefed issues "when it would have the effect of transforming this court's role from that of jurist to advocate." (Internal quotation marks and citation omitted.) *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2013 IL 110505, ¶ 63 (Thomas. J., specially concurring). "Were we to address these unbriefed issues, we would be forced to speculate as to the arguments that the parties might have presented had these issues been properly raised before this court. To engage in such speculation would only cause further injustice; thus we refrain from addressing these issues *sua sponte*. [Citation.]" (Internal quotation marks omitted.) *Id*. Accordingly, the trial court's judgment granting Greif's motion to compel arbitration in Ohio is affirmed.

¶ 43 Finally, we reject Greif's argument D-B has no right to bring this appeal from the trial court's order compelling arbitration based on a "no appeal" clause in the parties' contract. The arbitration

clause in the contract reads, in part: "There may be no appeal of an order compelling arbitration except as part of an appeal concerning confirmation of the decision of the arbitrator." Greif argues D-B cannot appeal the order compelling arbitration but must wait for an appeal of the decision by the arbitrator to appeal the question, in this case, of whether Greif waived enforcement of the arbitration clause. We disagree. The question raised in this appeal is whether the arbitration clause is enforceable, which is a question of law for the court. See *Coady v. Harpo, Inc.*, 308 Ill. App. 3d 153, 159 (1999) ("It is axiomatic that if the court were to find that no enforceable contract exists, as a matter of law, then there would be no contractual provisions to arbitrate."). D-B could pursue its appeal from the trial court's order granting Greif's motion to dismiss and to compel arbitration.

¶ 44 We turn next to the trial court's order granting summary judgment in favor of Plastipak and Chicago Petroleum. D-B argues the summary judgment orders as to both were erroneous because (1) the trial court misconstrued the nature of the "benefit" required to support a claim for *quantum meruit* and (2) the trial court mistakenly found that the existence of an express contract between D-B and Greif or Olympic barred D-B's claims against Plastipak and Chicago Petroleum seeking payment from them for *quantum meruit*.

> "A contract implied in law, or a quasi contract, is not a contract at all. Rather, it is grounded in an implied promise by the recipient of services or goods to pay for something of value which it has received. [Citation.] A quasi-contract, or contract implied in law, is one in which no actual agreement between the parties occurred, but a duty is imposed to prevent injustice. [Citation.] The term *quantum meruit* means literally as much as he deserves and is an expression that describes the extent of liability on a contract implied in law (also called a quasi-contract); it is predicated on the reasonable value of the services performed. [Citation.]

* * *

> 'The essence of a cause of action based upon a contract implied in law is the defendant's failure to make equitable payment for a benefit that it voluntarily accepted from the plaintiff. [Citation.] No claim of a contract implied in law can be asserted where an express contract or contract implied in fact exists between the parties and concerns the same subject matter. [Citation.] In order to state a claim based upon a contract implied in law, a plaintiff must allege specific facts in support of the conclusion that it conferred a benefit upon the defendant which the defendant has unjustly retained in violation of fundamental principles of equity and good conscience. [Citation.] Stated otherwise, to be entitled to a remedy based on a contract implied in law, a plaintiff must show that it has furnished valuable services or goods which the defendant received under circumstances that would make it unjust to retain without paying a reasonable value therefore.' [Citation.] [Citation.]" *Restore Construction Co., Inc. v. Board of Education of Proviso Township. High School District 209*, 2019 IL App (1st) 181580, ¶¶ 28, 39.

¶ 45 D-B argues the trial court took an overly narrow view of the requirement for "some measurable benefit" when it found that because Plastipak and Chicago Petroleum did not own the products being shipped and were not reimbursed for any shipping costs they could not have received a benefit from the shipping, even though, D-B claims, they "initiated the shipping by issuing bills of lading." D-B argues Plastipak and Chicago Petroleum did receive "some measurable benefit" from the shipping in that (1) "Plastipak was able to fulfill its contractual commitment to [OWI] by moving bottles from its facility to Olympic's facility where those bottles would be filled;" and (2) Plastipak took on the responsibility for

moving the bottles "by being the only party to issue the bills of lading required to make that move." As to Chicago Petroleum D-B argues Chicago Petroleum must have benefitted from its business decision to move bottles from one facility to another and "at minimum" D-B was "entitled to the inference that Chicago Petroleum incurred some measurable benefit from issuing hundreds of bills of lading directing D-B to move products from one location to another." D-B argues there is a question of fact as to the "measurable benefit" to Plastipak and Chicago Petroleum. D-B also argues there is already evidence it provided services to Plastipak and Chicago Petroleum based on the bills of lading they issued, they received those services, and it would be unjust for them to retain the benefit of those services without having to pay.

¶ 46 As stated earlier, Chicago Petroleum did not file a brief in this case. Plastipak responds to D-B's "some measurable benefit argument" by asserting that (1) amended Count IV of the second amended complaint fails to allege any facts specifying the benefit Plastipak allegedly received; (2) D-B failed to adduce evidence during discovery that Plastipak received a benefit from D-B, including evidence to support the inference that Plastipak received a benefit from the movement of the bottles because that movement allowed Plastipak to fulfill its contract with OWI; and (3) Plastipak's issuance of bills of lading created no measurable benefit to Plastipak because Olympic, not Plastipak, directed the movement of the bottles and Plastipak only issued the bills of lading to reflect what was on the trucks.

¶ 47 Plastipak also argued that the existence of the contract between D-B and Greif and later Olympic for the shipping at issue bars D-B from seeking relief from Plastipak or Chicago Petroleum. D-B argued an exception to that rule applies in this case in that Plastipak and Chicago Petroleum "enticed" D-B to perform by issuing bills of lading "that were given directly to D-B instructing D-B to carry products from one location to another." Plastipak argued D-B waived its "enticement" argument by failing to raise it in the trial court and, regardless, Plastipak did not "entice" D-B.

> "Ordinarily, the remedy of unjust enrichment based on a quasi-contract is not available when an express contract exists concerning the same subject matter. [Citations.] Instead, when work is done under a contract, a suit generally must be between the parties to the contract. [Citation.] Simply because a third party has benefited from the work does not make that party liable. [Citations.] In other words, a party performing pursuant to a contract who is disappointed by its co-party's failure to pay generally cannot turn to a third party for compensation. [Citation.]" *C. Szabo Contracting, Inc. v. Lorig Construction Co.*, 2014 IL App (2d) 131328, ¶ 25.

¶ 48 In *C. Szabo Contracting Inc.*, the parties, relying on a decision from the United States Court of Appeals for the Seventh Circuit, agreed that despite the general rule stated above, "quasi-contractual relief is available in the face of an express contract when a general contractor either has enticed a sub-subcontractor to perform or has given a sub-subcontractor a reasonable expectation of payment." *Id*. ¶ 26, citing *Midcoast Aviation, Inc. v. General Electric Corp.*, 907 F.2d 732 (7th Cir. 1990). The *Szabo* court found that "[n]o Illinois case [had] relied on *Midcoast Aviation* to allow a contracting party to pursue quasi-contractual relief from a third party who benefitted from the contracting party's performance" (*id*. ¶ 29) and even if *Midcoast* did present an accurate summation of Illinois law it was distinguishable (*id.* ¶ 30). The *Szabo* court distinguished *Midcoast* on the grounds that the third party did not guarantee payment to the plaintiff and did not "entice" the plaintiff to perform. *Id*. ¶¶ 30-31. The *Szabo* court found that "[a]lthough the [trial] court noted that Szabo had an expectation of payment just as 'anybody working on the job expected to be paid,' this is far different from requesting and receiving assurances of payment, as the plaintiff in *Midcoast Aviation* did." *Id*. ¶ 30. The *Szabo* court also held that "to the extent that the trial court found that [the defendant] encouraged Szabo to perform *** its finding is against the manifest weight of the evidence." *Id*. ¶ 32.

¶ 49 Plastipak argues this case is similarly distinguishable in that D-B did not request assurances of payment from Plastipak and Plastipak did not guarantee payment to D-B, and Plastipak did not encourage D-B to "get the work done" as was the case in *Szabo*. See *id*. ¶ 31 ("although the trial court found that [the defendant] 'certainly encouraged them [*sic*] to get the people out there and get the work done,' it also found that [the defendant] did not 'entice' Szabo to complete [the work.]"). In this case, D-B does not claim it sought or that Plastipak or Chicago Petroleum granted it any assurances of payment under D-B's contract with Greif and/or Olympic but relies solely on their alleged "enticement" of D-B's performance. That alleged enticement took the form of "bills of lading that were given directly to D-B instructing D-B to carry products from one location to another."[2] D-B argued the bills of lading "did not simply identify the product *** but identified where the products were to be picked up and where they were to be delivered" and without them D-B could not have legally transported anything. D-B concludes that by issuing the bills of lading Plastipak "not only encouraged and enticed D-B to perform, but no performance would have occurred without Plastipak issuing those bills of lading and delivering them to D-B." D-B argued "that whether these facts rose to the level of 'enticement' *** was a factual matter to be decided by the trier of fact."

¶ 50 We find D-B's argument fails because there is no genuine factual dispute that the bills of lading issued by Plastipak or Chicago Petroleum did not rise to the level of "enticement" necessary to except D-B from the general rule that "a party performing pursuant to a contract who is disappointed by its co-

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[2] Neither *Midcoast* or *Szabo* provided any guidelines to determine what constitutes "enticement" in this context, but in *Midcoast*, where the Seventh Circuit found the defendant in the suit to recover in *quantum meruit* "not only benefited from [the] work[] but enticed [the plaintiff] to undertake the work in the first place," (*Midcoast Aviation, Inc.*, 907 F.2d at 739), when the plaintiff sought assurances of payment, which were given, the plaintiff "made it clear to [the defendant] that it knew [the contracting party's] role in the project was only that of marketing. It also made clear that it knew where the money for the project came from—the [defendant]." *Midcoast Aviation, Inc.*, 907 F.3d at 735.

party's failure to pay generally cannot turn to a third party for compensation." *C Szabo Contracting, Inc.*, 2014 IL App (2d) 131328, ¶ 25, citing *Hayes Mechanical, Inc., v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 8 (2004). We find *Hayes Mechanical, Inc.* instructive. The *Hayes* court analyzed the decision in *Midcoast* in the context of the facts before it and held "*Midcoast Aviation*'s analysis and conclusion only suggest that the present circumstances are the run-of-the-mill scenario in which a party providing services pursuant to a contract is disappointed by its co-party's failure to pay and, thus unreasonably turns to a third party for compensation." *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 10. We reach the same conclusion in this case.

¶ 51 In *Hayes*, the issue was whether a construction contractor's proposed amended complaint stated a claim for *quantum meruit* and unjust enrichment against the owner of a building the contractor had improved pursuant to a contract with the building's tenant where the tenant failed to pay off of the contractor's charges. *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 2. The contractor (Hayes) asserted in the proposed amended complaint that the landlord received the benefit of the renovations to the property and it would be unjust for it to retain that benefit without paying the contractor. *Id*. at 6. The landlord attacked the legal sufficiency of the proposed amended complaint and, after the trial court denied leave to amend, argued on appeal that "the lack of a relationship between the landlord and contractor prevents the contractor from ever stating viable quasi-contract claims against the landlord." *Id*. at 8. The court began with a discussion of the law of quasi-contract stating, in part, as follows:

> "Notably, even when a person has received a benefit from another, he 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 another is not of itself sufficient to require the other to make restitution therefor. [Citations.]" *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 9.

¶ 52 The *Hayes* court also analyzed the decision in *Midcoast* and cases from foreign jurisdictions involving recovery against property owners in similar circumstances. *Id*. at 10-12. The court noted that its research had disclosed "that other jurisdictions have concluded that quasi-contract relief is not available to a contractor unless the owner has engaged in some type of improper, deceitful, or misleading conduct making it unjust for the owner not to pay for the improvement." *Id*. at 10. Notably, the *Hayes* court cited a decision from the Supreme Court of Colorado that found "[i]t was not enough that the tenant breached a contract to pay for improvements and that the landlord owned an improved building." *Id*. at 11, quoting *DCB Construction Co. v. Central City Development Co.*, 965 P.2d 115, 121 (Colo. 1998).

"Rather:

> There must be more. It is unjust for a contractor to bear the loss of a debt unpaid. However, it is not necessarily just or right to impose that debt upon the owner of the property merely to rectify the first injustice. If that were so, anyone [benefitting] from another's services could be liable for those services. We all enjoy the protection that we are generally not liable for services or goods for which we did not contract. The courts should be slow to impose obligations in the absence of a contract; slow to impose the debts of one party upon another. [Citation.]" (Internal quotation marks omitted.) *Id*., quoting *DCB Construction Co.*, 965 P.2d at 121.

¶ 53 Based on the principles surrounding the imposition of liability in quasi-contract, the *Hayes* court concluded there were no facts indicating the contractor "could factually allege the elements of *quantum meruit* or unjust enrichment against the property owner." *Id*. at 15. The court found that in contrast to *Midcoast*, in *Hayes* there was "no indication that the landlord enticed the contractor to complete the

renovation work requested by the tenant." *Id*. at 10. Specifically, the court found "no direct contract between the landlord and the contractor from which it might be inferred the landlord had enticed, coerced, or mislead the contactor into believing it would be paid by the landlord." *Id*. at 13.

¶ 54 "In general *** if you do work pursuant to a contract with X, you don't expect that Y, a nonparty, will pay you if X defaults, merely because Y was benefited by your work. [Citation.] And without your expectation of payment, the enrichment of the Y can hardly be called unjust. [Citation.]" (Internal quotation marks omitted.) *Midcoast Aviation, Inc.*, 907 F.2d at 739. We are not persuaded differently in this case based on the issuance of bills of lading. We hold as a matter of law the issuance of the bills of lading did not create a reasonable expectation in D-B of payment from Plastipak or Chicago Petroleum leaving this case within the ambit of the general rule. See *id*. "A bill of lading can serve many functions. Most fundamentally, it is an acknowledgment of the receipt for goods. [Citation.] But it can also be evidence of title, or more importantly, serve as evidence of a contract of carriage." *Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co.*, 696 F.3d 647, 652 (7th Cir. 2012). We note that in this case D-B has made no argument that the bills of lading created an express contract of carriage between it and either Plastipak or Chicago Petroleum.[3] As such, we find that the bills of lading served merely as an acknowledgement of the receipt of goods. *Id*. In *Hayes*, the court found that "the landlord's right to approve the renovation plans was a matter between the landlord and the tenant, and it

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[3] If such argument, which is forfeited (*Hayashi v. Illinois Department of Financial and Professional Regulation*, 2014 IL 116023, ¶ 43 ("points not argued in the appellant's brief 'are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing'), quoting Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)) had been made we would not find under the facts presented that the bills of lading created an express contract of carriage or a reasonable expectation of payment from Plastipak or Chicago Petroleum. See *Marx Transport, Inc. v. Air Express International Corp.*, 379 Ill. App. 3d 849, 857 (2008) (holding carrier could not proceed under "bills of lading") citing *Jackson Rapid Delivery Service, Inc. v. Thomson Consumer Electronics, Inc.*, 210 F. Supp. 2d 949, 952-53 (E.D. Ill. 2001) (holding "parties are free to contract when and by whom the freight charges should be paid").

reflects the landlord's interest in the real estate, rather than the landlord's desire to shape the renovation for its own use and benefit." In this case, the issuance of the bills of lading did not reflect Plastipak's desire to direct D-B's shipping activities for its own benefit but was a matter between Plastipak and OWI so that OWI could have its bottles filled. In the case of Chicago Petroleum, which allegedly shipped bottles between its own facilities, D-B alleged it made the shipments pursuant to a contract with Greif and Olympic, and issuing a "bill of lading" (in this case an acknowledgment of the goods shipped[4]) so that D-B could fulfill its contract with Greif or Olympic, even if that fulfillment benefitted Chicago Petroleum (or Plastipak) in some way, does not create a circumstance in which receipt of that benefit without paying D-B is unjust. *Rutledge v. Housing Authority of City of East St. Louis*, 88 Ill. App. 3d 1064, 1068 (1980) ("it is important to consider the context in which particular services are rendered in determining whether any benefit accruing to the defendant would be unjustifiably retained absent the intercession of equitable principles. It is unjust enrichment which is to be avoided.").

¶ 55 Neither Plastipak nor Chicago Petroleum ever agreed to pay for the shipping. When D-B contracted with Greif and Olympic it assumed the risk they would not pay. Under the circumstances, shifting the risk of loss from D-B to Plastipak and Chicago Petroleum would impose upon them an obligation they never agreed to incur. *Cf., C. Szabo Contracting, Inc.*, 2014 IL App (2d) 131328, ¶ 45 ("The cases that cite a party's assumption of the risk of nonpayment as support for denying quasi-contractual relief in the presence of an express contract typically involve a third party who incidentally benefited from the plaintiff's performance. [Citation.] Under those circumstances, shifting the risk of loss to the benefitting third party would impose on that party an obligation that it never agreed to incur.

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[4] See, *e.g., Mach Mold Inc. v. Clover Associates, Inc.*, 383 F. Supp. 2d 1015, 1030 (N.D. Ill. 2005) ("A bill of lading is evidence of the condition of goods at the time of delivery, although it 'may not necessarily establish a *prima facie* case that an entire shipment was received in good order.' [Citation.]").

Here, by contrast, Lorig specifically requested and agreed to pay for the pipe-jacking. Thus, requiring Lorig to compensate Szabo for the pipe-jacking does not exceed the obligation that Lorig agreed to incur.") This the law does not allow. *Id*. ¶ 40.

¶ 56 D-B admits an express contract exists for the shipping that forms the basis of its claims against Plastipak and Chicago Petroleum based on an implied contract. We hold neither Plastipak nor Chicago Petroleum enticed D-B to perform or guaranteed payment. Therefore, the general rule that "the remedy of unjust enrichment based on a quasi-contract is not available when an express contract exists concerning the same subject matter" (*id*. ¶ 25) applies. Finally, D-B's policy argument is unpersuasive. Accordingly, we hold the trial court's order granting summary judgment in favor of Plastipak and Chicago Petroleum was correct.

¶ 57 CONCLUSION

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

¶ 59 Affirmed.