2019 IL App (2d) 180913-U
No. 2-18-0913
Order filed October 7, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HIGHVIEW GROUP, LTD. and THOMAS SWARTHOUT,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellees,	)	
v.	)	No. 17-L-371
WILLIAM RYAN HOMES, INC. and NORTH SHORE BUILDERS I, INC.,	)	Honorable Diane Winter,
Defendants-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying motion for judgment *n.o.v.*, and plaintiffs' counsel did not make improper closing argument, where plaintiffs introduced evidence of value of unjust enrichment at trial.

¶ 2 This action involves the development of a 47-acre farm, referred to as the Reilly family property, in Lake Forest. Plaintiffs, Thomas Swarthout and his company, Highview Group, Ltd., attempted to purchase and develop the property with single-family homes and a vineyard. Plaintiffs obtained final plat approval and additional, temporary governmental approvals, referred to as "entitlements," but could not obtain financing to purchase the property.

¶ 3 Plaintiffs sought out a real estate developer to invest in the project before the entitlements expired. Defendants William Ryan Homes and its entity, Northshore Builders, expressed interest, and the two sides negotiated toward pursuing the project together. Plaintiffs gave defendants all their information regarding the final plat, the entitlements, appraisals, and marketing materials, but defendants ultimately purchased the land and took steps to develop the property on their own.

¶ 4 Plaintiffs sued for breach of contract and unjust enrichment, and a jury returned a verdict of $510,000 for unjust enrichment. Defendants moved for a judgment notwithstanding the verdict (judgment *n.o.v.*) or for a new trial, both of which were denied.

¶ 5 Defendants appeal the denial of judgment *n.o.v.*, arguing that (1) plaintiffs did not suffer a detriment because their entitlements expired before defendants obtained title to the property; (2) even if plaintiffs suffered a detriment, the $510,000 judgment lacks an evidentiary basis; and (3) plaintiffs' counsel improperly argued to the jury that the value of plaintiffs' loss was "up to $1 million." We affirm.

¶ 6 I. BACKGROUND

¶ 7 The property is a 47-acre parcel that historically had been farmed. In addition to open fields, the Reilly family maintained horses, a stable, and a large home. Mature woodlands ran along the central east portion and southern boundary of the property. A pond was in the southwest corner.

¶ 8 Swarthout learned that the Reillys were interested in selling the property, and he spent several years pursuing his "vision" for a residential development. Swarthout called his concept the "White Stable Vineyard," which consisted of 34 single-family homes encircling a vineyard on the property.

¶ 9 Swarthout contemplated leaving most of the property preserved as an open space and selling smaller lots to individuals who would have access to that space. The City of Lake Forest zoned the property R-4, which required a minimum lot size of 60,000 square feet for single family residences. Swarthout applied for a variance pursuant to an ordinance allowing for a preservation district with smaller lot sizes and a trade off for open space.

¶ 10 Swarthout planned a road that would roughly encircle the property. The road would go around a large open space with the vineyard, and homes would be built on the other side of the road. Swarthout characterized his concept of a "single loaded" road, with homes on only one side, as very unusual and creative because in most subdivision developments, the roads are "double loaded," with houses on both sides.

¶ 11 Swarthout intended to build and market homes that were smaller than usual in Lake Forest. He expected the smaller homes to be attractive to buyers seeking to downsize or move into a less expensive residence. A homeowners association would make the homes maintenance-free, proving environmentally-friendly lawn treatments that would not harm the vineyard.

¶ 12 Swarthout hired an engineer, Michael Bleck, and a land planner, Nicholas Patera from Teska Associates, to implement his concepts, at considerable expense.

¶ 13 On December 9, 2009, the city granted tentative preliminary subdivision approval, which Swarthout called an important step in the overall subdivision approval process. Swarthout testified that such tentative approval signals to the developer that he has a viable project and is likely to be granted final approval. Indeed, plaintiffs obtained final approval of the plat of subdivision on June 21, 2010.

¶ 14 However, plaintiffs could not obtain financing for the purchase and development of the property. Plaintiffs continued the process of obtaining all the necessary governmental approvals,

such as a permit from the U.S. Army Corps of Engineers for work related to the pond. As part of the final engineering, plaintiffs were required to prepare a storm water management report and obtain a permit from the Lake County Storm Water Management Agency.

¶ 15 Providing sewer service to the property required annexation by the Northshore Sanitary District. To connect to the municipal water system, plaintiffs needed to file an application with the Division of Public Water Supply of the Illinois Environmental Protection Agency (IEPA). In August 2010, the IEPA issued a permit for the water connection. Plaintiffs also complied with IEPA's requirement of a storm water pollution prevention plan. The Illinois Historic Preservation Agency required a "phase one" archeological survey, which plaintiffs obtained. Furthermore, a permit for the sanitary sewer was granted by IEPA, in conjunction with the City of Lake Forest and the Northshore Sanitary District.

¶ 16 Swarthout testified that he had a contract with the Reilly family to purchase the property for $17 million. However, Swarthout characterized the residential real estate market as "bleak," and he had trouble finding investors or lenders. Swarthout's purchase contract with the Reilly family expired in October 2013.

¶ 17 Swarthout obtained extensions for the zoning approvals from the city, but the final zoning approval extension was set to expire on June 27, 2014. As long as the Reilly family owned the property, Swarthout could not record the plat and begin construction.

¶ 18 Even after the expiration of his purchase contract, Swarthout continued seeking out a developer who could buy the property. He considered the entitlements to be valuable and believed the Reilly family still wished to sell the property for the right price and financing. Swarthout also testified that, because he already succeeded in obtaining final plat approval with the necessary entitlements, he believed that the City of Lake Forest would not withhold approval

if he resubmitted the materials after the entitlements expired. Nevertheless, Swarthout wished to record the final plat before the expiration of the entitlements, to avoid the extra work of resubmitting his proposal to the various agencies involved.

¶ 19 Swarthout testified that, in May 2014, he identified Jacobs Homes as a potential developer and investor. Plaintiffs and Jacobs Homes agreed to pursue the project together, and the Reilly family agreed to sell the property for $10 million. The deadline to complete due diligence was May 30, 2014, and the closing was scheduled for June 13, 2014. However, in early June 2014, Jacobs Homes withdrew from the project when its main investor became very ill.

¶ 20 With the entitlement expiration date of June 27, 2014, fast approaching, Swarthout renewed his search for an investor. James Hanson and Jeffrey Wescott, intermediaries for plaintiffs, identified William Ryan Homes as a potential partner. Wescott scheduled a meeting with William Ryan, the chief executive officer, on June 9, 2014.

¶ 21 Swarthout sent Ryan all of the information he had accumulated for the project, much of which was not publicly available. Swarthout included copies of the final plats, final landscape drawings, engineering drawings, marketing information, appraisals, and approvals from the City of Lake Forest. Swarthout testified that he sent Ryan as much information as possible to instill confidence in the project.

¶ 22 Swarthout testified that Ryan initially expressed excitement and enthusiasm for the project because the entitlements were in place. Ryan allegedly told Wescott that the entitlements were especially valuable because cities are reluctant to approve new developments. Swarthout believed that Ryan wanted to see all of his materials before committing to the project.

¶ 23 On June 12, 2014, Ryan sent plaintiffs an email setting forth six "purchase scenarios," each of which specified an amount that Swarthout would receive for his work toward the project's completion. The least lucrative scenario, which Ryan labeled the "worst case scenario," specified that Swarthout would receive $1.08 million, which was comprised of (1) a $250,000 fee when defendants purchased the property from the Reilly family, (2) a $250,000 developer fee, (3) a $10,000 project consulting fee for each of 33 lots as they were sold, amounting to $330,000, and (4) the option of purchasing one of the homes at a $250,000 discount. Under the most lucrative purchase scenario, Swarthout could receive up to $2.035 million in fees and discounts.

¶ 24 Swarthout explained in his testimony at trial that, under the worst case scenario described by Ryan, plaintiffs expected to be paid $250,000 as reimbursement for some of Swarthout's prior expenses, the $250,000 developer fee, and $10,000 per lot.

¶ 25 In the email, Ryan confirmed the "worst case scenario" payout to plaintiffs but predicted that plaintiffs would be paid much more. Ryan stated, "in a nutshell, we see the worst case scenario as [defendants] paying seller $10 million at one closing (entitlements in place) and [Swarthout] receiving $1 million throughout the deal." The day after sending the email, on June 13, 2014, Ryan met with Swarthout and toured the property.

¶ 26 On June 17, 2014, Nate Wynsma and Chris Fiegan, representing defendants, met with Swarthout to discuss financing. Swarthout left the meeting with the belief that the project was proceeding normally.

¶ 27 Plaintiffs and defendants were finalizing plans for defendants to make an offer to the Reilly family to purchase the property, in part because Swarthout's relationship with the family had become strained. Swarthout, Hanson, and Wescott all testified that plaintiffs expected to be

partners with defendants in developing the property. Plaintiffs expected Ryan to make an offer on behalf of plaintiffs and defendants to purchase the property from the Reilly family. The parties met on June 20, 2014, which was a Friday, and plaintiffs expected Ryan to make the offer soon thereafter.

¶ 28 Defendants made an offer, and the Reillys accepted. However, defendants did not disclose the terms with plaintiffs, claiming they were barred from discussing the proposed sale. Defendants cited a confidentiality provision in a letter of intent with the Reillys. Swarthout testified that it was the first time that defendants took the position that plaintiffs were not part of the project.

¶ 29 Wynsma testified that defendants never intended to include plaintiffs as a partner. At best, he claimed, Swarthout could ask to serve as a consultant. Ryan testified that he believed that defendants could withdraw from the project after the conference call on June 20, 2014. Ryan directed Wynsma to make an offer to the Reilly family over the weekend. When Wynsma went to see the Reilly family's broker, defendants did not consider plaintiffs to be their partners. Ryan considered the project to be defendants' only.

¶ 30 Defendants' concept, called Westleigh Farms, is similar to the White Stable Vineyard concept. Defendants' plan has a central lawn encircled by an orchard in the center of the property. In turn, a single-loaded road with 34 single-family homes encircles the orchard.

¶ 31 Bleck, plaintiffs' engineer, testified to several precise measurements shared by the two plats. The identical measurements suggested to Bleck that defendants used plaintiffs' survey and other planning materials because a survey resulting in the same measurements would be very unlikely.

¶ 32 On the unjust enrichment claim, the jury was instructed that plaintiffs provided at least one of the following benefits to defendants: (1) numerous and expensive materials, plans, maps, drawings, and documents pertaining to the proposed development of the property; (2) valuable and confidential information about the value of the property, and the amount of money needed to purchase the property; (3) information concerning previous governmental approvals for the possible development of the property; and (4) an introduction to the Reilly family and their agents.

¶ 33 The jury was instructed that defendants received those benefits and unjustly failed to pay for them, violating fundamental principles of justice and equity. Defendants denied that plaintiffs provided any valuable materials, information, or any other services; denied that it received any benefits from plaintiffs; denied that it unjustly failed to pay for any claimed benefits, and denied that the failure to pay plaintiffs violated any fundamental principles of justice and equity. Defendants further denied that plaintiffs were damaged to the extent claimed.

¶ 34 The jury was instructed that, if it found in favor of plaintiffs on the unjust enrichment claim, it must then decide how much money, if any, would fairly compensate plaintiffs. In calculating the amount, the jury was instructed to determine that sum of money that reflects defendants' gain, not plaintiffs' loss. Thus, the jury was instructed not to consider the amount of plaintiffs' loss or expenses in determining damages. Defendants concede that the jury was correctly instructed.

¶ 35 On August 10, 2018, the jury found for defendants on the breach of contract claim but returned a verdict of $510,000 for plaintiffs on the unjust enrichment claim. On August 29, 2018, defendants responded with a motion for judgment *n.o.v.* or for a new trial. Defendants argued that plaintiffs failed to present evidence of a benefit to defendants or a detriment to

plaintiffs. Claiming that plaintiffs failed to quantify either a benefit or a detriment, defendants asserted that plaintiffs' counsel improperly argued to the jury that defendants were unjustly enriched by up to $1 million. Defendants' posttrial motion was denied on October 9, 2018, and this timely appeal followed.

¶ 36 II. ANALYSIS

¶ 37 A. Judgment *N.O.V.*

¶ 38 In ruling on a motion for judgment *n.o.v.*, the trial court must view the evidence presented at trial in the light most favorable to the nonmovant and should grant the motion only if that evidence " 'so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand.' " *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). "In other words, a motion for judgment *n.o.v.* presents 'a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case.' " *York*, 222 Ill. 2d at 178 (quoting *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 311 (1942)). A trial court should not grant judgment *n.o.v.* if " 'reasonable minds might differ as to inferences or conclusions to be drawn from the facts presented.' " *York*, 222 Ill. 2d at 178 (quoting *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 351 (1995)).

¶ 39 Ultimately, the standard for entry of judgment *n.o.v.* is " 'high' " (*York*, 222 Ill. 2d at 178) (quoting *Pasquale*, 166 Ill. 2d at 351)) and is " 'limited to extreme situations only' " (*Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 548 (2005) (quoting *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1125 (2000))). A motion for judgment *n.o.v.* may not be

granted simply because a verdict is against the manifest weight of the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992).

¶ 40 When reviewing a ruling on a motion for judgment *n.o.v.*, a reviewing court will not reweigh the evidence or evaluate the credibility of the witnesses, as these functions are within the province of the jury. *Board of Trustees of Community College District No. 508 v. Coopers & Lybrand*, 208 Ill. 2d 259, 274 (2003). A trial court's decision to grant or deny a motion for judgment *n.o.v.* is reviewed *de novo*. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37.

¶ 41 Defendants claim that the trial court erroneously denied their motion for judgment *n.o.v.* on the unjust enrichment claim because plaintiffs failed to show that they suffered a detriment. To state a claim for unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that the defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989). An unjust enrichment claim does not require fault or illegality on the part of the defendant; the essence of the cause of action is that one party is enriched and it would be unjust for that party to retain the enrichment. *National Union Fire Insurance Co. of Pittsburgh, PA v. DiMucci*, 2015 IL App (1st) 122725, ¶ 67.

¶ 42 Defendants' theory is that plaintiffs did not suffer a detriment because the information they turned over to defendants became worthless when the entitlements expired. Defendants claim that "[t]he 'vision' and the materials that set it forth was [*sic*] specific to the Reilly property and could only conceivably have value to plaintiffs if they could—on their own or in

partnership with someone else—acquire the Reilly property," which plaintiffs were unable to accomplish.

¶ 43 However, Swarthout explicitly testified to plaintiffs' expenses to create the plans and other documents that formed the basis for the entitlements that were approved by the City of Lake Forest. In his email, Ryan explained that, regardless of the purchase scenario, plaintiffs would receive fees representing a reimbursement for those expenses, plus developer and consultant fees. Ryan made assurances that Swarthout would be compensated if he pursued the project with defendants, and Swarthout testified that those assurances induced him not to look for a different partner. Swarthout detrimentally relied on Ryan's representations, which left Swarthout at a disadvantage when defendants excluded him from the project.

¶ 44 The jury heard ample evidence that plaintiffs suffered a detriment and that defendants benefited from Swarthout's efforts. Defendants accepted and retained all of plaintiffs' information regarding the entitlements, including the plans, drawings, and marketing materials. Defendants then purchased the property and took steps to develop it using a design similar to plaintiffs' plan.

¶ 45 Defendants emphasize the expiration of the entitlements, suggesting that the work in acquiring them was wasted because Swarthout had no viable options when defendants took over the project. However, Swarthout testified that, because he already succeeded in obtaining final plat approval with the necessary entitlements, he believed that the City of Lake Forest would not withhold approval if he resubmitted the materials after the entitlements expired. Swarthout explained that, although reapplying for approval would require additional time and expense, the supporting materials had substantial value despite the expiration of the entitlements.

¶ 46 Moreover, the inference that plaintiffs' materials had value was supported by the similarity between plaintiffs' plat and defendants' plat. Bleck testified to several precise measurements shared by the two plats, which suggested to Bleck that defendants used plaintiffs' survey and other planning materials.

¶ 47 The circumstances surrounding the parties' communications suggests that defendants were stringing along plaintiffs until the entitlements expired, so defendants could purchase and develop the property without compensating plaintiffs. On June 12, 2014, two weeks before the expiration of the entitlements, Ryan sent the email to Swarthout explaining that "[i]n a nut-shell, we see the worst case scenario as us paying Seller $10mm at 1 close (entitlements in place) and Tom receiving $1mm throughout the deal. *** In each scenario I contemplated a 50/50 sharing in the benefits between us and Tom."

¶ 48 As soon as the entitlements expired, defendants for the first time identified several problems with the arrangement and entered into a confidential letter of intent with the Reilly family. From the evidence, the jury could reasonably conclude that defendants unjustly retained the benefit of the plans and approvals to the detriment of plaintiffs. Swarthout testified that he was induced not to seek out another partner and had incurred considerable expense in creating his materials and obtaining the approvals.

¶ 49 In a related argument, defendants claim that plaintiffs failed to present adequate evidence to quantify the alleged unjust enrichment. Defendants argue that there is no evidence that they retained a benefit worth $510,000. We disagree.

¶ 50 The jury could reasonably infer from Ryan's June 12, 2014, email to Swarthout that defendants retained the benefit of the fees that otherwise would have been paid to Swarthout under the "worst case scenario." Ryan represented that, under this arrangement, Swarthout

would receive $250,000 when defendants purchased the property, a $250,000 developer fee, and an additional project consulting fee of $10,000 per lot as each was sold. Had the jury compensated plaintiffs for the sale of one lot, the $510,000 judgment corresponds to these amounts. Defendants retained these amounts by excluding plaintiffs from the project.

¶ 51 On review of the denial of judgment *n.o.v.*, we do not reweigh the evidence or evaluate the credibility of the witnesses. *Board of Trustees of Community College District No. 508*, 208 Ill. 2d at 274. Viewing the evidence in the light most favorable to plaintiffs, we reject the notion that "no contrary verdict based on that evidence could ever stand." See *York*, 222 Ill. 2d at 178. The trial court did not err in denying defendants' posttrial motion.

¶ 52 B. Closing Argument

¶ 53 Finally, defendants argue that plaintiffs' counsel improperly argued to the jury that the value of the unjust enrichment was up to $1 million. Defendants contend that the argument was not supported by the evidence. We disagree.

¶ 54 Before closing argument, defendants made an oral motion *in limine* to bar plaintiffs' counsel from arguing a specific dollar amount of damages, such as "[a] million dollars or any other number." Defendants claimed that plaintiffs had not presented any evidence regarding the value retained by defendants to plaintiffs' detriment. The trial court denied the motion.

¶ 55 During closing argument, plaintiffs' counsel remarked on the damages for breach of contract and unjust enrichment. Counsel made the following remarks concerning the breach-of-contract verdict form:

> "[D]id we present value of the loss [for breach of contract]? Answer, we did. Value of the loss, remember, is a $1 million dollar minimum throughout the deal, that is what Mr.·Ryan said. We didn't reject the deal, we were looking for more money than

> that and we told him we really wanted $2 million dollars, a million for expenses, a million for our fee and a role in the project; that is what we were looking for.
>
> Mr. Ryan goes ahead and makes the offer accepting the contract [with plaintiffs]. So somewhere between $1 and $2 million dollars is the value of the loss and you will get down to the bottom there and fill in that amount. I suggest that amount should be $2 million dollars;·it is a minimum of $1 million dollars because that is the value that we contributed to the property, ***.
>
> If [defendants'] offer to purchase the real estate is successful, then we are going to be paid up to $1 million dollars. We are going to be paid up to $1 million dollars for expenses, up to $1 million dollars for the development. We are going to continue to act as a consultant."

¶ 56 Counsel also argued that the materials retained by defendants were "obviously valuable" and supported a verdict on the unjust enrichment claim of "up to a million dollars."

¶ 57 Defendants did not renew their motion *in limine* by objecting to counsel's remarks. Plaintiffs argue on appeal that the omission results in forfeiture of the issue. *Cf. Simmons v. Garces*, 198 Ill. 2d 541, 569 (2002) ("When a motion *in limine* is denied, a contemporaneous objection to the evidence at the time it is offered is required to preserve the issue for review."). Regardless of the forfeiture, we conclude that defendants' claim of improper closing argument lacks merit.

¶ 58 During closing argument, counsel is allowed wide latitude in drawing reasonable inferences from the evidence. *Guski v. Raja*, 409 Ill. App. 3d 686, 698 (2011). A challenge to closing argument should result in a new trial only if, when the trial is viewed in its entirety, the argument resulted in substantial prejudice to the losing party or rose to the level of preventing a

fair trial. To require reversal, errors in closing argument must result in substantial prejudice such that the result would have been different absent the complained-of remark. *Davis v. City of Chicago*, 2014 IL App (1st) 122427, ¶ 84.

¶ 59 Questions concerning the prejudicial impact of improper comments made during closing argument, including violations of *in limine* orders, are within the purview of the trial court and may not be reversed absent an abuse of discretion. *Simmons*, 198 Ill. 2d at 568. The abuse-of-discretion standard is the most deferential standard of review (*In re D.T.*, 212 Ill. 2d 347, 356, (2004)), and an abuse of discretion only occurs when the trial court's ruling is unreasonable, arbitrary, or fanciful, or where no reasonable person would adopt the same view. *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009). We afford such deference to the trial court on this issue because it heard the comments and arguments and observed the effect of those remarks upon the jury and was in a better position to measure the prejudicial effect, if any, of the remarks. *Carlasare v. Wilhelmi*, 134 Ill. App. 3d 1, 7 (1985).

¶ 60 First, plaintiffs' closing argument did not violate the ruling on defendants' motion *in limine*, which had been denied. Second, as discussed, the trial court admitted into evidence Ryan's June 12, 2014, email to Swarthout that, under the "worst case scenario," Swarthout could expect $1.08 million in fees and a new-home discount.

¶ 61 The $1 million amount specified during closing argument represented (1) a $250,000 fee when defendants purchased the property, (2) a $250,000 developer fee, (3) a project consulting fee of $10,000 for each of 33 lots as they were sold, amounting to $330,000, and (4) the option of purchasing one of the homes at a $250,000 discount. The jury did not return a verdict for the $1 million claimed, but the $510,000 judgment corresponds to the $250,000 fee when the

property was sold, the $250,000 developer fee, and a $10,000 consulting fee for the sale of one lot.

¶ 62 When viewing the trial in its entirety, plaintiffs' closing argument did not result in substantial prejudice to defendants or rise to the level of preventing a fair trial. The result would not have been different absent counsel's remarks. See *Davis*, 2014 IL App (1st) 122427, ¶ 84. There was no abuse of discretion because allowing these remarks was not unreasonable, arbitrary, or fanciful, or where no reasonable person would adopt the same view. See *Blum*, 235 Ill. 2d 21, 36 (2009).

¶ 63 III. CONCLUSION

¶ 64 For the preceding reasons, we affirm the judgment of $510,000 in favor of plaintiffs on their unjust enrichment claim.

¶ 65 Affirmed.