2011 IL App (1st) 092035-U

SECOND DIVISION
January 10, 2012

No. 1-09-2035

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CAROL BLONSTEIN, Special Administrator of the Estate of Michael Blonstein, Third-party Plaintiff-Appellee and Cross-Appellant, v. HAMILL PROPERTY PARTNERSHIP; TENNESSEE VENTURES CORPORATION; HAMILL ROAD PROPERTY, LLC.; LYNCHBURG DEVELOPMENT CORPORATION; AND DiMUCCI BRAINERD PROPERTY PARTNERSHIP, Third-party Defendants-Appellants and Cross-Appellees (American Realty Corporation, Plaintiff and Counterdefendant, v. Michael Blonstein, Defendant, Counterplaintiff and Third-party Plaintiff).	)	Appeal from the Circuit Court of Cook County No. 00 L 2065 Honorable Charles R. Winkler, Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices McBride and Robert E. Gordon concurred in the judgment.

O R D E R

¶ 1 ***Held*:** Trial court's $427,354.50 judgment in favor of plaintiff Carol Blonstein on her amended third-party complaint for unjust enrichment is affirmed over the third-party defendants's argument that the trial court erred in finding they were liable under a theory of unjust enrichment; and Carol's argument that her award should be increased to reflect the full amount of the unjust enrichment realized by the third-party defendants.[1]

¶ 2 This appeal and cross-appeal arise from a $427,354.50 judgment in favor of plaintiff Carol Blonstein, the special administrator for the estate of her late husband Michael Blonstein, on her amended third-party complaint for unjust enrichment against Hamill Property Partnership, Tennessee Ventures Corporation, Hamill Road Property, LLC, DiMucci Brainerd Property Partnership and Lynchburg Development Corporation (collectively, the third-party defendants). The third-party defendants contend the trial court erred in ruling for Carol on her unjust enrichment claim. Carol cross-appeals, contending her award should be increased to reflect the full amount of the unjust enrichment realized by the third-party defendants. We affirm.

¶ 3 Michael was an Illinois licensed real estate salesman. On September 9, 1996, Michael entered into a written independent contractor agreement (agreement) with DiMucci Realty, a real estate development company that develops shopping centers through its "affiliates." The term "affiliates" was not defined in the agreement. Michael and Salvatore DiMucci (Sal), president of DiMucci Realty, signed the agreement. Michael agreed to identify viable commercial real estate

[1]Justice Robert Cahill participated in the oral argument in this case. Justice Cahill died on December 4, 2011. Justice Patrick J. Quinn read the briefs, reviewed the record and listened to oral arguments online.

transactions for DiMucci Realty in exchange for a commission. All proposed transactions were to be submitted by Michael in writing to Sal. DiMucci Realty, at its discretion, would buy, develop, sell and/or lease the real estate. If DiMucci Realty decided to pursue development of a transaction, Michael was required to obtain leasing or co-development commitments from tenants, negotiate site control agreements and oversee issues related to zoning, planning and design of the project.

¶ 4 Under the agreement, in addition to a commission, Michael could elect to become a 10% limited partner in developments on each real estate transaction he brought to DiMucci Realty. To make a partnership election Michael was required to notify Sal within 30 days of presenting the transaction and make a cash capital contribution. The right to elect a partnership interest automatically expired on termination of the agreement. Also, "termination of [Michael's] association with [DiMucci Realty] may be an event that causes his limited partnership interest to be liquidated, upon such terms and conditions as the parties may agree." The agreement further provided that DiMucci Realty would advance money to Michael to cover business expenses. The advances would offset Michael's commissions. On termination of the agreement, Michael was required to repay all outstanding advances plus interest at an annual rate of 9% to DiMucci Realty.

¶ 5 Michael worked for DiMucci Realty from September 1996 until he resigned in June 1997. Michael's business cards designated him as DiMucci Realty's "Director of New Development." Michael's advances were paid by United Administrative Services, a payroll company jointly owned by Sal and Sal's brother Anthony DiMucci. Sal and Anthony jointly

owned about 100 corporations and worked together from the same office. Attorney Jerry Biederman represented Sal and Anthony and their entities. Biederman testified that he created about 50 entities on behalf of Sal and/or Anthony. Biederman said that Sal owned DiMucci Realty and that Anthony held no interest or position in the company. Anthony averred in his affidavit that DiMucci Realty was a family business and that all decisions regarding real estate transactions were made jointly by him and Sal. Michael testified in his deposition that he reported exclusively to Sal and did not speak with Anthony about potential real estate transactions.

¶ 6 During the term of Michael's employment with DiMucci Realty, he presented to Sal three transactions for potential development of Revco/CVS drugstores at: (1) Old Forest Road and Link Road in Lynchburg, Virginia (Lynchburg site); (2) Route 153 and Hamill Road in Chattanooga, Tennessee (Hamill site); and (3) Graysville Road and East Brainerd Road in Chattanooga, Tennessee (Brainerd site).

¶ 7 With regard to the Lynchburg site, Michael testified that he met with Bill Russell, Revco's head of real estate, and Kathy Evans, Revco's midwest regional manager of real estate, at Revco's corporate office in Cleveland, Ohio. The group discussed the development of a CVS drugstore in Lynchburg, Virginia. In connection with the development, Michael traveled to Lynchburg, negotiated the outline of Revco's lease, prepared correspondence, presented the land acquisition deal to the owner's broker and selected local transactional counsel. Michael also prepared detailed cost estimate *pro formas* with Don Bailey, the chief financial officer of DiMucci Realty.

¶ 8 With regard to the Hamill and Brainerd sites, Michael testified that he traveled to Chattanooga, Tennessee five or six times. He interviewed and selected a local commercial real estate broker to find suitable sites for potential developments. Michael and the broker viewed numerous sites and prepared site packages for Russell and Evans. Michael met with Russell and Evans and reviewed the proposed sites. Michael also prepared correspondences and detailed cost estimate *pro formas* with Bailey for the Hamill and Brainerd sites.

¶ 9 Evans testified that she worked with Michael on potential development sites in and near Chattanooga. She said she believed Michael was a development manager for DiMucci Realty. Evans and Michael viewed many potential development sites together and Michael prepared written submissions for the visited sites, including the Hamill and Brainerd locations. Evans said Michael's work was integral to her selection of the three sites and her decision to seek approval of the three sites by CVS.

¶ 10 In November 1996, DiMucci Development Corporation of Lynchburg, an affiliate of DiMucci Realty, was formed by Biederman to develop the Lynchburg site. The Virginia Secretary of State listed Anthony as the president of DiMucci Development Corporation of Lynchburg. Biederman said his firm mistakenly listed Anthony as an officer in one of Sal's entities. Anthony testified that due to the large number of corporations he owned with Sal there was often confusion about who owned what interest in each entity. Revco executed a lease with DiMucci Development Corporation of Lynchburg on April 29, 1997. On the same date, DiMucci Development Corporation of Lynchburg entered into a real estate purchase agreement with the owners of the Lynchburg site.

¶ 11 In January1997, DiMucci 153 and Hamill Road, LLC, was formed in connection with DiMucci Realty, developing the Hamill site. DiMucci 153 and Hamill Road, LLC, entered into a real estate purchase agreement with the owners of the Hamill site on January 30, 1997. Revco executed a lease with DiMucci 153 and Hamill Road, LLC, on May 12, 1997.

¶ 12 In March 1997, DiMucci East Brainerd and Graysville, LLC, was formed in connection with DiMucci Realty, developing the Brainerd site. Revco executed a lease with DiMucci East Brainerd and Graysville, LLC, on September 30, 1997. This lease was signed by Anthony on behalf of DiMucci East Brainerd and Graysville, LLC.

¶ 13 On April 10, 1997, about 10 days after Michael learned of DiMucci Realty's intent to develop the proposed sites, Michael informed Sal in writing of his intent to take a 10% partnership interest in the developments. Michael did not offer a cash capital contribution in exchange for the partnership interest and Sal did not tell Michael the amount needed to acquire an interest in the developments. Michael testified that he intended to sell his 10% interest in the developments back to Sal at a "10% cap rate," in lieu of making a cash capital contribution.

¶ 14 Michael gave notice of termination to DiMucci Realty on June 12, 1997. On July 12, 1997, Sal died and his wife Yvonne DiMucci was appointed representative of his estate. Anthony testified that after Sal died, he administrated Sal's businesses, including DiMucci Realty, until they could be transferred to Yvonne. Anthony said he held no interest or position in DiMucci Realty. Anthony acknowledged signing DiMucci Realty's 1997 annual report as its director, president and secretary. He said he signed the report by mistake.

¶ 15 After Sal died, Jerald Para, DiMucci Realty's in-house counsel, asked Michael to identify

in writing to Anthony interests in property or commissions Michael believed he was entitled to receive. In a letter dated July 16, 1997, Michael outlined the commissions he was owed and reaffirmed his intent to take a 10% partnership interest in the three developments. In the letter, Michael referred to the Lynchburg site generally without specifying the address of the site. He provided documents reflecting the work he had performed with regard to each development. Michael did not offer a cash capital contribution in exchange for a partnership interest in the three developments. Anthony testified that he did not receive Michael's letter.

¶ 16 On July 24, 1997, Michael and DiMucci Realty finalized the termination of the agreement under an addendum. The addendum was signed by Michael and Para. The addendum provided that Michael would continue to share in commissions paid or payable to DiMucci Realty in exchange for Michael diligently pursuing each of the proposed developments to completion. The addendum also provided that Michael would repay $268,000 of outstanding advances to DiMucci Realty. Michael acknowledged that he did not continue to work on the proposed developments after termination of the agreement. He also acknowledged that he did not repay the $268,000 in outstanding advances to DiMucci Realty.

¶ 17 On December 22, 1997, Anthony sent a letter to Michael, saying that "nothing was happening" with regard to the three proposed developments. The letter was written on DiMucci Development Corporation letterhead. Anthony said he used this letterhead for "everything." Biederman testified that although leases were secured for the three properties and land purchase agreements had been entered into, none of the three deals had closed before Sal died and Michael resigned.

¶ 18 In 1998, Anthony entered into a written settlement agreement with Yvonne concerning the numerous companies Anthony and Sal had jointly and separately operated. Under the settlement agreement, Anthony and Yvonne divided DiMucci Realty's assets equally. Anthony acknowledged that he did not give consideration to DiMucci Realty to acquire interest in the company.

¶ 19 Anthony testified that he discussed the Lynchburg, Hamill and Brainerd developments with Yvonne and that Yvonne did not intend to pursue them. Anthony said that after visiting the three proposed sites he decided to pursue their development for himself, independent of DiMucci Realty and Michael. He said he was not aware that Michael had any involvement with the three developments. Anthony averred in his affidavit that he and Sal hired Michael to produce viable transactions for their businesses. He also averred that he had personal knowledge of all transactions involving any DiMucci entity and was involved in every decision regarding the development of any property in which the DiMucci family entities had an interest. He said he considered the three developments to be "gift horses."

¶ 20 Third-party defendant Lynchburg Development Corporation was formed in February 1998 and owns and developed the Lynchburg site. Third-party defendant DiMucci Brainerd Property Partnership was formed in December 1999 and owns and developed the Brainerd site. Its partner is third-party defendant Tennessee Ventures Corporation. Third-party defendant Hamill Property Partnership was formed in December 1999 and owns and developed the Hamill site. Its partner is third-party defendant Hamill Road Property, LLC. The third-party defendants are entities owned and controlled either directly or indirectly by Anthony.

¶ 21 After Sal died, Anthony caused: DiMucci Development Corporation of Lynchburg to assign its Revco lease to third-party defendant Lynchburg Development Corporation; DiMucci East Brainerd and Graysville, LLC, to assign its Revco lease to third-party defendant DiMucci Brainerd Property Partnership; and DiMucci 153 and Hamill Road, LLC, to assign its Revco lease to third-party defendant Hamill Property Partnership. Third-party defendants did not give consideration for the lease assignments.

¶ 22 In December 1999, Anthony sent Michael a "DiMucci Companies" invoice for the outstanding advances Michael allegedly owed to DiMucci Realty. Michael did not repay the advances.

¶ 23 On February 22, 2000, American Realty Corporation, successor to DiMucci Realty, filed suit against Michael. DiMucci Construction Company was later substituted for American Realty Corporation as the plaintiff. DiMucci Construction alleged it advanced Michael $328,209.06 to cover business expenses from September 1996 until July 1997. DiMucci Construction alleged Michael refused to repay the advances or identify viable real estate transactions to offset the amount Michael owed DiMucci Construction. DiMucci Construction sought to recover the advances under theories of fraud and breach of contract.

¶ 24 Michael filed a counterclaim on September 22, 2000, alleging breach of contract by DiMucci Construction. Michael alleged DiMucci Construction failed to pay him commission for, or give him a 10% partnership interest in, the three real estate transactions identified by Michael under the agreement.

¶ 25 In answer to discovery requests, DiMucci Construction produced documents showing

that the third-party defendants owned and were developing the three pieces of real estate in which Michael alleged an interest. Michael was unaware the third-party defendants existed until the documents were produced in March 2003. Michael later learned the third-party defendants were affiliates of DiMucci Construction.

¶ 26 On October 3, 2003, Michael filed a third-party complaint against the third-party defendants. Michael alleged the third-party defendants were affiliates of DiMucci Realty and that he had a 10% ownership interest in the three pieces of real estate owned and developed by the third-party defendants. Michael sought: (1) a declaratory judgment that he owned a 10% interest in the three properties under the agreement he had with DiMucci Realty; (2) an accounting to reflect sums owed to him; (3) an order directing the third-party defendants to transfer to him a 10% interest in the properties or, alternatively, a monetary award sufficient to liquidate his interest under a theory of unjust enrichment.

¶ 27 On April 12, 2006, the trial court dismissed Michael's counterclaim against DiMucci Construction. Michael died on February 24, 2008, and his wife Carol was appointed special administrator of his estate. DiMucci Construction voluntarily dismissed its complaint against Michael on February 27, 2008. Carol amended Michael's third-party complaint, adding a claim of successor liability against the third-party defendants. The case proceeded to trial solely on Carol's amended third-party complaint. The trial was bifurcated on the issues of liability and damages.

¶ 28 Following a hearing on liability, the court found in favor of Carol on her unjust enrichment claim and, on May 1, 2008, entered a written order finding that: Michael's unjust

enrichment claim survived his death and Carol had standing to pursue it; Michael was acting as the director of new development on behalf of DiMucci Realty and not as a broker when rendering services in Tennessee and Virginia; Anthony was aware of the business dealings conducted by DiMucci Realty and its affiliates; the term "affiliates" under the agreement encompassed any entity in which Sal or Anthony held an ownership interest, including new entities created to develop a transaction; Michael was entitled to be compensated for the work he performed on the three developments; Anthony was aware of acts taken by Sal and/or DiMucci Realty's affiliates with regard to the three developments; Anthony considered the three developments to be "gift horses" and caused the third-party defendants to obtain from DiMucci Realty's affiliates their right to develop the three properties; and that the third-party defendants have benefitted from developing and retaining 100% ownership interest in the three developments while not compensating Michael for his work on these developments. The court rejected Anthony's testimony that he initiated the development of the three sites independent of the work performed by Michael. The court deferred ruling on Carol's accounting claim and ruled against her on her alternative claim for successor liability.

¶ 29 Before a hearing on damages, third-party defendants filed three affirmative defenses that are relevant to this appeal: (1) illegality because Michael was not a licensed real estate broker in Tennessee or Virginia; (2) setoff based on amounts Michael allegedly owed DiMucci Realty under the agreement; and (3) Carol's lack of standing to raise an unjust enrichment claim on behalf of Michael who died before trial. Carol filed a motion to strike. The trial court granted Carol's motion to strike the third-party defendants's illegality defense and denied her motion to

strike the setoff defense. Third-party defendants withdrew their lack of standing defense.

¶ 30 At the hearing on damages, Carol presented the testimony of Robert Miller, president and owner of Milco Investments, a company that specializes in the development of commercial investment real estate with a focus on free-standing, single-tenant, net-lease properties such as drugstores. Miller testified as a valuation expert. Miller opined that if each development was debt free, the fair market value of each property was: $2,620,350 (Brainerd); $3,555,871 (Hamill); and $3,556,906 (Lynchburg). Miller's opinion was based on: the secured leases for each development; amendments to those leases, if any; the size of the tenants; square footage of the property; the financial wherewithal of the tenant; his analysis of over 70 comparable drugstore real estate transactions; and the demographic data for Chattanooga and Lynchburg. Miller said his valuation opinions reflected what a seller of the three developments would have achieved in the open market as of March 2008.

¶ 31 Carol also presented the federal tax returns filed by the third-party defendants for the years 2000 to 2007. Carol sought entry of a $1,126,670 award, comprised of Michael's leasing commissions for each property plus a 10% share of profits and equity in each property for the years 2000 to 2007.

¶ 32 Anthony testified at the damages hearing that he pursued development of the three sites independent of DiMucci Realty and Michael. Anthony described the work he performed to develop the properties and the money he invested in each development. It was undisputed that Michael did not contribute capital to develop the properties. The leases Michael secured for each site remained unchanged. CVS is the sole tenant of each property.

¶ 33 In support of the third-party defendants's setoff defense, Anthony testified that third-party defendants were seeking a credit for the amount Michael owed DiMucci Realty under the agreement. Anthony said Michael owed DiMucci Realty $268,000 in outstanding advances and that DiMucci Realty borrowed this amount from United Administrative Services, a payroll company jointly owned by Anthony and Sal. Anthony said DiMucci Realty assigned its right to collect amounts owed by Michael under the agreement to DiMucci Real Estate Company. Anthony owned DiMucci Real Estate Company. Anthony said DiMucci Real Estate Company assigned its right to collect to DiMucci Construction. DiMucci Construction assigned its right to collect to United Administrative Services, which then assigned this right to the third-party defendants.

¶ 34 On cross-examination, Anthony acknowledged that he could not recall whether the first assignment from DiMucci Realty to DiMucci Real Estate Company was oral or in writing. Anthony also acknowledged that he was not aware of a written document or oral agreement, assigning DiMucci Realty's right to collect under the agreement to DiMucci Real Estate Company. Anthony further acknowledged that the December 1999 invoice listed DiMucci Realty, rather than DiMucci Real Estate Company, as the entity that was seeking to collect the outstanding advances. Anthony said he considered the DiMucci family companies to be "all the same." Anthony said he was not an owner or officer of DiMucci Realty and had not been appointed by a court to administer DiMucci Realty after Sal died.

¶ 35 Guy Ackermann, a certified public accountant, testified as an expert witness on behalf of the third-party defendants. Ackerman opined that Michael was entitled to recover zero dollars in

damages on his unjust enrichment claim. In reaching this opinion, Ackermann said he considered the terms of the agreement, the leases, the third-party defendants's tax returns, Michael's testimony and the third-party defendants's setoff defense. Ackermann explained that although Michael should have earned $39,150 for "site procurement" work and $86,393 for the work he did to secure the CVS leases, Michael owed a debt to DiMucci Realty that exceeded the value of the services he rendered and was therefore not entitled to damages.

¶ 36 After the third-party defendants rested, Carol moved to strike their affirmative defense of setoff, arguing that they failed to prove that DiMucci Realty assigned its right to collect the outstanding advances from Michael to DiMucci Real Estate Company or another DiMucci family entity. After considering arguments from both parties, the court granted Carol's motion, finding that the third-party defendants failed to prove they were entitled to a setoff.

¶ 37 The court then entered a written order, awarding Carol $427,354.50 in damages on her unjust enrichment claim. In reaching this amount, the court reviewed the third-party defendants's federal tax returns for the years 2000 to 2007 and noted that each of the three developments produced an income in those years. The court then selected the highest and lowest annual income earned by each of the three properties, added those two numbers and divided the total by two to reach a median annual income for each property during the years in question. This calculation yielded damage figures of: $160,144.50 for Brainerd; $224,396 for Hamill; and $42,814 for Lynchburg. The court then added these numbers to arrive at a total amount of $427,354.50 of unjust enrichment damages. The court noted in its order that it considered several different methods of calculating damages but that this method was the most direct,

transparent and fair method of placing a reasonable value on Michael's efforts in securing a source of revenue for the third-party defendants from the three developments. The court also noted that this calculation did not include interest or depreciation as urged by Carol.

¶ 38 Third-party defendants appeal and Carol cross-appeals. Third-party defendants contend the trial court erred in ruling for Carol on her unjust enrichment claim. They raise a number of arguments challenging the trial court's factual findings and conclusions of law based on those findings. We will not overturn the court's factual findings unless they are against the manifest weight of the evidence, *i.e.*, they are arbitrary, not reasonable and not based on the evidence or the opposite conclusion is clearly evident from the record. *Tully v. McLean*, 409 Ill. App. 3d 659, 670, 948 N.E.2d 714 (2011). We review *de novo* the court's conclusions of law. *Tully*, 409 Ill. App. 3d at 670.

¶ 39 We first consider the third-party defendants's argument that the trial court erred in finding that Michael's unjust enrichment claim survived his death and that Carol had standing to pursue it. Third-party defendants contend this finding was erroneous because a quasi-contract claim such as a claim for unjust enrichment does not survive a plaintiff's death. We review this question of law *de novo*. *Tully*, 409 Ill. App. 3d at 670.

¶ 40 Neither the parties nor our research provided Illinois cases discussing whether an unjust enrichment claim survives a plaintiff's death. Section 27-6 of the Probate Act of 1975 (755 ILCS 5/27-6 (West 2008)) sets forth actions that survive a plaintiff's death "[i]n addition to the actions which survive by the common law[.]" Section 27-6 does not specifically list unjust enrichment as a claim that survives. However, survival provisions such as section 27-6 are liberally

construed as remedial statutes to prevent abatement. See *Williams v. Palmer*, 177 Ill. App. 3d 799, 803, 532 N.E.2d 1061 (1988). At common law, actions for breach of contract survive the death of a plaintiff. *Williams*, 177 Ill. App. 3d at 802. A claim for unjust enrichment is predicated on quasi-contract principles because it seeks to protect an underlying property interest often based on breach of a contract. *Marks v. Rueben H. Donnelley, Inc.*, 260 Ill. App. 3d 1042, 1051, 636 N.E.2d 825 (1994); *Williams*, 177 Ill. App. 3d at 803. Given the liberal interpretation of survival provisions and the nature of unjust enrichment claims, we believe that a claim for unjust enrichment survives the death of a plaintiff. See *Williams*, 177 Ill. App. 3d at 803 (although the plaintiff's claim sounded in tort, which at common law would not survive the plaintiff's death, the underlying interest to be protected was a property interest based on breach of contract and therefore survives). The trial court did not err in finding as a matter of law that Michael's unjust enrichment claim survived his death and that Carol, as administrator of his estate, had standing to pursue it.

¶ 41 In reaching this conclusion, we have considered *Creighton v. Pope County*, 386 Ill. 468, 54 N.E.2d 543 (1944), cited by the third-party defendants, and find it distinguishable. In *Creighton*, a blind plaintiff's right to relief under the Blind Relief Act did not survive the plaintiff's death because the cause of action for blind relief benefits was considered personal to the beneficiaries who qualified under the Blind Relief Act, not their personal representatives who did not come within the contemplation of the statute. *Creighton*, 386 Ill. at 478. Here, unlike *Creighton*, Michael's unjust enrichment claim is not personal to Michael and there is no statute preventing Carol from pursuing his claim.

¶ 42 Having found that Michael's unjust enrichment claim survived his death and that Carol had standing to pursue it, we next consider the propriety of the court's finding that the third-party defendants were liable under a theory of unjust enrichment. To prevail on a theory of unjust enrichment, a plaintiff must show that (1) the defendant has unjustly retained a benefit (2) to the plaintiff's detriment and that (3) defendant's retention of the benefit violates the fundamental principles of justice, equity and good conscience. *HPI Health Care Services, Inc.*, 131 Ill. 2d at 160.

¶ 43 Here, Carol has established these three elements and the court did not err in finding the third-party defendants liable. First, the third-party defendants unjustly retained a benefit. The record shows that Michael identified, presented and initiated the three developments, all of which produced an annual income for the years 2000 to 2007. Anthony testified that he considered the three developments to be "gift horses," as they were all but complete before Sal died and Michael resigned. Anthony created and controls the third-party defendants and caused DiMucci Realty's affiliates to assign their CVS leases to the third-party defendants. The third-party defendants retained a 100% ownership interest in the three developments and did not compensate Michael for his work.

¶ 44 Second, third-party defendants retained their benefit to Michael's detriment. As mentioned, Michael identified, presented and initiated the three developments. Michael met with CVS representatives, identified the three sites in question for development and obtained leasing commitments from CVS. He prepared correspondence, site packages and detailed cost estimate *pro formas* for Evans and Bailey. Evans testified that Michael's work was integral to

her decision to select the three sites and seek their approval from CVS. The record shows that two of the three CVS leases now assigned to the third-party defendants were in place before Michael resigned and the third-party defendants were formed. Michael was not compensated with commissions or interest for the work he performed on the three transactions.

¶ 45 Finally, the third-party defendants's retention of the benefit violates principles of justice, equity and good conscience. The trial court found and the record shows that Anthony was aware of Michael's agreement with DiMucci Realty and that Michael was hired to "produce transactions" for Sal's and Anthony's businesses in exchange for a commission and potential partnership interest in the proposed developments. We cannot say that this finding was against the manifest weight of the evidence where Anthony averred that he had personal knowledge of all transactions involving any DiMucci entity and was involved in every decision regarding the development of any property in which the DiMucci family entities had an interest. We also cannot say that the trial court erred in finding that Michael substantially performed his duties under the agreement and was entitled to compensation. As a result of Michael's work, Anthony considered the three deals to be "gift horses." Despite this sentiment, Anthony sent Michael a letter in December 1997, telling him that nothing was happening with regard to the three developments. We note that as of the date of the letter, leases were in place for each site and land purchase agreements had been signed. See *HPI Health Care Services*, 131 Ill. 2d at 161 (receipt of enrichment is unjust where the defendant procured the benefit from the third party through some type of wrongful conduct). Based on this evidence, the trial court did not err in finding for Carol on her unjust enrichment claim.

¶ 46 We are unpersuaded by the third-party defendants's argument that Carol is barred from recovering on her unjust enrichment claim because of the agreement between Michael and DiMucci Realty. Although it is true that a plaintiff cannot state a cause of action based on unjust enrichment where an express contract exists and governs the relationship between the parties (*Perez v. Citicorp Mortgage, Inc.*, 301 Ill. App. 3d 413, 425, 703 N.E.2d 518 (1998)), here there was no express contract between Michael and the third-party defendants. Accordingly, the agreement between Michael and DiMucci Realty does not bar Carol from raising a claim of unjust enrichment against the third-party defendants.

¶ 47 We are likewise unpersuaded by the third-party defendants's argument that there can be no basis for the court's finding of liability against them under a theory of unjust enrichment because the third-party defendants had no agreement or relationship with Michael. The third-party defendants claim they had no contact with Michael while he performed work on the three transactions and therefore there can be no wrongful conduct or basis in tort to support a finding of liability.

¶ 48 Contrary to this argument, there need not be a basis in tort for a plaintiff to prevail on an unjust enrichment claim. See *HPI Health Care Services, Inc.*, 131 Ill. 2d at 160 (to state a cause of action for unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment and that defendant's retention of the benefit violates the fundamental principles of justice, equity and good conscience). Also, a plaintiff may seek recovery of a benefit that was transferred to the defendant by a third party. *HPI Health Care Services, Inc.*, 131 Ill. 2d at 161.

¶ 49 This aside, the third-party defendants's argument that they had no contact with Michael while he performed his work on the three developments and that there was no wrongful conduct to support a finding of liability is belied by the record. Although the third-party defendants were not formed until after Michael resigned, Anthony was aware of the work Michael performed on the three developments and that leases had been secured. He considered the developments to be "gift horses." Anthony's knowledge is imputed to the third-party defendants. See *People ex rel. Richard M. Daley v. Warren Motors, Inc.*, 114 Ill. 2d 305, 320, 500 N.E.2d 22 (1986) (knowledge of an owner of a corporation generally is imputed to the corporation). Despite this knowledge, Anthony sent Michael a letter saying that nothing was happening with the three developments. Anthony then caused DiMucci Realty's affiliates to assign their leases to the third-party defendants without consideration.

¶ 50 This scenario is readily distinguishable from *Wolff v. Ampacet*, 284 Ill. App. 3d 824, 673 N.E.2d 745 (1996) (overruled on other grounds), relied on by the third-party defendants to support their argument that because they had no contact with Michael, there can be no claim for unjust enrichment. Here, unlike *Wolff*, the third-party defendants were not ignorant of Michael's work on the three transactions nor did they try to reject his contribution to the developments. See *Wolff*, 284 Ill. App. 3d at 830. Rather, they were aware of and benefitted from Michael's work.

¶ 51 The third-party defendants next challenge the trial court's finding that the term "affiliates" as used in the agreement encompassed any entity in which Sal or Anthony held an ownership interest, including new entities created to develop a transaction. They claim that this finding was

against the manifest weight of the evidence because there was no common ownership or control of these entities.

¶ 52 We first note that Carol did not raise a claim for breach of contract or prevail on her claim of successor liability and therefore the court's finding that the third-party defendants were affiliates of DiMucci Realty was not a prerequisite for the court to impose liability under a theory of unjust enrichment. See *Sabo v. Dennis*, 408 Ill. App. 3d 619, 629, 948 N.E.2d 121 (2011). Rather, the evidence that the third-party defendants were aware of Michael's work on the three developments and that they unjustly retained a benefit at his expense was sufficient to establish a claim of unjust enrichment, independent of the court's finding that the third-party defendants were affiliates of DiMucci Realty. See *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 398 Ill. App. 3d 773, 787-88, 935 N.E.2d 949 (2009); *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 9, 812 N.E.2d 419 (2004).

¶ 53 In any event, the trial court's finding that the term "affiliates" as used in the agreement encompassed any entity in which Sal or Anthony held an ownership interest, including new entities created to develop a transaction, was not against the manifest weight of the evidence. The record shows that Anthony considered his and Sal's entities to be family businesses and averred that all decisions regarding real estate transactions were made jointly by him and Sal. Anthony also averred that he had personal knowledge of all transactions involving any DiMucci entity and was involved in every decision regarding the development of any property in which the DiMucci family entities had an interest. Anthony testified that he considered all the DiMucci family companies to be the same and that there was often confusion between him and Sal about

who owned what interest in which entity. The record shows Anthony signed annual reports for entities owned by Sal and was listed as the president of allegedly Sal-owned companies. The record also shows that transfers of interest from Sal-owned companies to Anthony-owned entities were done without consideration. This evidence was more than sufficient to support the trial court's finding.

¶ 54 The third-party defendants next argue that even if Carol established a claim for unjust enrichment, she is barred from recovering on the claim because she seeks compensation for services that Michael rendered illegally, *i.e.*, real estate brokerage in Virginia and Tennessee without being licensed in those states. They claim that the trial court's finding that Michael was acting as the director of new development on behalf of DiMucci Realty, rather than a broker, was against the manifest weight of the evidence.

¶ 55 It is undisputed that Michael was not a licensed real estate broker in either Virginia or Tennessee and that both Virginia law and Tennessee law prohibit the payment of commission or other compensation to an unlicensed broker in connection with a transaction involving real estate. See Va. Real Estate Comm. Reg. 3.5.2 (1984); Tenn. Code Ann. § 62-13-302 (2007). The third-party defendants claim that given the nature of Michael's work and his agreement with DiMucci Realty, he was acting as a real estate "broker" as that term is defined in section 1-10 of the Illinois Real Estate License Act of 2000 (225 ILCS 454/1-10 (West 2006)).

¶ 56 Under section 1-10, a "broker" is an individual:

> "other than a real estate salesperson *** who for another and for compensation *** either directly or indirectly:

(1) Sells, exchanges, purchases, rents, or leases real estate.

(2) Offers to sell, exchange, purchase, rent, or lease real estate.

(3) Negotiates, offers, attempts, or agrees to negotiate the sale, exchange, purchase, rental, or leasing of real estate.

(4) Lists, offers, attempts, or agrees to list real estate for sale, lease, or exchange.

(5) Buys, sells, offers to buy or sell, or otherwise deals in options on real estate or improvements thereon.

(6) Supervises the collection, offer, attempt, or agreement to collect rent for the use of real estate.

(7) Advertises or represents himself or herself as being engaged in the business of buying, selling, exchanging, renting, or leasing real estate.

(8) Assists or directs in procuring or referring to prospects, intended to result in the sale, exchange, lease, or rental of real estate.

(9) Assists or directs in the negotiation of any transaction intended to result in the sale, exchange, lease, or rental of real estate.

(10) Opens real estate to the public for marketing purposes.

(11) Sells, leases, or offers for sale or lease real estate at auction."

225 ILCS 454/1-10 (West 2006).

The third-party defendants argue that most of these factors support the conclusion that Michael was acting as a broker in Tennessee and Virginia.

¶ 57 We note that the trial court, as the finder of fact, was in the best position to observe the conduct and demeanor of the parties and the witnesses. *Tully*, 409 Ill. App. 3d at 670. We will not substitute our judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence or the inferences to be drawn. *Tully*, 409 Ill. App. 3d at 670-71.

¶ 58 Although Michael's work resembled that of a broker, we cannot say that the trial court erred in concluding that he was acting as the director of new development on behalf of DiMucci Realty. First, section 1-10 specifically excludes real estate salespersons from the definition of "broker." In the agreement, Michael was described as a "licensed real estate sales person," not a broker. Second, Michael testified that he was working as the director of new development and his business cards reflected this position. Evans testified that she believed Michael was a development manager for DiMucci Realty. Third, Michael interviewed and selected local commercial real estate brokers to find suitable sites for potential developments. Finally, unlike a broker, Michael reviewed the proposed sites with Evans and Russell and prepared cost estimate *pro formas* with Bailey, the chief financial officer of DiMucci Realty. Based on this evidence, the trial court did not err in finding Michael was acting as the director of new development for DiMucci Realty.

¶ 59 The third-party defendants next contend that even if Carol was entitled to recover on her unjust enrichment claim, the trial court erred in calculating damages. They argue that the proper measure of damages should have been calculated by considering the reasonable value of the services performed by Michael, not the value of the benefit allegedly received by the third-party

defendants.

¶ 60 In setting forth this argument, the third-party defendants seem to confuse the measure of damages for unjust enrichment and *quantum meruit* actions. The two types of actions are similar in that the plaintiff must show that valuable services were rendered by the plaintiff and received by the defendant under circumstances that would make it unjust for the defendant to retain the benefit without paying. *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 9, 812 N.E.2d 419 (2004). However, "in a *quantum meruit* action, the measure of recovery is the reasonable value of work and material provided, whereas in an unjust enrichment action, the inquiry focuses on the benefit received and retained as a result of the improvement provided by the contractor." *Hayes Mechanical*, 351 Ill. App. 3d at 9. The trial court did not err in calculating damages based on the value of the actual benefit received by the third-party defendants.

¶ 61 The third-party defendants finally contend that the trial court erred as a matter of law by denying their affirmative defense of setoff. They argue that Michael received "hundreds of thousands" of dollars from DiMucci Realty in advances and that because these advances were greater than the value of the services rendered by Michael, Carol was not entitled to damages. The third-party defendants's argument is based on the addendum to the agreement in which Michael agreed to repay $268,000 of outstanding advances to DiMucci Realty. They maintain that this sum should be subtracted from Carol's award. We review this issue *de novo* and may affirm the judgment of the trial court on any basis provided in the record. *Piser v. State Farm Mutual Automobile Insurance Company*, 405 Ill. App. 3d 341, 351, 938 N.E.2d 640 (2010).

¶ 62 We find that the third-party defendants are not entitled to a setoff because they failed to counterclaim against Carol. *Nadhir v. Salomon*, 2011 IL App (1st) 110851, ¶ 37. The record shows the third-party defendants raised and argued the outstanding advances as an affirmative defense, not as a counterclaim. However, a setoff is a counterclaim, not an affirmative defense, which is a very different procedural device:

> " '[T]he difference between a counterclaim and an affirmative defense is that a counterclaim seeks affirmative relief whereas an affirmative defense merely attempts to defeat a plaintiff's cause of actions. [Citation.] Presently, the procedural concept of setoff is subsumed under the term 'counterclaim' even where no affirmative relief is sought.' " *Id.* ¶ *37* (quoting *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, 461-62, 654 N.E.2d 1109 (1995).

An affirmative defense is designed to defeat a defendant's liability to a plaintiff, while a setoff is a counterclaim that is designed to mitigate the damages that a liable defendant owes to a plaintiff. Id. ¶ 37. A defense or claim not properly pleaded is deemed waived even though support for the defense or claim may appear in the evidence. *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 984, 684 N.E.2d 816 (1997). The effect of the third-party defendants's failure to assert a counterclaim bars them from using the outstanding advances as a setoff. *Nadhir*, 2011 IL App (1st) 110851, ¶ 40.

¶ 63 Carol cross-appeals, contending her award should be increased to reflect the full amount of the unjust enrichment realized by the third-party defendants. Carol claims she is entitled to

$953,512 in damages. She maintains that this amount represents the total amount by which the third-party defendants were unjustly enriched before the date of judgment. This amount is comprised of Michael's leasing commissions for each property plus a 10% share of profits and equity in each property for the years 2000 to 2007, which Carol argues Michael is entitled to because he elected to become a partner in the three developments under his agreement with DiMucci Realty.

¶ 64 A reviewing court will not disturb the damages assessed by a trial court unless its judgment was against the manifest weight of the evidence. *Med + Plus Neck and Back Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 856, 726 N.E.2d 687 (2000). A trial court's assessment of damages is against the manifest weight of the evidence when it ignored the evidence presented or used the wrong measure of damages. *Med + Plus*, 311 Ill. App. 3d at 857. We note that in implied-in-law contracts, such as unjust enrichment claims, the proper determination of damages is often difficult and depends on the peculiar facts of each case. *County of Champaign v. Hanks*, 41 Ill. App. 3d 679, 684, 353 N.E.2d 405 (1976).

¶ 65 Here, we cannot say that the trial court's damage assessment was against the manifest weight of the evidence. The record shows the court considered several different methods of calculating damages and chose the most "direct, transparent and fair method of placing a reasonable value" on Michael's efforts in securing the three developments for the third-party defendants and the benefits they received from those efforts. To this end, the court considered Michael's efforts in locating the three sites and finding tenants to occupy those sites. The court also considered the annual income of each development and awarded Carol the median annual

income from each property. Given the peculiar facts of this case, the court's damages assessment was not against the manifest weight of the evidence.

¶ 66 We are unpersuaded by Carol's argument that Michael was entitled to a 10% share of profits and equity in each property for the years 2000 to 2007 because he elected to become a partner in the developments. Although Michael expressed his intent to take a 10% partnership interest in the developments, he did not offer a cash contribution as required under the agreement. Also, Michael's right to elect a partnership interest automatically expired on termination of the agreement. This aside, even if Michael had properly elected to become a partner, termination of his association with DiMucci Realty would have caused his partnership interest to be liquidated under the agreement.

¶ 67 For the reasons stated we affirm the judgment of the trial court.

¶ 68 Affirmed.