FIRST DIVISION
November 3, 2014

No. 1-13-3871
2014 IL App (1st) 133871-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MASS REALTY LLC, an Illinois limited liability company,	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County.
v.	)	
FIVE MILE CAPITAL SPE A LLC, a Delaware limited liability company, and FIVE MILE CAPITAL CAHNERS SPE LLC, a Delaware limited liability company,	)	No. 13 L 3785
Defendants-Appellees.	)	Honorable John C. Griffin, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Dismissal was improper where plaintiff's claims were not barred by *res judicata* and complaint sufficiently stated claims for breach of contract and unjust enrichment; reversed and remanded.

¶ 2 Plaintiff, Mass Realty LLC (Mass Realty), appeals from an order of the circuit court dismissing with prejudice its amended verified complaint that sought, in part, payment of

$376,550 from defendants, Five Mile Capital SPE A LLC (Five Mile) and Five Mile Capital Cahners SPE LLC (Five Mile Cahners), as commission for procuring a tenant for a commercial building. Five Mile became the owner of the building following a foreclosure proceeding and Five Mile Cahners subsequently became the owner pursuant to a quitclaim deed. On appeal, Mass Realty contends that the circuit court erroneously found that *res judicata* barred its claims and asserts that its amended verified complaint stated valid causes of action for breach of contract and unjust enrichment.

¶ 3 This appeal concerns two matters: a 2010 foreclosure action initiated by Five Mile, to which Mass Realty was joined as a defendant, and a 2013 amended verified complaint (the 2013 complaint) filed by Mass Realty that named Five Mile and Five Mile Cahners as defendants and alleged breach of contract, unjust enrichment, and fraudulent transfer.[1]

¶ 4 As to the first matter, in 2010, Five Mile filed an amended verified complaint to foreclose on a mortgage for a commercial property in Des Plaines and for other relief. In addition to the foreclosure count, Five Mile sued on the note and guaranty, and alleged theories of conversion, breach of contract, tortious interference with existing contract, and fraudulent transfer. Only the foreclosure count concerned Mass Realty, which was joined as a defendant because it had claimed an interest in the property pursuant to a broker's lien.

¶ 5 Subsequently, Mass Realty filed a counterclaim, seeking to foreclose on its broker's lien and other relief. In the counterclaim, Mass Realty averred that pursuant to a May 2008 registration letter, the property's owner acknowledged an agency relationship between Mass Realty and a prospective tenant. The letter also stated that the owner agreed to pay Mass Realty a specified commission if the tenant leased space. According to Mass Realty, the tenant entered

[1] The fraudulent transfer claim is mentioned only once in passing in Mass Realty's brief and so we do not address it. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (points not argued are waived).

into a lease on or about May 29, 2009, and took possession of the leased space on September 1, 2009. Mass Realty further stated that according to the terms of the registration letter, Mass Realty procured the tenant's lease to the owner's benefit. Mass Realty also averred that all of its work had been accepted, benefited the owner and Five Mile, and was a valuable improvement to the property. Mass Realty stated that as of September 23, 2009, it was owed a commission of $376,550 and that "[o]n information and belief, the Owner and/or Five Mile *** are in possession or control of certain funds escrowed for the purpose of paying the Commission ***." Mass Realty averred that since it performed the work, and despite repeated requests for payment, the owner had "failed, refused[,] and/or neglected" to pay the amount due and Mass Realty had also not received any payments from the escrow funds. Mass Realty stated that on September 23, 2009, it recorded a claim for a broker's lien against the property and was entitled to a lien for $376,550. The claim for a lien, which was attached to the counterclaim, stated that pursuant to paragraph 26(k) of the lease, the owner acknowledged that Mass Realty was the sole procuring broker representing the tenant in connection with the lease and agreed to pay Mass Realty any commission that was due. Mass Realty asserted that its interest in the property was superior to all claims recorded after September 23, 2009.

¶ 6 As relief, Mass Realty sought in part: (1) an accounting to determine the amount due to Mass Realty and that some of the defendants be directed to pay Mass Realty the amount due with interest and costs; (2) an accounting of escrow funds to determine Mass Realty's rights in and to the escrow funds; (3) that Mass Realty be decreed to have a valid lien on the property and on sums due to the owner for the amount found due to Mass Realty; (4) in default of payment of the amount due, a sale of the property; and (5) a deficiency decree against any liable defendants in case the proceeds of the sale were insufficient to satisfy the amount due to Mass Realty.

¶ 7 In its answer to the counterclaim, Five Mile admitted that Mass Realty sought to foreclose on a broker's lien. Five Mile also denied that it possessed any escrowed funds, but stated that any escrowed funds were Five Mile's collateral and the subject of its foreclosure action and perfected first priority security interest. Five Mile further stated that any claimed lien was subject to Five Mile's perfected first priority security interest.

¶ 8 On September 25, 2012, Five Mile filed a motion for entry of a consent foreclosure judgment, asserting that "[n]o good cause exists to Five Mile's motion [*sic*]" and it was anticipated that the brokers did not wish to redeem the property. Five Mile also contended that because its mortgage was recorded first, its interest had priority over the brokers' liens.[2] The corresponding notice of motion indicated that a copy of the motion was sent to Mass Realty's attorney of record. The record does not contain a written response to the motion from Mass Realty.

¶ 9 On October 2, 2012, the circuit court entered a consent foreclosure judgment order in favor of Five Mile pursuant to section 15-1402 of the Illinois Mortgage Foreclosure Law (Mortgage Foreclosure Law) (735 ILCS 5/15-1402 (West 2012)). The order stated that Five Mile and certain defendants—not including Mass Realty—had entered into a confidential settlement agreement and stipulation and agreed to the entry of a consent foreclosure. The order also found that because Five Mile's mortgage was recorded first, Mass Realty's broker's lien was extinguished because it was subordinate and inferior to Five Mile's interest. Additionally, the order stated that Five Mile had "absolute title" in the property "clear of all claims, liens *** and interests of the mortgagor, all person[s] made parties to this foreclosure action whose interests are subordinate to Five Mile's interests, and all nonrecord claimants" who had been given notice.

[2] Another broker, Jones Lang LaSalle Americas, had also been joined as a defendant and subsequently filed a counterclaim to foreclose on a broker's lien that had been recorded on October 1, 2009.

Pursuant to the order, Five Mile waived its rights to a deficiency judgment and the sheriff was ordered to execute a deed to the property in favor of Five Mile. The order included a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason to delay enforcement of the judgment.

¶ 10 The second matter at issue began in 2013, when Mass Realty filed an amended verified complaint against Five Mile and Five Mile Cahners, seeking to be paid its broker's commission and alleging breach of contract, unjust enrichment, and fraudulent transfer. The factual allegations were as follows. Mass Realty alleged that in October 2012, Five Mile became the owner of the property that had been the subject of the 2010 foreclosure action, and Five Mile Cahners subsequently became the owner pursuant to a quitclaim deed. Additionally, Mass Realty stated that in a May 2008 registration letter, the prior owner acknowledged an agency relationship between Mass Realty and a prospective tenant, and agreed to pay Mass Realty a specified commission if the tenant leased space. Mass Realty averred that the tenant subsequently entered into a lease with the prior owner and took possession of the space on September 1, 2009. According to Mass Realty, the lease was for five years with a five-year renewal option, and the net base rent due varied from $98,028.52 per month to $104,931.93 per month. Mass Realty stated that the commission to be paid for its work procuring the tenant was $376,550, and that pursuant to paragraph 26(k) of the lease, the prior owner had agreed to pay any commission due to Mass Realty. However, according to Mass Realty, the prior owner did not pay the commission.

¶ 11 The lease, which was dated June 1, 2009, was attached to the complaint. Paragraph 26(k) of the lease stated:

> "The Landlord and Tenant represent that they have dealt directly and only with Mass Realty LLC as Tenant's broker, and Jones Lang LaSalle, as Landlord's broker, in connection with this Lease, and that insofar as the Parties know, no other broker negotiated this Lease or is entitled to any commission in connection therewith. Landlord agrees to pay any commission due to Jones Lang LaSalle and Mass Realty LLC. The parties agree to indemnify and hold each other harmless from all claims of any other broker or brokers in connection with this Lease."

¶ 12 Mass Realty further alleged that at the tenant's request, the prior owner, tenant, and Five Mile had entered into an attornment agreement on June 1, 2009, in which Five Mile agreed that in the event that Five Mile or any other entity became the owner of the property as a result of a foreclosure sale or a conveyance in lieu of foreclosure, Five Mile or the applicable entity would be bound by the lease and attorn to the tenant. Mass Realty stated that Five Mile subsequently became the owner of the property pursuant to a foreclosure, and thus became obligated to perform all of the landlord's obligations under the lease.

¶ 13 The attornment agreement was attached as an exhibit to the lease. According to its terms, the tenant had required the attornment agreement as a condition to the lease. Additionally, the attornment agreement stated that if Five Mile completed a foreclosure under the mortgage or received a conveyance of the property in lieu of foreclosure, the tenant would attorn to and recognize Five Mile as the substitute lessor, and the tenant's possession would not be disturbed as long as the tenant complied with the lease. The attornment agreement further stated that if Five Mile or any other entity became the owner as a result of a foreclosure sale or a conveyance in lieu of foreclosure, Five Mile or the applicable entity "shall be bound by the Lease and shall attorn to Tenant." Further, the attornment agreement stated that it "shall be binding upon and

shall inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors[,] and assigns."

¶ 14 Following those factual allegations, Mass Realty set out its breach of contract claim. Mass Realty stated that the lease expressly required the prior owner to pay any commission due to Mass Realty on account of the lease, and that Mass Realty performed all the conditions necessary to be paid its commission. Mass Realty further alleged that the lease was a valid, binding contract between the prior owner and tenant. Additionally, Mass Realty stated that the attornment agreement was a valid, binding contract between the prior owner, the tenant, and Five Mile, and pursuant to the attornment agreement, Five Mile became obligated to perform all of the landlord's obligations under the lease, including paying Mass Realty its commission. According to Mass Realty, it was an express third-party beneficiary of the lease, and as a result, it was entitled to enforce the terms of the lease. Mass Realty averred that on March 21, 2013, it made a demand on Five Mile to pay the commission, as required by the lease and attornment agreement, but Five Mile refused. Mass Realty contended that by failing to pay the commission, Five Mile breached its obligations under the lease and attornment agreement. Mass Realty stated that as a result of the breach, it was damaged in the amount of $376,550, plus interest and costs.

¶ 15 In the alternative, Mass Realty claimed unjust enrichment. Mass Realty alleged that Five Mile had received a benefit from Mass Realty's services in the form of a rent-paying tenant. Mass Realty further asserted that it believed that the tenant satisfied its rent payment obligations by paying Five Mile after the foreclosure. According to Mass Realty, Five Mile was unjustly enriched by failing and refusing to repay the commission while retaining the benefits of Mass Realty's commercial leasing efforts. Mass Realty also stated that Five Mile's collection of rental payments without paying the commission to Mass Realty was an unjust enrichment at Mass

Realty's expense. Mass Realty contended that as a result of the unjust enrichment, Mass Realty was damaged in the amount of $376,550.

¶ 16 Mass Realty made similar, alternative breach of contract and unjust enrichment claims against Five Mile Cahners.

¶ 17 Five Mile and Five Mile Cahners[3] filed a motion to dismiss Mass Realty's amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)). In the motion, Five Mile contended that the complaint should be dismissed pursuant to section 2-619 under principles of *res judicata*. Five Mile contended that it and Mass Realty were parties to the 2010 foreclosure action, the consent foreclosure order was a final judgment on the merits, and Mass Realty's 2013 complaint and 2010 foreclosure action counterclaim were the same cause of action. Five Mile also asserted that dismissal was warranted under section 2-619 because the claims were barred by section 15-1509(c) of the Mortgage Foreclosure Law (735 ILCS 5/15-1509(c) (West 2012)), which bars all claims of parties and nonrecord claimants after title vests following a consent foreclosure or after a foreclosure sale, except claims against the proceeds of the sale. Additionally, Five Mile asserted that Mass Realty's breach of contract and unjust enrichment claims should both be dismissed under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). Finally, without citing a basis under the Code, Five Mile contended that Mass Realty's claims should be dismissed because Five Mile did not agree to pay any outstanding broker's commission under the attornment agreement. Five Mile contended that the only agreement governing the commission was the registration letter between Mass Realty and the prior owner, to which Five Mile was not a party.

¶ 18 In response to Five Mile's assertion of *res judicata*, Mass Realty stated that the only final judgment on the merits in the 2010 foreclosure action concerned the priority of Mass Realty's

[3] The motion stated that Five Mile's arguments for dismissal applied equally to Five Mile Cahners.

broker's lien. Mass Realty also asserted that the two proceedings had different causes of action. Mass Realty stated that its counterclaim in the foreclosure action only sought to enforce the broker's lien that was derived from the registration letter, while its 2013 complaint alleged breach of contract and was based on the lease, an entirely different document. Mass Realty also asserted that section 15-1509(c) of the Mortgage Foreclosure Law only relates to claims against the property at issue and was not intended to bar all claims that may exist between the parties to a foreclosure.

¶ 19 In its order, the circuit court found that *res judicata* barred Mass Realty's complaint. The court found that the order entered in the 2010 foreclosure action was a final judgment on the merits and that Mass Realty and Five Mile had been in privity in the 2010 foreclosure action. The court further found that both matters had the same cause of action, noting that the facts to support Mass Realty's purported entitlement to the broker's commission in both instances were wholly based on paragraph 26(k) of the lease. Additionally, the court stated that even if *res judicata* did not bar Mass Realty's complaint, additional arguments supported dismissal. The court noted that the attornment agreement specifically stated it was " 'binding upon and shall inure to the benefit of the parties' thereto" and it was uncontested that Mass Realty was not a party to the attornment agreement. As a result, no benefits or rights directly flowed to Mass. The court further stated that the contract that provided the basis for Mass Realty's claims was a registration letter, to which Five Mile was not a party. The court also stated that nothing within paragraph 26(k) of the lease or the registration letter unambiguously stated that the prior owner's purported obligation to pay the broker's fee later bound Five Mile to pay Mass Realty. Five Mile's motion to dismiss was granted with prejudice.

¶ 20 On appeal, Mass Realty first contends that *res judicata* does not bar the claims in its 2013 complaint. Mass Realty argues that the consent foreclosure judgment was not a final judgment on the merits because it was a settlement agreement. Mass Realty also asserts that in the 2010 foreclosure action, there were no allegations that Mass Realty was liable to Five Mile or that Five Mile was liable to Mass Realty. Additionally, Mass Realty contends that the indispensible and material facts in the 2013 complaint did not exist in the foreclosure action. Mass Realty asserts that at the time of the foreclosure action, Five Mile did not own the property at issue, was not the landlord, did not own the rent being collected from the tenant, and had not received or refused a demand for payment.

¶ 21 Five Mile brought its motion to dismiss pursuant to section 2-619.1 of the Code, which allows a party to combine a section 2-615 motion to dismiss and a section 2-619 motion for involuntary dismissal in one pleading. 735 ILCS 5/2-619.1 (West 2012); *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1046 (1998). As a preliminary matter, Mass Realty contends that in the second part of its order, the circuit court improperly applied the standards for dismissal under sections 2-615 and 2-619. To be sure, it is unclear whether the second part of the circuit court's analysis was under section 2-615 or section 2-619, and the corresponding portion of Five Mile's motion leaves this question unanswered. Meticulous practice dictates that movants clearly state the section of Code under which a motion to dismiss is brought. *Storm & Associates, Ltd.*, 298 Ill. App. 3d at 1046. Although the unlabeled part of Five Mile's motion is not dispositive to this appeal, we nonetheless caution the parties and the court to avoid confusion by clearly indicating the section of Code at issue for motions brought under section 2-619.1.

¶ 22 Turning to the merits, Five Mile's assertion of *res judicata* was brought under section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)), which admits the legal sufficiency of the

complaint and raises defects, defenses, or other affirmative matter which appear on the face of the complaint or are established by external submissions that defeat the plaintiff's claim. *LaSalle National Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 789 (2001). Dismissal is proper under section 2-619 if after construing the pleadings and supporting documents in the light most favorable to the nonmoving party, the trial court finds that no set of facts can be proven upon which relief could be granted. *Webb v. Damisch*, 362 Ill. App. 3d 1032, 1037 (2005). On appeal, the question is whether the existence of a genuine issue of material fact should have precluded the dismissal or whether dismissal is proper as a matter of law. (Internal quotation marks omitted.) *Saxon Mortgage, Inc. v. United Financial Mortgage Corp.*, 312 Ill. App. 3d 1098, 1104 (2000). We review a dismissal pursuant to a section 2-619 motion *de novo*. *Storm & Associates, Ltd.*, 298 Ill. App. 3d at 1047.

¶ 23 *Res judicata* is an equitable doctrine that is designed to prevent a multiplicity of lawsuits between the same parties where the facts and issues are the same. *Quintas v. Asset Management Group, Inc.*, 395 Ill. App. 3d 324, 328 (2009). Under the doctrine of *res judicata*, a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998). For the doctrine to apply, three requirements must be satisfied: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there is an identity of parties or their privies; and (3) there is an identity of cause of action. *Id*. If these three requirements are satisfied, then *res judicata* will bar not only every matter that was actually determined in the first suit, but also every matter that might have been raised and determined in that suit. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 338 (1996).

¶ 24 We first determine whether the consent foreclosure judgment was a final judgment on the merits. Five Mile contends that Mass Realty is bound by its concession below that there was a final judgment on the merits in the 2010 foreclosure action. Five Mile also asserts that, by raising it for the first time on appeal, Mass Realty has waived the argument that the consent foreclosure judgment was not a final judgment on the merits because it was a settlement agreement. While we recognize that Mass Realty raises this argument for the first time on appeal, we note that waiver is a limitation on the parties and not on the court. *Central Illinois Public Service Co. v. Allianz Underwriters Insurance Co.*, 244 Ill. App. 3d 709, 713 (1993). We will address this issue on the merits accordingly.

¶ 25 We find that the consent foreclosure judgment was not a final judgment on the merits for *res judicata* purposes. A judgment is "on the merits" when it determines the parties' respective rights and liabilities based on facts before the court. *Lehman v. Continental Health Care, Ltd.*, 240 Ill. App. 3d 795, 802 (1992). As to Mass Realty, the consent foreclosure judgment only determined that its lien was extinguished. The judgment did not address Five Mile's liability to pay the commission. We also find persuasive Mass Realty's argument that a consent foreclosure judgment is akin to a settlement agreement, which is not considered a final judgment on the merits. See *Currie v. Wisconsin Central, Ltd.*, 2011 IL App (1st) 103095, ¶ 29 (noting a split between courts in Illinois on the question of whether a settlement agreement operates as a final judgment on the merits, but agreeing with the cases that do not view a settlement agreement as a final judgment on the merits); *Goodman v. Hanson*, 408 Ill. App. 3d 285, 300 (2011) (a dismissal with prejudice pursuant to a settlement agreement was not a final judgment on the merits because " 'an agreed order is not a judicial determination of the parties' rights, but rather is a recordation of the agreement between the parties' " (quoting *Kandalepas v. Economou*, 269 Ill. App. 3d 245,

252 (1994)). Mass Realty was not even a party to the confidential settlement agreement that was the basis for the consent foreclosure judgment. Because there was no final judgment on the merits as to Mass Realty's right to be paid its commission, the first requirement for *res judicata* is not satisfied.

¶ 26 Moreover, we also find that Mass Realty's counterclaim in the 2010 foreclosure action and 2013 complaint had different causes of action. Illinois courts use the transactional test to determine whether causes of action are the same for *res judicata* purposes. *River Park, Inc.*, 184 Ill. 2d at 310. Under this test, separate claims will be considered the same cause of action if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. *Id*. at 311. The facts as they exist as the time of judgment determine whether *res judicata* bars a subsequent action. (Internal quotation marks omitted.) *Doe v. Gleicher*, 393 Ill. App. 3d 31, 39 (2009).

¶ 27 In its counterclaim, Mass Realty did not establish a relationship between itself and Five Mile, or the basis of any obligation that Five Mile had to pay the commission. Mass Realty only stated that despite requests for payment, the prior owner had "failed, refused[,] and/or neglected" to pay the amount due, and that Mass Realty had not received payments from the escrow funds, which were possessed by the "[o]wner and/or Five Mile ***." Although Mass Realty sought, in part, an accounting of the escrow funds, Mass Realty did not allege a basis for Five Mile's obligation to pay Mass Realty. Additionally, Five Mile had not yet refused to pay the commission. In contrast, in the 2013 complaint, Mass Realty alleged that Five Mile had the obligation to pay the commission via the attornment agreement and lease, and had refused to do so. Significantly, Mass Realty could not have asserted this claim against Five Mile earlier because Five Mile was not yet the owner of the property. Because the counterclaim in the

foreclosure action and the 2013 complaint had different causes of action, this element of *res judicata* is also missing.

¶ 28 We disagree with Five Mile's reliance on cases decided under the Mechanic's Lien Act (770 ILCS 60/1 *et seq.* (West 2012)) that found that a suit to foreclose on a mechanic's lien and a suit on the underlying contract were the same cause of action. In those cases, the contract claim against the defendant was explicitly raised in the suit to foreclose the lien. See *Thorleif Larsen & Son, Inc. v. PPG Industries, Inc.*, 177 Ill. App. 3d 656, 658 (1988) (the plaintiff alleged that the defendant had failed to pay the balance due on a contract); *Sjostrom v. McMurray*, 47 Ill. App. 3d 1040, 1042 (1977) (the plaintiff alleged that the defendants had defaulted in a certain amount under a building contract); *Douglas v. Papierz*, 121 Ill. App. 2d 242, 247-48 (1970) (issues raised by the pleadings were whether the plaintiff had faithfully performed according to the contract, whether the defendant had properly terminated the contract, and whether the plaintiff was entitle to judgment for the defendant's breach); *Howard T. Fisher & Associates, Inc. v. Shinner Realty Co.*, 24 Ill. App. 2d 216, 224 (1960) (the plaintiff sought a declaratory judgment declaring the original contract valid). The mechanic's lien cases cited by Five Mile do not persuade us that *res judicata* should bar Mass Realty's claims. As noted above, Mass Realty did not and could not have raised a contract claim in the foreclosure action and did not otherwise allege that Five Mile was responsible for paying the commission.

¶ 29 Having found that Mass Realty's 2013 complaint is not barred by *res judicata*, we next consider other potential grounds for dismissal. Five Mile contends that Mass Realty's claims are barred by section 15-1509(c) of the Mortgage Foreclose Law (735 ILCS 5/15-1509(c) (2012)), warranting dismissal under section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). Five Mile interprets section 15-1509(c) to mean that a foreclosing lender takes property free and clear

of all claims, while Mass Realty contends that section 15-1509(c) is a bar only to claims on the property that was the subject of foreclosure. We agree with Mass Realty.

¶ 30 Section 15-1509(c) states:

> "Any vesting of title by a consent foreclosure *** or by deed *** shall be an entire bar of (i) all claims of parties to the foreclosure and (ii) all claims of any nonrecord claimant who is given notice of the foreclosure ***. Any person seeking relief from any judgment or order entered in the foreclosure in accordance with subsection (g) of Section 2-1301 of the Code *** may claim only an interest in the proceeds of sale." 735 ILCS 5/15-1509(c) (West 2012).

¶ 31 Section 15-1509(c) has been interpreted to act as a bar to claims on the property that was the subject of the foreclosure. See *Deutsche Bank National Trust Co. v. Brewer*, 2012 IL App (1st) 111213, ¶ 14 ("[u]nder section 15-1509, the party aggrieved by an erroneous judgment and a sale pursuant to that judgment cannot challenge the sale, and the court must limit the relief from an erroneous judgment to a claim for the proceeds from the sale"); *BCGS, LLC v. Jaster*, 299 Ill. App. 3d 208, 213 (1998) (section 15-1509(c) "expressly provides that all outstanding claims on property that has been the subject of a foreclosure and sale pursuant to the law are extinguished"). Five Mile's authority for the proposition that a lender takes a property free and clear of all claims, *U.S. Bank National Ass'n v. Prabhakaran*, 2013 IL App (1st) 111224, itself involved a defendant who was attempting to vacate a foreclosure judgment and confirmation of sale—in effect, a claim on the property that was the subject of the foreclosure. In contrast, Mass Realty's breach of contract and unjust enrichment claims are not claims on the property, but rather are claims against Five Mile. Section 15-1509(c) does not bar Mass Realty's claims.

¶ 32 We next address Five Mile's challenges to Mass Realty's breach of contract and unjust enrichment claims under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)). A section 2-615 motion attacks the sufficiency of the complaint and asks whether it states a cause of action upon which relief can be granted. *Storm & Associates, Ltd.*, 298 Ill. App. 3d at 1046. The merits of the case are not at issue. *Talbert v. Home Savings of America, F.A.*, 265 Ill. App. 3d 376, 379 (1994). Attached exhibits are an integral part of the complaint and must be so considered. *Id.* A trial court should dismiss a cause of action on the pleadings only if it is clearly apparent that no set of facts can be proven which will entitle a plaintiff to recover. *Weil, Freiburg & Thomas, P.C. v. Sara Lee Corp.*, 218 Ill. App. 3d 383, 389 (1991). On appeal, a court must decide whether the allegations in the complaint, interpreted in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Id*. We review a dismissal under section 2-615 *de novo*. *Visvardis v. Ferleger*, 375 Ill. App. 3d 719, 724 (2007).

¶ 33 Mass Realty pled a cause of action for breach of contract under a third-party beneficiary theory. A third-party beneficiary may sue under a contract even when not a party to it, provided the benefit of the contract is direct to him, as opposed to being merely incidental. *Gallagher Corp. v. Russ*, 309 Ill. App. 3d 192, 199-200 (1999). A third party is a direct beneficiary when the contracting parties have manifested an intent to confer a benefit on the third party. *155 Harbor Drive Condominium Ass'n v. Harbor Point Inc.*, 209 Ill. App. 3d 631, 646 (1991). The intention of the parties is gleaned from the language of the contract and the circumstances surrounding the parties at the time of its execution. *Cahill v. Eastern Benefit Systems, Inc.*, 236 Ill. App. 3d 517, 520 (1992). While there is a strong presumption that parties to a contract intend that the contract's provisions apply to only them and not to third parties, this presumption can be overcome where the implication that the contract applies to third parties is so strong as to be

practically an express declaration. (Internal quotation marks omitted.) *155 Harbor Drive Condominium Ass'n*, 209 Ill. App. 3d at 647.

¶ 34 Here, Mass Realty sufficiently alleged that it was a third-party beneficiary of the lease between the prior owner and the tenant, which Five Mile subsequently obtained through the attornment agreement. We note that Mass Realty does not state that the lease is itself a brokerage agreement, but rather, the registration letter was the brokerage agreement that Mass Realty fully performed, and that in paragraph 26(k) of the lease, the landlord agreed to pay the tenant's broker in consideration of the tenant agreeing to the lease. Examining the documents together, the complaint and exhibits are sufficient at this point to show that the parties intended to bestow a direct benefit on Mass Realty by paying the broker's commission. Paragraph 26(k) of the lease explicitly names Mass Realty as the tenant's broker and states that the landlord "agrees to pay any commission due to *** Mass Realty LLC." According to the attornment agreement, which was made on the same day as the lease and the tenant required as a condition to the lease, Five Mile agreed to be "bound by the Lease," not only selected portions of the lease. Five Mile had already started the foreclosure proceedings when it signed the attornment agreement and was not a stranger to the lease when it ultimately became the landlord. Further, Five Mile stood to benefit from Mass Realty's efforts. Though paying the commission was not the sole purpose of the lease, we note that a promise does not have to be for the sole benefit of the third party as long as it is for its direct or substantial benefit. *Advanced Concepts Chicago, Inc., v. CDW Corp.*, 405 Ill. App. 3d 289, 293 (2010). Through the language of the lease and attornment agreement and the circumstances surrounding both documents, we find that Mass Realty sufficiently pled a breach of contract claim under a third-party beneficiary theory. We

cannot say that it is clearly apparent that no set of facts can be proven that would entitle Mass Realty to recover. See *id*. at 292.

¶ 35 Further, contrary to Five Mile's apparent contention, there is no blanket rule against brokers being third-party beneficiaries of contracts. Defendant's reliance on *E.B. Harper & Co., Inc. v. Nortek, Inc.*, 104 F.3d 913, 920 n.4 (1997) is not helpful. In a footnote, the court stated that "brokers are generally not third-party beneficiaries of sales agreements to which they are not a party." *Id*. However, in that case, the plaintiff, a business-finder, had not even alleged it was a third-party beneficiary. Further, in spite of the court's general statement about brokers not being third-party beneficiaries, it still went on to discuss whether the plaintiff was a third-party beneficiary under the specific circumstances of that case. *Id.*

¶ 36 We next address whether Mass Realty sufficiently stated a claim for unjust enrichment, which it pled in the alternative. The theory of unjust enrichment is an equitable remedy based on a contract implied in law. (Internal quotation marks omitted.) *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604 (2005). 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. (Internal quotation marks omitted.) *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25. A party may plead a claim for breach of contract and unjust enrichment as long as the count for unjust enrichment does not include allegations of an express contract which governs the relationship of the parties. *Guinn*, 361 Ill. App. 3d at 604.

¶ 37 Here, Mass Realty's complaint adequately pled the elements of unjust enrichment. Mass Realty stated that Five Mile refused to pay the commission due to Mass Realty while enjoying the fruits of its efforts, collecting large rental payments from a tenant that Mass Realty procured,

resulting in damages of $376,550. The complaint satisfied the elements of an unjust enrichment claim and should have survived dismissal pursuant to section 2-615.

¶ 38 In reaching this conclusion, we are not persuaded by Five Mile's continued attempt to frame Mass Realty's claim as an attack on the property. Five Mile contends that allowing the claim would make all property subject to being encumbered by equitable claims after a foreclosure. Here, however, Mass Realty is not trying to take an interest in the property, but rather is raising a new claim against Five Mile.

¶ 39 Finally, we deny Five Mile's request to impose sanctions under Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994). Rule 375 states that sanctions may be appropriate where an appeal is frivolous or "was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation ***." Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994). Mass Realty raised valid arguments that were ultimately meritorious, although we also note that even an unsuccessful appeal, by itself, does not indicate that sanctions are warranted (*RBS Citizens, National Ass'n v. RTG-Oak Lawn, LLC*, 407 Ill. App. 3d 183, 194 (2011)). We deny Five Mile's request for sanctions.

¶ 40 For the foregoing reasons, the judgment of the circuit court is reversed and the cause is remanded for further proceedings.

¶ 41 Reversed and remanded.