2013 IL App (1st) 112987-U

FOURTH DIVISION
September 19, 2013

No. 1-11-2987

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

EDWIN W. EVASHENK, Plaintiff-Appellant, v. MILLER BREWING COMPANY, TEAM ENTERPRISES, INC., Defendants-Appellees, and HAYES BEER DISTRIBUTING COMPANY, COACH'S CORNER OF O.P., INC., and UNKNOWN MILLER LITE GIRLS, Defendants.	)	Appeal from the Circuit Court of Cook County. No. 07 L 13428 Honorable Irwin J. Solganick, Judge Presiding.

ORDER

PRESIDING JUSTICE HOWSE delivered the judgment of the court. Justices Palmer and Taylor concurred in the judgment.

¶ 1 *HELD:* The trial court's decision granting defendants'

motion for directed verdict on plaintiff's breach of contract claim is affirmed; the trial court's ruling on defendants' 2-615 motion, requiring plaintiff to elect a remedy, is reversed and remanded for further proceedings.

¶ 2 On September 16, 2011, after plaintiff-appellant Edwin Evashenk rested his case on a breach of contract claim, defendants-appellees moved for directed verdict. The trial court granted defendants' directed verdict finding that plaintiff had failed to prove the elements of a breach of contract. On appeal, plaintiff contends that: (1) the trial court erred in granting defendants' section 2-615 motion and requiring him to elect a remedy to pursue, and (2) the trial court erred in granting defendants' motion for directed verdict. For the following reasons, we affirm in part, reverse in part and remand for further proceedings consistent with this order.

¶ 3 BACKGROUND

¶ 4 Pretrial Proceedings

¶ 5 Plaintiff filed his initial complaint against defendants on November 30, 2007. His initial complaint contained the following claims: (1) breach of contract, (2) violation of the Deceptive Practices Act, (3) specific performance, (4) equitable estoppel, (5) common law fraud, (6) negligent misrepresentation, and (7) battery.

¶ 6 On July 2, 2009, plaintiff filed a motion for partial

summary judgment, and on July 6, 2006 defendants filed a motion for summary judgment. On August 17, 2009, the trial court ruled on both motions. The trial court granted defendants' motion for summary judgement as to plaintiff's battery, negligent misrepresentation and Deceptive Practices Act and denied defendants' motion for summary judgment as to plaintiff's breach of contract and common law fraud claims. Further, as a result of the trial court's ruling, plaintiff voluntarily dismissed Coach's Corner as a defendant and voluntarily dismissed his specific performance and equitable estoppel claims. Following the trial court's ruling, plaintiff's remaining claims were breach of contract and common law fraud.

¶ 7 On November 15, 2010, plaintiff amended his complaint to reflect the rulings the trial court had made on August 17, 2010. Accordingly, plaintiff's first amended complaint only contained two claims: breach of contract and common law fraud.

¶ 8 On December 22, 2010, both defendants filed motions to dismiss pursuant to section 2-615 of the Code of Civil Procedure. See 735 ILCS 5/2-615 (West 2008). After fully briefing the motion, the trial court denied defendants' motions to dismiss on May 6, 2011 "for the reasons stated in open court." There is nothing in the record to indicate the trial court's reasoning in denying defendants' motions on May 6, 2011.

¶ 9 In July 2011, both defendants filed motions for summary judgment; however, on August 15, 2011, in response to plaintiff's argument that the motions were untimely filed, the trial court struck both motions.

¶ 10 On September 13, 2011, the day before trial was set to begin, defendants' filed joint motions to dismiss pursuant to section 2-615, or in the alternative, to require plaintiff to elect a remedy. Specifically, defendants argued:

> " 'The Illinois courts recognize that a plaintiff may not recover on two inconsistent theories. *McCormick v. Kopmann*, 23 Ill. App. 2d 189, 161 N.E.2d 720 (3rd Dist., 1959); *Ransburg v. Haase*, 224 Ill. App. 3d 681, 586 N.E.2d 1295, 1300 (3rd Dist., 1992). The general rule that a defrauded person may elect to accept the situation created by the fraud and seek to recover his damages, or he may elect to repudiate the transaction and seek to be placed in the status quo. *Walsh v. Oberlin*, 2 Ill. App. 3d 987, 276 N.E.2d 728, 730 (3rd Dist. []1971). Since this case is set for trial, and is beyond the pleading stage, it is proper for the defendants to

> move for dismissal and require plaintiff to elect his remedy. At this conjuncture his choice is to either repudiate the reported contract or seek to be placed in the status quo or elect to accept the situation created by the alleged fraud and seek damages associated with the alleged fraud. The plaintiff choose to seek to persuade his fraud claim does not acknowledge and concede that there was no contract as his own complaint states that defendants made him an offer with absolutely no intention of awarding him the million dollar prize (he claims was shown on his ticket)."

¶ 11 Plaintiff filed a written response to defendants' motion on the same day. In his response, plaintiff asserted that *Walsh v. Oberlin* was not on point with his case because plaintiff is not seeking to rescind the contract but rather to enforce the contract. Plaintiff further stressed in his response that he is seeking the one million dollars plus prejudgement interest on his contract claim and attorney fees under his fraud claim.

¶ 12 On September 13, 2011, the trial court heard oral arguments on the motion to dismiss. Ultimately, the trial court granted

defendants' 2-615 motions to dismiss and stated:

> "THE COURT: Since there's no axiom in the law that you cannot sue for contract and tort on the same cause of action, the motion to dismiss is granted. Under 2-617, the plaintiff can elect which they wish to sue under."

Plaintiff subsequently elected to proceed on his breach of contract claim and dismissed his common law fraud claim. Trial commenced on September, 15, 2011.

¶ 13 Trial

¶ 14 At trial, plaintiff called Jessica Mossuto and Rebecca Bolton as adverse witnesses. Mossuto testified that she performed services for Team Enterprises between 2006 and 2009, and that her manager at that time was Rebecca Bolton. While performing services for Team Enterprises, Mossuto would conduct promotions. On June 17, 2007, Mossuto testified that she was promoting Miller Lite on behalf of Miller Brewing Company at Coach's Corner. Her role that day was to act as a spokes model for the Miller brand.

¶ 15 Prior to June 17, 2007, Mossuto had received training regarding the "See the Lite" promotion, which was the specific promotion she was involved in on June 17, 2007. Bolton was in

charge of this training and provided Mossuto with the clothing she would need to wear at the promotion, which was a blue tank top bearing the Miller Lite logo.

¶ 16 Upon arriving at Coach's Corner on June 17, 2007, Mossuto looked for Bolton for instructions. Bolton gave Mossuto a stack of stickers to hand out. Mossuto testified that the stickers had solid printing on the top and a decoded message on the bottom that could only be seen with a decoding device. Mossuto did not learn what the decoded message said until a recipient decoded the message with a decoder.

¶ 17 Upon being given a sticker and a decoder, both of which were entered into evidence, Mossuto testified that the decoded printing at the bottom of the sticker stated "win a million dollars." She testified that to the best of her knowledge this was the sticker given to plaintiff on June 17, 2007. Mossuto was then given another sticker that she was asked to decode. The second sticker, which she recognized to be one that she handed out on June 17, 2007, stated "Drink out of a plastic cup". When asked if the individual who received this sticker was given a plastic cup, Mossuto responded "they could have." Mossuto testified that the items that were given out that day included T-shirts, koozies, key chains and cups, all of which referenced Miller Lite or Miller Brewing Company. These items were provided

to Mossuto by Bolton.

¶ 18 Mossuto then identified plaintiff in the courtroom and stated that she remembered speaking with him on June 17, 2007; however, she did not recall the exact words she used when she spoke with him. She testified that she placed a sticker in plaintiff's hand and described the promotion plaintiff would be participating in by taking the sticker. Mossuto gave plaintiff a decoder as well. Although she doesn't recall specifically seeing plaintiff decode the sticker, she recalls him saying something to the effect of "If this thing says what I think it says, I'm going to fall out of my chair." Following this comment, Mossuto decoded the sticker herself. At that point, Mossuto indicated to him that she did not believe the sticker was his.

¶ 19 Mossuto then brought the sticker over to Bolton due to the confusion the sticker had raised with plaintiff and her belief that the sticker was from a different promotion. Mossuto testified that although she now knows that Bolton wrote the encoded message on the sticker, at the time she did not know.

¶ 20 On cross-examination, Mossuto testified that she was an independent contractor for Team Enterprises on the date of the promotional event, and that she has never been employed by Miller Brewing Company. During her training for the "See the Lite" promotion, she was never given any insight on how to interact

with customers, and she was never given any information suggesting that money was being given away. She testified that there was no contest for $1 million during the promotional event that she was promoting and she was not authorized to create such a contest.

¶ 21 Mossuto testified that at the promotional event, she would give out any promotional items if someone asked her for one. She testified that consumers participating in the promotional event were not required to fill out any paperwork. After Mossuto took the sticker from plaintiff, he never asked for it to be returned, he never asked for her manager, he never asked for a million dollars and he never asked for any information on how to claim his million-dollar prize. Mossuto described plaintiff's demeanor as joking and laughing when he handed her the sticker. Mossuto was at the event for another two hours after she took the sticker away from plaintiff and during those hours plaintiff never tried to speak with her or get her attention.

¶ 22 Mossuto testified that when holding the decoder up to the sticker, the words "this summer I want to" did not disappear and that with the decoder one could see that the sticker read "This summer, I want to win a million dollars."

¶ 23 Plaintiff next called Rebecca Bolton as an adverse witness. Bolton testified that she worked for Team Enterprises from 2005

until 2011. In 2007 her position at Team Enterprises was portfolio brand ambassador. In that position, her responsibilities were to run the promotions, drive sales and engage with consumers, specifically for Miller Brewing brands. She was also responsible for hiring subcontractors to work as promotional specialists. Bolton testified that she received training for the "See the Lite" promotional event in 2007 from Team Enterprises. The guidelines and rules for these promotional events were provided to her by Miller and she reviewed those guidelines. Per the manual, the stickers that were used in the June 17, 2007 promotion were customizable to enable the creation of additional messages with local relevance. She was never informed by anyone at Team Enterprises that she was not to utilize the stickers to award prizes.

¶ 24 On June 17, 2007, Bolton was present at the event at Coach's Corner. She was in charge of the "Miller Girls" that day. The "Miller Girls" were to go out at the event and interact with the public in order to drive the sales of Miller products. Specifically, they were to give stickers to the public as an icebreaker. Bolton testified that the promotional specialists under her control have discretion in their interactions with clients.

¶ 25 On cross-examination, Bolton testified that there were no

cash prizes being given out during the 2007 promotional event and she had no authority to award any cash prizes or create any contests. Bolton testified that she never instructed any of the promotional specialists to tell the patrons to ignore any of the language printed on the stickers they were handing out.

¶ 26 Bolton testified that she created the encoded message on the sticker that was given to plaintiff, which read in total: "This summer, I want to win a million dollars." Bolton stated that no one at Miller Brewing Company told her what to print in the encoded section of the sticker. At the promotional event, the promotional specialists were allowed to give away T-shirts, bottle openers, beer charms and plastic cups at their discretion.

¶ 27 Bolton spoke with plaintiff after receiving the sticker from Mossuto, and asked him what he thought the sticker was all about. Plaintiff said he "[thought] he won a million dollars"; to which she replied, "no, it says, this summer I want to win a million dollars." Bolton testified that she remained at the promotional event for approximately two hours after the exchange with plaintiff.

¶ 28 Next, plaintiff called Beverly Skarupinski (Beverly) to testify. Beverly testified that she was at Coach's Corner with plaintiff and a group of people on June 17, 2007. Three of the Miller girls came over to their group and gave them stickers and

decoders. Beverly testified that she was present when plaintiff decoded his sticker and that after he decoded it he asked one of the Miller girls if he was seeing the code right. At that point, the Miller girl took the sticker away from him stating he was not supposed to have the sticker and that it was the wrong thing. After that, she saw the Miller girls walking around, but none of them came back to her group. She does not recall plaintiff saying anything else to the Miller girls after one of them took his sticker.

¶ 29 On cross-examination, Beverly testified that she had no expectation of winning a million dollars when she went to the June 17, 2007 event, and she never saw any signs advertising money awards, only a sign about the car cruise night, which indicated that the Miller girls would be there.

¶ 30 Plaintiff next called William Skarupinski (William), Beverly's husband. William testified that he attended a car cruise night at Coach's Corner with a group of people including plaintiff on June 17, 2007. At the event, he was sitting next to plaintiff. William had known plaintiff for approximately 30 years and considers him a friend. Approximately an hour after his group arrived at the event, they were approached by the Miller girls, whom he didn't know would be there. When they approached, the Miller girls explained that there was going to be

a contest, that they would be handing out items and that the patrons would be given a card and a decoder in order to determine what item they would receive. When William read his sticker, he won a koozie. Plaintiff decoded his sticker at roughly the same time, and said to William "Bill, I don't believe what this says. *** It says you won a million dollars." William then took a look at the decoded message and told plaintiff he was right. Plaintiff then told William that he was going to call one of the girls back and ask about it, which he did. The girl took the sticker out of his hand, said "[he] wasn't supposed to get that," and walked away. The girl came back later and William heard plaintiff asking questions about the prize, to which the girl responded "[he] did not have anything coming."

¶ 31 On cross-examination, William agreed that the Miller girl did not say that there was a contest for a million dollars. He testified that at one point in the night he did recall walking around with plaintiff to look for the Miller girl that took the sticker. William also recalled plaintiff asking someone about his sticker and where his sticker went, but did not hear plaintiff ask for the Miller girl's name or employment information.

¶ 32 Plaintiff next called James Kelly to testify. Kelly testified that he attended the car show with a group that

included plaintiff. He was unaware of any contest or promotion going on at the car show prior to their arrival, but when they arrived, the Miller girls were talking about some kind of door prizes that would be available. Because of the girls' attire, Kelly believed that they worked for Miller Brewing Company. From his recollection, one of the girls placed a sticker on his shirt and later came back with a decoder and informed him that he had won a bottle-cap remover.

¶ 33 Kelly saw plaintiff receive a sticker; however he never saw plaintiff use the decoder to read his sticker and never actually saw plaintiff's sticker. He did hear plaintiff say that he won a million dollars. Kelly stated that there was a lot of commotion within the group after that. He recalled hearing one of the girls tell plaintiff that "the sticker was not for this group." Plaintiff's sticker was taken and the girls walked off with it. Kelly did not recall whether plaintiff had any further conversation with any of the Miller girls for the remainder of the day.

¶ 34 On cross-examination, Kelly stated that he saw multiple Miller signs in the area, although he did not read them. There was no amplified promotion of a contest for a million dollars, although Kelly did understand that door prizes would be given out. He testified that he had no reasonable expectation of

winning any money that day.

¶ 35 Plaintiff then made an offer of proof outside the presence of the jury of the testimony of Dianne Pejkovich, who also attended the car show. Pejkovich testified that during the car show, the Miller girls handed out stickers for a contest. She was nearby when plaintiff's sticker was decoded, and she heard him say "I just won a million dollars." Plaintiff's statement got everyone's attention, and everyone in their group stood up to see the sticker. After the Miller girl took plaintiff's sticker, she never saw it again. She eventually saw plaintiff talking with one of the Miller girls, saying "what do you mean I didn't win a million dollars?" Pejkovich's ticket did not win her a prize, although she did not remember what it said. Following Pejkovich's testimony, the trial court stood on its prior ruling barring her testimony.

¶ 36 Plaintiff then called Julian Green, formerly employed by Miller Brewing Company as the senior manager of communications. He recalled that Team Enterprises was a contractor that helped Miller Brewing Company do events and promotions. At some point, Green became aware of the incident that gave rise to the lawsuit, which he described as a promotional event called "See the Lite" that took place at Coach's Corner.

¶ 37 Plaintiff then testified on his own behalf. He testified

that he attended a car show at Coach's Corner on June 17, 2007 with a group of friends. The Miller girls were there, and about an hour into the event, one of them approached him and asked him if he wanted to win a prize, to which he responded yes. She handed plaintiff a sticker and told him "You get what it says. You win what it says." He was also given a decoder to read the sticker.

¶ 38 Plaintiff testified that it was his understanding that he would win whatever prize was listed in the encoded part of the sticker. Plaintiff accepted the sticker because he wanted to win a prize. Upon decoding the sticker, he became very excited because he thought he had won a million dollars. He showed the sticker to William Skarupinski, who was sitting next to him. When the Miller girl came back, he told her his ticket said that he won a million dollars. Plaintiff testified that the girl then "ripped" the ticket out of his hand, said that it was a mistake and that it was for a different promotion. Plaintiff did not see the sticker again until his deposition.

¶ 39 Prior to decoding his sticker, plaintiff testified that he saw other prizes being given away, which included T-shirts, bottle openers and koozies. Plaintiff thought the girls handing out the stickers were employed by Miller because of their uniform, the fact that they were handing out Miller products and

because he had seen a sign indicating that the Miller girls would be at the event. Plaintiff called Miller Brewing Company the following Monday morning regarding the sticker. Plaintiff testified that to date, he has not been paid one million dollars even though he agreed to accept the sticker in order to win whatever prize was stated on the sticker.

¶ 40 On cross examination, plaintiff testified that he did not see any signs at Coach's Corner that advertised a million dollar giveaway on the day of the car show. He further testified that he had no expectation of winning any money prior to looking at the promotional sticker; he did not pay any money for the sticker; he did not fill out any type of sweepstakes or contest entry form; he did not give the promotional specialist his name prior to receiving the sticker; he did not know any of the rules and guidelines governing the promotion; he did not know who Mossuto and Bolton were prior to that day; he did not know that Team Enterprises existed prior to that day and he did not learn of their existence for several months following the promotional event. Plaintiff testified that the decoder he received was imprinted with the words "use this decoder to reveal hidden messages for Miller Lite." He acknowledged that the words "prize" and "million dollars" did not appear on the decoder. When asked to hold the decoder over the sticker, plaintiff

testified that the words "this summer I want to" were clearly visible through the decoder without any obstruction, and further stated that the promotional specialist did not tell him to ignore those words. Plaintiff further testified that he thought the word "you" was printed in the encoded section of the sticker at the time he received the sticker. Plaintiff did not speak to anyone other than Mossuto about his sticker or prize while at the car show, including Bolton, who he assumed to be the "boss" over the girls. Plaintiff never asked for his sticker back and never made any phone calls that day to try and get his sticker returned.

¶ 41 Plaintiff further testified that on the day of the promotion, the Miller girl asked him if he had a car, and when he said yes, she said, "well, here is a ticket. You get what the ticket says. You win what the ticket says." The following questions were then asked of plaintiff:

> Q. So it is true they never said to you, initially, 'Do you want to win a prize?'
>
> A. They did say do you want - - well, that meant do you want to win a prize.
>
> Q. That was your understanding of it, correct, sir?
>
> A. Well, I don't know why they would be

> handing the tickets out if they, you know, weren't going to give you a prize."

¶ 42 After plaintiff rested, defendants moved for directed verdict. The trial court granted defendants' motion for directed verdict finding that plaintiff had not proven the essential elements of a breach of contract claim. Specifically, the court stated that plaintiff's proof was insufficient to show that a contract was formed as the elements of offer, acceptance, and consideration were not established; there was a total lack of evidence of a meeting of the minds; there was no evidence with regards to specificity of terms or conditions of a contract or oral agreement between the parties; and a million dollar contest was never advertised. In coming to its conclusion, the trial court made the following remarks on the record:

> "I had some thoughts that--I was surprised the person in command decided to proceed on the contract as opposed to the fraud count. As in the pretrial discussions, I thought the fraud was a better count for plaintiff to proceed on than the contract action when they had to make the election. If the issue at the directed verdict stage was only apparent agency, the plaintiff has met their prima

facie case on apparent agency. Probably its much stronger against Miller than it is against Team Enterprises, but there is sufficient evidence with regard to apparent agency. *** I have my thoughts about how this whole thing was handled at the time that it was handled. If Ms. Bolton was my employee for the way that she handled this thing, I would have fired her. If I was Miller Brewing Company, I never would've hired her because she doesn't know how to handle a situation that could cause liability to her employer in dealing with the public. But the issue here is whether or not there is a breach of contract and whether plaintiff has met its burden at the close of the plaintiff's case and the plaintiff has not. Plaintiff's proof is insufficient to show that there was a contract formed. With regard to offer, acceptance, consideration, there is no indication. *** The defendant's motion for a directed verdict will be granted."

¶ 43 Following the trial court's ruling on defendants' motion for directed verdict, which effectively dismissed plaintiff's case in its entirety, plaintiff appealed claiming that (1) the trial court erred in applying the election of remedies doctrine to his case, and (2) the trial court erred in granting defendants' motion for directed verdict on his breach of contract claim.

¶ 44 ANALYSIS

¶ 45 I. Election of Remedies

¶ 46 Plaintiff claims that the trial court erred when it applied the election of remedies doctrine to his case, requiring him to elect to dismiss his claim of common law fraud prior to trial. Specifically, plaintiff argues that the election of remedies doctrine does not apply to his case because the remedies he has sought under each of his claims are not inconsistent. When reviewing the trial court's ruling on a 2-615 motion to dismiss, our review is *de novo*. *Lorman v. Freeman*, 229 Ill. 2d 104, 109 (2008). For the reasons that follow, we agree that the election of remedies doctrine does not apply to this case and find that the trial court erred in having plaintiff elect to dismiss one of his claims prior to trial.[1]

[1]The trial court also indicates that its ruling on the election of remedies doctrine is pursuant to section 2-617 of the Code of Civil Procedure. Section 2-617 states: "Where relief is sought and the court determines, on motion directed to the pleadings, or on motion for summary judgment or upon trial, that

¶ 47 The election of remedies doctrine applies:

> "only where a party has elected inconsistent remedies for the same injury or cause of action. The prosecution of one remedial right to judgment or decree constitutes an election barring subsequent prosecution of inconsistent remedial rights. For instance, a remedy based on the affirmance of a contract (*e.g.*, damages) is generally inconsistent with one based on the disaffirmance of the contract (*e.g.*, rescission). Thus, the election of either remedy is an abandonment of the other." (Internal citations omitted.) *Hanson-Suminski v. Rohrman Midwest Motors, Inc.*, 386 Ill. App. 3d 585, 596-97 (2008); *Lempa v. Finkel*,

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the plaintiff has pleaded or established facts which entitled the plaintiff to relief but that the plaintiff has sought the wrong remedy, the court shall permit the pleadings to be amended, on just and reasonable terms, and the court shall grant the relief to which the plaintiff is entitled on the amended pleadings or upon the evidence." 735 ILCS 5/2-617 (West 2008). The trial court's reliance on this section appears to be a misapplication as the rule deals with the amendment of pleadings when the wrong remedy is sought, rather than the dismissal of alternative causes of action.

278 Ill. App. 3d 417, 423-24 (1996).

As further explained in the Restatement (Second) of Contracts:

> "If a party has more than one remedy under the rules stated in this Chapter, his manifestation of a choice of one of them by bringing suit or otherwise is not a bar to another remedy unless the remedies are inconsistent and the other party materially changes his position in reliance on the manifestation." Restatement (Second) of Contracts § 378 (1981); *Kel-Keef Enterprises, Inc. v. Quality Components Corp.*, 316 Ill. App. 3d 998, 1009 (2000).

¶ 48 Plaintiff's amended complaint contained two claims: breach of contract and common law fraud. He seeks monetary damages under each claim and does not seek any equitable remedies, such as rescission. In order to state a cause of action for fraud, a plaintiff must establish: (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) intent to induce the other party to act; (4) action by the other party in justifiable reliance on the truth of the statement; and (5) damage to the other party resulting from such reliance. *Adler v. William Blair & Co.*, 271 Ill. App. 3d 117, 125 (1995).

In order to state a cause of action for breach of contract, a plaintiff must show: (1) a contract exists, (2) plaintiff performed its obligations under the contract, (3) defendant breached the contract, and (4) plaintiff was injured as a result. *Talbert v. Home Savings of America, F.A.*, 265 Ill. App. 3d 376, 379-80 (1994). To allege the existence of a valid contract, a plaintiff must plead facts indicating there was an offer, an acceptance, and consideration. *Id.* at 380.

¶ 49 Notably, the elements of these two claims are different, and proving the elements of one claim will almost certainly preclude plaintiff from proving the other. However, sections 2-604 and 2-613(b) of the Code of Civil Procedure permit alternative pleading, even where the counts are contradictory or inconsistent. See 735 ILCS 5/2-604 & 5/2-613(b) (West 2008); *Wegman v. Pratt*, 219 Ill. App. 3d 883, 895 (1991). Section 5/2-604 states, in relevant part:

> "Every count in every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself or herself entitled except that in actions for injury to the person, no ad damnum may be pleaded except to the minimum extent necessary to comply with the circuit

> rules of assignment where the claim is filed. Relief may be requested in the alternative." 735 ILCS 5/2-604 (West 2008).

Section 5/2-613(b) states:

> "When a party is in doubt as to which of two or more statements of fact is true, he or she may, regardless of consistency, state them in the alternative or hypothetically in the same or different counts or defenses. A bad alternative does not affect a good one." 735 ILCS 5/2-613(b) (West 2008).

Thus, a plaintiff may seek alternative relief on contradictory causes of action. *Concord Industries, Inc. v. Harvel Industries Corp.*, 122 Ill. App. 3d 845, 849 (1984). "[T]he fact that the plaintiff could only recover for one cause of action does not require him to make an election, nor does it justify the dismissal of the suit by the trial court." *Downs v. Exchange National Bank*, 24 Ill. App. 2d 24, 30 (1959). A party is allowed to "plead inconsistent theories of recovery or defense, and the proof at trial will determine which theory, if any, entitles him to a favorable verdict." *Daehler v. Oggpian*, 72 Ill. App. 3d 360, 370 (1979); see also *Urnest v. Sabre Metal Products, Inc.*, 22 Ill. App. 2d 172 (1959) (holding that the plaintiff was

entitled to proceed to trial on claims of breach of contract and fraud and deceit because it was up to the jury to determine upon which set of facts, if any, the plaintiff was to recover).

¶ 50 Here, while plaintiff certainly pled inconsistent *theories* of liability, which is encouraged in Illinois[2], he did not seek inconsistent *remedies* such that the election of remedies doctrine was implicated.[3] First, there was no prior proceeding during which plaintiff recovered any remedy, which is typically what occurs where the election of remedies doctrine has been held to apply. *Ransburg v. Haase*, 224 Ill. App. 3d 681, 689 (1992) (the "acceptance of the benefit of one theory will bar a subsequently filed complaint alleging an inconsistent theory"). Second, plaintiff did not claim inconsistent remedies such as breach of contract and rescission of contract. Rather, plaintiff claimed money damages--the million dollars plus costs associated with bringing the lawsuit--under different theories of liability,

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[2] "Sound policy weighs in favor of alternative pleading, so that controversies may be settled and complete justice accomplished in a single action." *McCormick v. Kopmann*, 23 Ill. App. 2d 189, 201 (1959).

[3] While defendant argues that plaintiff failed to label the theories of liability as "alternative" theories, such a strict labeling of the claims as alternative is not necessary. See *Tuttle v. Fruehauf Division of Fruehauf Corp.*, 122 Ill. App. 3d 835, 842 (1984)("we do not believe there is some magic in labeling inconsistent pleadings 'alternative' or 'hypothetical' which invokes the principle underlying the alternative pleading rule").

breach of contract and fraud. As such, if the jury found in favor of plaintiff under either of the conflicting theories, it would then be asked to determine what money damages plaintiff is entitled to receive.

¶ 51 Furthermore, Illinois courts have made it clear that the election of remedies doctrine "should be confined to cases where (1) double compensation of the plaintiff is threatened or (2) the defendant has actually been misled by the plaintiff's conduct or (3) res ajudicata [sic] can be applied." *Kel-Keef Enterprises, Inc.*, 316 Ill. App. 3d at 1008. Here, there is no threat of double compensation as the theories of liability, each containing different elements to be proven, would be tried together before a jury; there is no indication in the record that defendant was in any way misled by plaintiff's conduct (likely because throughout the litigation, it was clear that plaintiff was only seeking money damages); and there was no threat of *res judicata* as both claims were to be tried together and both claims required plaintiff to prove different elements based upon different facts. Thus, the election of remedies doctrine did not apply in the instant case.

¶ 52 Finding that the trial court erred in applying the election of remedies doctrine in this case, we now must determine whether that error was harmless. Harmless error occurs when the error

did not prevent the plaintiff from receiving a fair trial and the error did not affect the outcome of the case. See *Lawson v. G.D. Searle & Co.*, 64 Ill. 2d 543, 559 (1976) (plaintiff is not entitled to absolutely error-free trial). "Where it appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment or decree will not be disturbed." (Internal quotations omitted.) *Simmons v. Garces*, 198 Ill. 2d 541, 566-67 (2002).

¶ 53 While we have serious concerns about the viability of plaintiff's common law fraud claim[4], we cannot point to anything in the record that allows us to affirm the trial court's dismissal of plaintiff's fraud claim.[5] Based on the evidence that was presented on the breach of contract claim, it appears highly unlikely that plaintiff will be able to prove common law fraud. However, from the record, we cannot say that plaintiff would not have offered any additional evidence on his fraud

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[4] Further, while this court has serious concerns about the sufficiency in plaintiff's pleading regarding common law fraud, defendants previously challenged this issue and the trial court, for reasons that are not contained within the record, found the fraud claims to be sufficiently plead. That finding was never appealed and, therefore, that issue is not before us.

[5] An appellate court can affirm the trial court on any basis that appears in the record, regardless of whether the trial court relied upon such ground or whether its rationale was correct. *Bowers v. State Farm Mutual Automobile Insurance Co.*, 403 Ill. App. 3d 173, 176 (2010); *AIDA v. Time Warner Entertainment Co., L.P.*, 332 Ill. App. 3d 154, 158 (2002).

claim. In fact, during a side bar that was taken while plaintiff was testifying, the attorneys refer to a second deposition of plaintiff that was taken solely for the limited purpose of discovering facts related to his fraud claim. The trial court made it clear that any of the testimony elicited during this second deposition could only to be used for impeachment purposes, if necessary, and not for substantive purposes.

¶ 54 Further, the record actually suggests that plaintiff may have had a better chance of success on his fraud claim than his breach of contract claim. Specifically, in granting a directed verdict on the breach of contract claim, the trial court stated:

> "I had some thoughts that--I was surprised the person in command decided to proceed on the contract as opposed to the fraud count. As in the pretrial discussions, I thought the fraud was a better count for plaintiff to proceed on than the contract action when they had to make the election. *** I have my thoughts about how this whole thing was handled at the time that it was handled. If Ms. Bolton was my employee for the way that she handled this thing, I would have fired her. If I was Miller Brewing Company, I

> never would've hired her because she doesn't know how to handle a situation that could cause liability to her employer in dealing with the public."

As such, despite this court's reservations about the viability of plaintiff's common law fraud claim, based on the record before us, we cannot find that the trial court's error was harmless especially in light of the fact that we have no way to know what proof plaintiff might have offered at trial with respect to his fraud claim and the fact there is some indication that plaintiff had a better chance of succeeding at trial on the common law fraud claim. Because we cannot find that the trial court's error in applying the election of remedies doctrine to the case at bar was harmless, we reverse the trial court's dismissal of plaintiff's common law fraud claim and remand the claim for further proceedings consistent with this order.

¶ 55 II. Directed Verdict

¶ 56 Plaintiff claims that the trial court also erred in granting defendants' motion for a directed verdict. The grant or denial of a directed verdict is reviewed *de novo*. *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 28 (2008). For the reasons that follow, we affirm the trial court's grant of defendants' motion for directed verdict.

¶ 57 A motion for directed verdict should be granted when " 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on the evidence could ever stand.' " *Susnis ex rel. Susnis v. Radfar*, 317 Ill. App. 3d 817, 826 (2000) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). " 'A directed verdict is appropriate where the plaintiff has failed to establish a *prima facie* case.' " *Jones*, 381 Ill. App. 3d at 28 (quoting *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 460 (2004)). A directed verdict is improperly granted where " 'there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome.' " *Susnis*, 317 Ill. App. 3d at 826 (quoting *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992)).

¶ 58 As stated above, to state a cause of action for breach of contract, a plaintiff must allege that a contract exists, plaintiff performed its obligations under the contract, defendant breached the contract, and plaintiff was injured as a result. *Talbert*, 265 Ill. App. 3d at 379-80. To prove the existence of a valid contract, a plaintiff must prove "the elements of offer, a

strictly conforming acceptance of the offer, and supporting consideration." *Martin v. Government Employees Insurance Co.*, 206 Ill. App. 3d 1031, 1035 (1990). "[I]t is well established that in order for an oral contract to be binding and enforcible [sic], its terms must be definite and certain." *Panko v. Advanced Appliance Service*, 55 Ill. App. 3d 301, 304 (1977). Where it appears that the language used or the terms proposed are understood differently by the parties, there is no meeting of the minds and hence no contract exists between them. *Id.*

¶ 59 Here, plaintiff testified that the promotional specialist offered him a sticker, stating that he would win whatever was listed on the sticker, and as a result he took the sticker. The sticker was imprinted with the words "this summer I want to" above the encoded box. Inside the encoded box were the words "win a million dollars." However, plaintiff's own testimony established that he never read the entire sticker, even though it was visible through the decoder. His belief that he had won a million dollars was based largely on the fact that he misread the sticker.

¶ 60 Further, plaintiff never provided any consideration in receipt of the sticker. He merely accepted the sticker in exchange for nothing. Nothing cannot legally be considered consideration.

¶ 61 It is also clear from the record that there was never a meeting of the minds between the parties. Plaintiff claims that he thought he won a million dollars, yet defendants did not believe they were giving out cash prizes, were not authorized to give out cash prizes and the promotion they were involved in was not advertised as one in which cash prizes would be given out. As such, it is clear that there was never a meeting of the minds between the parties.

¶ 62 We conclude that the evidence presented at trial failed to establish offer, acceptance, consideration and meeting of the minds and, therefore, find that the trial court properly granted defendants' motion for directed verdict.

¶ 63 CONCLUSION

¶ 64 Because we find that plaintiff failed to present sufficient evidence at trial on his breach of contract claim, we affirm the trial court's decision to grant defendants' motion for directed verdict on that claim. However, because we find that the trial court erred in applying the election of remedies doctrine in this case and cannot find that this error was harmless, we reverse and remand for further proceedings with respect to plaintiff's common law fraud claim.

¶ 65 Affirmed in part; reversed in part and remanded for further proceedings consistent with this order.