No. 2—09—0589
Order filed January 31, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ATLANTIC TRUST COMPANY and STEIN ROE INVESTMENT COUNSELS, INC.,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellants,	)	
v.	)	No. 08—CF—999
STEVEN F. GRAVER, an Individual,	)	Honorable David M. Hall,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Presiding Justice Jorgensen concurred in the judgment.
Justice McLaren dissented.

ORDER

Held: Where plaintiffs sufficiently alleged that consideration existed to uphold a separation agreement negotiated by the parties, the trial court erred by dismissing count I of plaintiffs' first amended complaint. Because the trial court properly dismissed counts II and III alleging unjust enrichment and promissory estoppel, the judgment is reversed and remanded only as to count I.

Plaintiffs, Atlantic Trust Company, a division of Invesco National Trust Company, and Stein Roe Investment Counsel, Inc., appeal the judgment of the trial court dismissing their cause of action against a former employee, defendant Steven F. Graver. At issue is a separation agreement negotiated by the parties that released defendant from a covenant not-to-compete in exchange for a sharing of revenue from specified clients. The trial court determined that the separation agreement lacked consideration and granted defendant's motion to dismiss under section 2—615 of the Code of Civil Procedure (Code) (735 ILCS 5/2—615 (West 2008)). Plaintiffs appeal this dismissal, and we reverse and remand.

I. FACTS

Plaintiffs' first amended complaint, filed November 25, 2008, alleged the following. Plaintiffs are "professional affiliated investment management firms that specialize in managing the private affairs of private individuals, families, and various entities such as foundations and endowments." Plaintiffs offered employment to defendant pursuant to a letter dated August 27, 2002 (employment letter). The employment letter provided that, in exchange for, *inter alia*, equity options, defendant was required to sign a non-competition/non-solicitation agreement (2002 Non-Solicitation Agreement). The employment letter also provided that defendant would receive various resources and a base salary of $250,000. On September 3, 2002, defendant agreed to the terms of the employment letter. On September 16, 2002, defendant was hired by plaintiffs as senior vice-president and principal. On December 23, 2002, defendant executed the options agreement and the 2002 Non-Solicitation Agreement.

Section 1(A)(i) of the 2002 Non-Solicitation Agreement provided that for two years after leaving his employment with plaintiffs, defendant could not:

> "[E]ngage in, invest in, or provide advice or assistance to any activities or businesses *wherever located*, that are substantially in competition with the Company or any of its affiliates (in each case for the purposes of this Section 1, the term 'Company' shall be deemed to include any successor entity to the Company) ('Competitive Activities'), including (a) engaging in portfolio management, investment counsel,

> client service or sales and marketing activities with respect to separate accounts, mutual funds, private funds and/or public funds, (b) engaging in securities analysis, hedge fund management, merchant banking or investment banking activities, and (c) assisting any person or entity in any way to do, or attempt to do, anything prohibited by clause (a) or (b) above." (Emphasis added.)

Section 1A(iii) provided that defendant could not "establish any new business that engages in Competitive Activities." Section B of the 2002 Non-Solicitation Agreement provided that for two years after leaving his employment, defendant could not, without the "prior written consent" of plaintiffs, "*wherever located*, (a) solicit, advise or assist any entity that is then a client or prospective client of the Company or any of its affiliates." (Emphasis added.)

Plaintiffs also alleged that "[a]s a Senior Vice President, Defendant was responsible for providing wealth counseling services to high-net-worth private clients through the implementation of tailored management solutions." Plaintiffs assisted defendant in establishing accounts for clients he had brought over to plaintiffs' company from his prior employer. Plaintiffs provided meaningful services, products, operating platforms, securities research, client support services, and reports to defendant to help him attract and maintain clients and to develop additional business from existing and new clients. In addition, plaintiffs' fixed income investments team managed the fixed income portion of the investment portfolios of clients whose relationships were managed by defendant, and, for a time, plaintiffs provided an individual to perform portfolio management services for the equity portion of those clients' investment portfolios. Defendant also made use of plaintiffs' multi-manager and alternatives investment platforms in managing his clients' investment portfolios. Plaintiffs paid defendant substantial income related to clients who were new to plaintiffs' business.

Plaintiffs alleged that defendant voluntarily "decided to leave plaintiffs' employ" and he resigned, "effective June 30, 2005, to set up his own investment advisory firm." Plaintiffs further alleged that "[m]onths before his resignation became effective, however, Defendant approached Plaintiffs and began negotiating the terms of his separation. Due to the potential competing nature between Plaintiffs' business and Defendant's new firm, and in light of the provisions of the [2002] Non-Solicitation Agreement, the parties negotiated the terms of their terminated relationship." Plaintiffs also alleged that "Defendant was represented by Vedder Price, P.C., a national law firm with a well-regarded executive compensation practice," and that "[t]hrough their negotiations, the parties reached a mutually acceptable arrangement."

Plaintiffs also alleged that on or around June 13, 2005, in conjunction with defendant's decision to leave plaintiffs' employ, the parties entered into a valid and binding "Confidential Separation Agreement and General Release" (2005 Separation Agreement). The 2005 Separation Agreement was intended, among other things, to resolve the parties' respective rights under prior agreements, including the 2002 Non-Solicitation Agreement. This 2005 Separation Agreement permitted defendant to "engage in a business that would compete with [plaintiffs] and to actively solicit [plaintiffs'] clients that he otherwise would have been prohibited from soliciting or servicing under the [2002] Non-Solicitation Agreement." Plaintiffs alleged that, in exchange for their agreement to forego bringing any legal claims under the 2002 Non-Solicitation Agreement, the 2005 Separation Agreement provided that defendant would pay plaintiffs a specified percentage of revenues he received from specified clients over four years. The specified clients were itemized in Exhibit B, which was attached to the 2005 Separation Agreement.

Section 5 of the 2005 Separation Agreement released defendant:

"from his obligations under Sections 1(A)(i) and 1(A)(iii) (but not under any other sections)

> of the [2002 Non-Solicitation Agreement] dated December 23, 2002[,] between [the parties], provided, however, that all such obligations shall be immediately reinstated and binding on [defendant] if he breaches this Agreement or any other nonsolicitation, confidentiality, or other restrictive covenant with [plaintiff] or any of its affiliates."

As provided above, sections 1(A)(i) and 1(A)(iii) of the 2002 Non-Solicitation Agreement prohibited defendant from, *inter alia*, starting his own business in competition with plaintiffs for two years after his termination date. Defendant's employment with plaintiffs terminated on June 30, 2005.

Plaintiffs alleged that, in the fall of 2006, after defendant had made four quarterly payments pursuant to the 2005 Separation Agreement, the parties renegotiated certain terms of the 2005 Separation Agreement at defendant's request. On November 1, 2006, the parties entered into a "First Amendment to Confidential Separation Agreement and General Release" (2006 Amended Agreement). In the 2006 Amended Agreement, the parties agreed to reduce the quarterly payment rate for periods after June 30, 2006, and to extend the term over which payments were to be made to plaintiffs. Plaintiffs alleged that the total amount that defendant was obligated to pay under the 2005 Separation Agreement was unchanged by the 2006 Amended Agreement; it only extended the time defendant had to pay. The ultimate payment due from defendant was equal to one year's worth of revenues received from specific clients. Under the 2005 Separation Agreement, that one year's worth of revenues was to be paid out in installments of 25% of revenues over four years. Under the 2006 Amended Agreement, the first year's 25% installment was to be paid as provided in the 2005 Separation Agreement, but the remaining 75% was spread out over five years (at 15% of revenues per year) instead of three (at 25% of revenues per year). The 2006 Amended Agreement attached to plaintiffs' complaint provided that defendant had to pay plaintiffs "25% of all revenues earned" from July 1, 2005 to June 30, 2006, and "15% of all revenues earned" from July 1, 2006, to June 30, 2011.

Plaintiffs alleged that, from July 1, 2006, through March 31, 2007, defendant paid plaintiffs in accordance with their agreements. Defendant's last payment to plaintiffs was made on or around May 22, 2007. Defendant did not make his scheduled payment to plaintiffs on August 31, 2007, and had since refused to make any additional required payments. Plaintiffs' first amended complaint alleged: (1) breach of contract; (2) unjust enrichment; and (3) equitable and promissory estoppel.

Defendant filed a motion to dismiss under section 2—615 of the Code (735 ILCS 5/2— 615 (West 2008)). In his motion, defendant alleged that plaintiffs sought to "enforce a restriction on competition under which [defendant] would be required to pay Plaintiffs a 15% kickback on 'all revenues earned' from clients [defendant] admittedly developed 'at his prior employer' before ever working for Plaintiffs." Because plaintiffs had no "protectable interest" in the clients that defendant had developed and serviced at his prior employer, there was no consideration to support the restriction in either of the Separation Agreements. Defendant argued that the Separation Agreements were "one-sided." Although plaintiffs made the "conclusory allegation" that they agreed to "forego" their alleged right to prohibit defendant from servicing "his own clients" under the 2002 Non-Solicitation Agreement, plaintiffs' argument failed because there was no protectable interest in defendant's clients as a matter of law. Defendant argued that the 2002 Non-Solicitation Agreement lacked consideration; that plaintiffs had no protectable interest in defendant's clients; and that the 2002 Non-Solicitation Agreement, like the Separation Agreements, were unenforceable. In addition, defendant argued that the 2002 Non-Solicitation Agreement, which lasted two years after defendant left plaintiffs' employ (June 30, 2005, to June 30, 2007), had expired. Defendant also alleged that plaintiffs' claims for unjust enrichment and equitable and promissory estoppel should be dismissed because the existence of a contract prohibited these causes of action and because they were unenforceable restrictions on competition.

Plaintiffs responded by filing a memorandum of law in opposition to defendant's motion to dismiss. First, plaintiffs pointed out that defendant negotiated the original terms of the 2005 Separation Agreement and then renegotiated and reaffirmed them by requesting an amendment (2006 Amended Agreement) only 16 months later. Second, plaintiffs argued that defendant improperly characterized the Separation Agreement as a restriction on competition as opposed to a contractual agreement that was reached between the parties to allow defendant to compete against plaintiffs. According to plaintiffs, the 2002 Non-Solicitation Agreement, which was executed three years earlier, specifically prohibited defendant from competing with them. Third, plaintiffs argued that the 2005 Separation Agreement was *not* a "last-minute arrangement forced on" defendant by plaintiffs. Although defendant signed the 2005 Separation Agreement only 17 days before his resignation became effective, defendant and his counsel had negotiated that document for weeks. Fourth, plaintiffs maintained that it was too late for defendant to challenge the enforceability of the 2002 Non-Solicitation Agreement because defendant, who was adequately represented by "respected counsel," had the choice of resigning his employment and challenging the validity of the 2002 Non-Solicitation Agreement *or* negotiating "around it" by agreeing to the 2005 Separation Agreement. Fifth, plaintiffs' decision to forgo their rights under the 2002 Non-Solicitation Agreement, a legal claim, provided the consideration for the 2005 Separation Agreement. Last, plaintiffs argued that even if the 2005 Separation Agreement was viewed as a restrictive covenant, it was enforceable.

Defendant filed a reply in support of his motion to dismiss plaintiffs' first amended complaint. In his reply, defendant argued that although the 2005 Separation Agreement required him to pay plaintiffs "a percentage of his earnings made from servicing his pre-employment clients," he “was not paid” for the 2005 Separation Agreement, “not even a severance.” After defendant moved to dismiss plaintiffs’ original complaint based on a lack of consideration, plaintiffs amended their complaint “to allege a new theory of consideration: forbearance” of a legal claim. According to defendant, although plaintiffs maintained that the “legal claim” related to the 2002 Non-Solicitation Agreement, the 2002 Non-Solicitation Agreement did not include the clients that defendant had developed at his prior employer. As a result, plaintiffs did not abandon or release defendant from any claim. Defendant alternatively argued that even if the 2002 Non-Solicitation Agreement could be read to include defendant’s pre-employment clients, foregoing a claim under the 2002 Non-Solicitation Agreement did not provide adequate consideration for plaintiffs’ “kickback provision” because plaintiffs had no protectable interest in defendant's pre-employment clients.

The trial court granted defendant's motion to dismiss. The trial court based the dismissal of the contract claim on “the failure of consideration.” The trial court’s dismissal was “without prejudice,” and it gave plaintiffs time to file an amended complaint. However, plaintiffs “waived the right to file an amended complaint,” and instead, the trial court entered an agreed order dismissing plaintiffs’ first amended complaint with prejudice. The agreed order also stated: “Entry of this Order is final, and there is no just reason to delay enforcement or appeal of this order.” Plaintiffs filed this timely appeal.

II. ANALYSIS

A motion to dismiss under section 2—615 “challenges the legal sufficiency of a complaint based on defects apparent on its face.” *Heastie v. Roberts*, 226 Ill. 2d 515, 531 (2007). To determine the legal sufficiency of a complaint, all well-pleaded facts are taken as true and all reasonable inferences from those facts are drawn in favor of the plaintiff. *Springfield Heating & Air Conditioning, Inc. v. 3947-55 King Drive At Oakwood, LLC,* 387 Ill. App. 3d 906, 908-09 (2009).

When reviewing a trial court's granting of a section 2—615 motion to dismiss, the reviewing court must view the complaint in a light most favorable to the plaintiff and ask whether the allegations contained in the complaint are sufficient to state a cause of action. *Id.* at 909. All facts apparent from the face of the pleadings, including any exhibits attached thereto, must be considered. *Beahringer v. Page*, 204 Ill. 2d 363, 365 (2003). We review a trial court's granting of a section 2—615 motion to dismiss *de novo*. *Springfield Heating & Air Conditioning*, 387 Ill. App.3d at 909.

The crux of plaintiffs' argument on appeal is that defendant is bound by the 2005 Separation Agreement which he negotiated. Plaintiffs point out that defendant signed the 2002 Non-Solicitation Agreement as a condition of employment nearly three years before signing the 2005 Separation Agreement. In exchange for signing the 2002 Non-Solicitation Agreement, defendant received a $250,000 salary, equity in the company, and access to plaintiffs' investment platforms, financial data, and confidential material. When defendant decided to leave plaintiffs' employ, he chose to negotiate "around" the 2002 Non-Solicitation Agreement rather than challenge its validity so that he could compete with plaintiffs. According to plaintiffs, the 2005 Separation Agreement was negotiated in good faith, and defendant was represented by competent counsel. In fact, the 2005 Separation Agreement was the "by-product of extensive negotiations" that lasted "many months," and it permitted defendant to engage in a competing business and to actively solicit certain clients that he otherwise would have been prevented from soliciting under the 2002 Non-Solicitation Agreement. The price defendant paid for this release was one year's revenue from the specified clients, spread out over a four-year period, and later a six-year period due to defendant's request to amend the payment schedule. As a result, defendant was able to derive revenue from the "exact same source as he did while employed by Plaintiffs: providing financial services to Plaintiffs' former clients," which was revenue that was "entirely lost" to plaintiffs when defendant began servicing them on his own. Plaintiffs further argue that defendant enjoyed the benefits of the bargain he struck with plaintiffs for two years, but then once the two-year period in the 2002 Non-Solicitation Agreement had "arguably expired," defendant violated his promise and stopped making payments to plaintiffs.

The first issue to decide is whether the 2005 Separation Agreement is to be viewed as a contract or as a restrictive covenant. While defendant characterizes the 2005 Separation Agreement as an unenforceable restrictive covenant on competition, plaintiffs characterize it as a "bargained-upon contract" in which plaintiffs released certain rights they had against defendant in exchange for a monetary payment by defendant, spread out over several years. Based on the above facts, we agree with plaintiffs that the 2005 Separation Agreement is a contract, meaning the general principles of contract law apply. Essentially, the 2005 Separation Agreement is a negotiated release from the covenant not to compete in the 2002 Non-Solicitation Agreement; it is not a restrictive covenant in and of itself. In *Aqua-Aerobic Systems, Inc. v. Ravitts*, 166 Ill. App. 3d 168, 170-71 (1988), for example, this court considered a release from a restrictive covenant in an employment agreement as a contract whereby one party abandoned claims against another. We noted that interpretation of the release was governed by the principles that govern contract law. *Id.* at 171.

The elements of an enforceable contract are well-settled: (1) offer and acceptance; (2) definite and certain terms; (3) consideration; and (4) performance of all required conditions. *Tower Investors, LLC. v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1027 (2007). The element disputed by the parties in this case is consideration. "Any act or promise that benefits one party or disadvantages the other is sufficient consideration to support the formation of a contract." *Kalis v. Colgate Palmolive Co.*, 337 Ill. App. 3d 898, 900 (2003).

In arguing a lack of consideration in the 2005 Separation Agreement, defendant argues that he received no severance, payment, or promise of any kind; the promises were not mutual and ran only one way; there was no "existing claim" to forbear; there was "no release provided by Plaintiffs to Defendant"; and the 2005 Separation Agreement stated that the 2002 Non-Solicitation Agreement continued in "full force and effect." For the following reasons, defendant's arguments lack merit.

In exchange for defendant's sharing of the revenue from specified clients, the 2005 Separation Agreement *released* defendant from his obligations under sections 1(A)(i) and 1(A)(iii) of the 2002 Non-Solicitation Agreement. Section 1(A)(i) prevented defendant from engaging in, investing in, or providing advice or assistance to any business that was substantially in competition with plaintiffs, and section 1(A)(iii) prevented defendant from establishing any new business that engaged in competitive activities. In addition, the 2005 Separation Agreement allowed defendant to service a list of specified clients of plaintiffs, which was prohibited in Section B of the 2002 Non-Solicitation Agreement. (Section B prevented defendant from soliciting, advising, or assisting any existing or prospective clients). In short, the 2005 Separation Agreement allowed defendant to do precisely what the 2002 Non-Solicitation Agreement prohibited. As plaintiffs point out, defendant was "free to pursue and service new clients" without any economic obligation to plaintiffs, and defendant was free to service existing, specified clients so long as he paid plaintiffs a certain percentage of revenues over a fixed amount of time. Therefore, we do not agree with defendant's depiction of the 2005 Separation Agreement.

In a related point, defendant argues that the 2002 Non-Solicitation Agreement remained in full force and effect, meaning that plaintiffs did not agree to forbear any claim. However, plaintiffs correctly note that defendant omitted critical language in the 2005 Separation Agreement. The 2005

Separation Agreement stated that "[e]xcept as provided in Section 5," which released defendant from sections 1(A)(i) and 1(A)(iii) of the 2002 Non-Solicitation Agreement, defendant "hereby reaffirms his commitment to comply in full with his obligations" under the 2002 Non-Solicitation Agreement, which "continues in full force and effect." Therefore, defendant mischaracterizes the nature of what plaintiffs released in the 2005 Separation Agreement.

The dissent points out that because section 5 of the 2005 Separation Agreement released defendant from "his obligations under sections 1(A)(i) and 1(A)(iii) (*but not under any other sections*)" (emphasis added) of the 2002 Non-Solicitation Agreement, that section B of the 2002 Non-Solicitation Agreement remained in effect. Section B provided that for two years after leaving his employment, defendant could not, without the "prior written consent" of plaintiffs, "wherever located, (a) solicit, advise or assist any entity that is then a client or prospective client of the Company or any of its affiliates." According to the dissent, plaintiffs appeared to permit defendant to compete with them for certain clients but in reality retained their right to prohibit defendant from competing with them for any client or prospective client. For this reason, the dissent concludes that plaintiffs' promise was illusory and did not constitute consideration.

We disagree with this conclusion. Section B prohibited soliciting and servicing existing or prospective clients *without prior consent*. However, the 2005 Separation Agreement constituted plaintiffs' "written consent" that defendant was allowed to service a list of plaintiffs' current clients, not to mention prospective or new clients. Thus, the language in section B does not render plaintiffs' promise in the 2005 Separation Agreement illusory.

With respect to defendant's claim that there was no existing claim to forbear, an existing claim is not necessary to provide consideration. "A promise to forego *pursuit* of a legal claim will be determined to be adequate consideration to support formation of a contract even if the claim is invalid, provided that it is asserted in good faith." (Emphasis added.) *Kalis*, 337 Ill. App. 3d at 900-01; see also *Cincinnati Insurance Company v. American Hardware Manufacturers Ass'n*, 387 Ill. App. 3d 85, 101 (2008) (same). In *Kalis*, the plaintiff *retained the right* to seek reconsideration of the summary judgment ruling in the trial court as well as the right to seek appellate review, and her *promise to compromise these rights* constituted consideration for the offer of settlement as long as they were asserted in good faith. *Kalis*, 337 Ill. App. 3d at 901. In other words, the plaintiff's promise to abandon her claims offered a compromise of her own legal rights, a benefit to the other party, and thus consideration. *Kalis*, 337 Ill. App. 3d at 902. The same is true here. As previously stated, rather than start a competing business and subject himself to a lawsuit by plaintiffs to enforce the 2002 Non-Solicitation Agreement, defendant obtained counsel and negotiated the 2005 Separation Agreement, abided by its terms for one year, renegotiated the payment schedule, and then, following the arguable expiration of the 2002 Non-Solicitation Agreement, stopped abiding by the 2005 Separation Agreement. We agree with plaintiffs that defendant received the benefit of the release in sections 1(A)(i) and 1(A)(iii) of the 2002 Non-Solicitation Agreement in that he was free to compete with plaintiffs immediately upon his resignation without incurring the costs of litigation. Under *Kalis*, plaintiffs' promise to forego pursuit of a legal claim under the 2002 Non-Solicitation Agreement constituted consideration.

In a similar vein, defendant's claim that the 2002 Non-Solicitation Agreement is not enforceable fails. Plaintiffs' promise to forego enforcement of the 2002 Non-Solicitation Agreement does not hinge on whether plaintiffs have a valid claim; it hinges on whether the claim is asserted in good faith. The fact that the parties engaged in extensive negotiations in reaching the 2005 Settlement Agreement, which defendant even later renegotiated, shows that plaintiffs' promise to forego pursuit of a legal remedy under the 2002 Non-Solicitation Agreement was made in good faith.

Again, defendant enjoyed the benefit of the of the release in the 2005 Separation Agreement by competing with plaintiffs without the risk of litigation.

For all of these reasons, plaintiffs alleged sufficient consideration to support the 2005 Separation Agreement. Therefore, the trial court erred by dismissing count I of plaintiffs' first amended complaint on this basis. We turn now to the propriety of the dismissal of counts II and III of the complaint.

Plaintiffs argue that the trial court erred by dismissing counts II and III alleging unjust enrichment and promissory estoppel. Plaintiffs contend that their equitable claims do not depend upon the alleged breach of contract but from the fact that defendant was unjustly enriched because he received a benefit to which he was not otherwise entitled - revenue from plaintiffs' former clients - without compensating plaintiffs. We determine that the trial court properly dismissed counts II and III.

"The theory of unjust enrichment is based on a contract implied in law." *Martis v. Pekin Memorial Hospital, Inc.*, 395 Ill. App. 3d 943, 952 (2009). Where there is an express contract that governs the relationship of the parties, the doctrine of unjust enrichment has no application. *Id.* at 952. While a plaintiff may plead in the alternative; that is, it may plead breach of contract in one count and unjust enrichment and promissory estoppel in other counts, it may *not* include allegations of an express contract which governs the relationship of the parties in the counts for unjust enrichment and promissory estoppel. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 604 (2005). In this case, plaintiffs' count II alleging unjust enrichment incorporates the allegations of the express contract. Specifically, plaintiffs allege that defendant has been unjustly enriched by failing to comply with his payment obligations under the 2006 Amended Agreement (which amended the 2005

Separation Agreement). Thus, plaintiffs failed to state a cause of action for unjust enrichment, and the trial court properly dismissed count II.

With respect to count III alleging promissory estoppel, plaintiffs have forfeited the issue of whether the trial court erred by dismissing that claim. The title of plaintiffs' one-paragraph argument states “Plaintiffs Properly Plead Claims of Unjust Enrichment and Promissory Estoppel.” However, plaintiffs offer no argument or analysis to support their statement regarding the trial court's dismissal of its promissory estoppel count. An appellant must argue the issues that it raises, or they are forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006) (“Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing”). A mere conclusory assertion, without supporting analysis, is not enough. *Pilat v. Lozzio*, 359 Ill. App. 3d 1062, 1063 (2005). Therefore, this issue is forfeited.

III. CONCLUSION

For the above reasons, we reverse the judgment of the Lake County circuit court dismissing count I of plaintiffs’ first amended complaint, affirm that portion of the judgment dismissing counts II and III, and remand the case for further proceedings consistent with this order.

Affirmed in part and reversed in part; cause remanded.

JUSTICE McLAREN, dissenting:

I respectfully dissent because the trial court properly determined that plaintiffs failed to plead that the 2005 Separation Agreement was supported by consideration. Although the majority chose to do otherwise, I begin my analysis by addressing appellants’ (plaintiffs’), rather than appellee’s (defendant’s), main argument. Plaintiffs argue that the 2005 Separation Agreement did not lack consideration because "plaintiffs gave up their legal right to pursue remedies provided by the [2002]

Non-Solicitation Agreement." The majority fails to understand that plaintiffs' argument fails for two reasons: (1) any promise plaintiffs made to give up their right to pursue remedies provided by the 2002 Non-Solicitation Agreement constituted insufficient consideration because it was illusory; and (2) plaintiffs had no legal right to pursue remedies pursuant to the 2002 Non-Solicitation Agreement because it was unenforceable as too broad in geographic scope.

A. Consideration

1. Illusory Consideration

Any promise plaintiffs made to give up their right to pursue remedies provided by the 2002 Non-Solicitation Agreement constituted insufficient consideration because it was illusory. An illusory promise is insufficient consideration to support a contract. *Keefe v. Allied Home Mortgage Corporation*, 393 Ill. App. 3d 226, 229 (2009). Illusory consideration is a promise, which at first glance appears to be a promise, but on closer examination reveals that the promissor has actually not promised to do anything; thus, performance is optional. *Keefe*, 393 Ill. App. 3d at 229.

In this case, section 5(a) of the 2005 Separation Agreement released defendant from: "[H]is obligations under sections 1(A)(i) and 1(A)(iii) (but not under any other sections) of the Non-Competition and Non-Solicitation Agreement dated December 23, 2002 [the 2002 Non-Solicitation Agreement]" and provided a list of permitted clients. Further, the 2005 Separation Agreement provided that every other section of the 2002 Non-Solicitation Agreement remained "in full force and effect". Section B of the 2002 Non-Solicitation Agreement provided that defendant could not "where ever located, ***solicit, assist, or advise *** any entity that is then a client or prospective client of [plaintiffs]". Therefore, while plaintiffs appeared to permit defendant to compete with them for certain clients, a closer examination of the agreements,[1] read *in pari materia*, reveals that plaintiffs retained their right to prohibit defendant from competing with them for any client or prospective client. Thus, plaintiffs' alleged promise was illusory and did not constitute consideration. Accordingly, the 2005 Separation Agreement is invalid and unenforceable. Because plaintiffs failed to properly allege consideration, the trial court properly dismissed plaintiffs' claim alleging breach of contract. See *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill. App. 3d 1019, 1027 (2007) (to state a cause of action for breach of contract, a plaintiff must allege, *inter alia*, consideration).

The majority dismisses the importance of section B of the 2002 Non-Solicitation Agreement by stating that:

> "the 2005 Separation Agreement allowed defendant to service a list of specified clients of plaintiffs, which was prohibited in Section B of the 2002 Non-Solicitation Agreement. (Section B prevented defendant from soliciting, advising, or assisting any existing or prospective clients). In short, the 2005 Separation Agreement allowed defendant to do precisely what the 2002 Non-Solicitation Agreement prohibited. As plaintiffs point out, defendant was 'free to pursue and service new clients'."

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[1]The contracts between the parties control rather than the facts contained in plaintiffs' complaint. See *R and B Kapital Development, LLC v. North Shore Community Bank and Trust Co.*, 358 Ill. App. 3d 912, 922 (2005) ("an exhibit attached to a complaint controls, and a motion to dismiss does not admit allegations of the complaint if such allegations are in conflict with the facts disclosed in the exhibit").

The majority also contends that section B did not render plaintiffs' promise illusory because the 2005 Separation Agreement provided defendant with prior written consent to solicit and service current, prospective and new clients. This contention violates two basic tenets of contract interpretation. In construing a contract, a court must give effect to the intent of the parties as expressed by the plain and ordinary language of the contract. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007). Further, when interpreting a contract, a court may not nullify provisions or render any provisions meaningless. See *Board of Managers of Hidden Lakes Townhome Owners Ass'n v. Green Trails Imp.,* 404 Ill. App. 3d 184, 190 (2010).

In ignoring these well settled principles, the majority fails to acknowledge that, although plaintiffs released defendant from sections 1(A)(i) and 1(A)(iii) of the 2002 Non-Solicitation Agreement, plaintiffs failed to release defendant from his obligations under section B of the 2002 Non-Solicitation Agreement. Subsection 5(a) provides in pertinent part: "The Company *** hereby releases Graver from his obligations under Sections 1(A)(i) and 1(A)(iii) *(but not under any other sections)* of the Non-Competition and Non-Solicitation Agreement dated December 23, 2002". (Emphasis added.)

The majority also fails to recognize that section 4 of the 2005 Separation Agreement cements defendant's obligations under every provision of the 2002 Non-Solicitation Agreement with the sole exception of sections 1(A)(i) and 1(A)(iii). Section 4 of the 2005 Separation Agreement provides:

> "Except as provided in Section 5, Graver hereby reaffirms his commitment to comply in full with his obligations under the following agreements, which continue in full force and effect in accordance with their respective terms: the Non-Competition and Non-Solicitation Agreement dated December 23, 2002".

Notably, the majority fails to mention subsection 4(a) of the 2005 Separation Agreement which essentially restates the prohibitions contained in section B of the 2002 Non-Solicitation Agreement. Subsection 4(a) expressly provides that defendant shall not:

> "[C]ontact or solicit any Client or Prospective Client (each as defined below) for the purpose of performing or providing, or facilitating the performance or provision of, any asset management or advisory services or products that compete with those of the Company".

Accordingly, the majority's position that the 2005 Separation Agreement provided defendant with "prior written consent" to do what was prohibited under section B of the 2002 Non-Solicitation Agreement is contrary to the plain and ordinary language of section 4, subsection 4(a) and subsection 5(a) of the 2005 Separation Agreement and erroneously renders these sections meaningless.

2. Invalid Consideration

In addition, plaintiffs' argument that, with the 2005 Separation Agreement, they "gave up their legal right to pursue remedies provided by the [2002] Non-Solicitation Agreement" fails because the relevant provisions of the 2002 Non-Solicitation Agreement were unenforceable restrictive covenants and, thus, provided no consideration.

Contrary to the majority's understanding, a restrictive covenant, is part of a contract. See *e.g.*, *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52 (2006). Therefore, the rules of contract interpretation apply to restrictive covenants. See *Dam, Snell and Taveirne, Ltd. v. Verchota,* 324 Ill. App. 3d 146, 154 (2001). Further, like every contract, a restrictive covenant must be supported by consideration to be enforceable. See, *e.g.*, *Lifetec, Inc. v. Edwards*, 377 Ill. App. 3d 260, 268-29 (2007).

The territorial limitations in a restrictive covenant involving professional services must be reasonable. See *Mohanty*, 225 Ill. 2d at 76-77. To determine whether a limitation is reasonable, a court must consider whether enforcement of the limitation will injure the public or cause undue hardship to the former employee, and whether the limitation is greater than necessary to protect the former employer. *Mohanty*, 225 Ill. 2d at 76. The question of whether a restrictive covenant is reasonable is one of law to be determined by the court. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 447 (2007).

In this case, the territorial limitations contained in the relevant provisions of the 2002 Non-Solicitation Agreement are unreasonable. Section 1A(i) provided that defendant could not: "[E]ngage in, invest in, or provide advice or assistance to any activities or businesses, *wherever located*, that are substantially in competition with the Company or any of its affiliates [plaintiffs]". (Emphasis added.) Section 1A(iii) provided that defendant could not "establish any new business that engages in Competitive Activities." These provisions contained no geographic limitations and precluded defendant "from working, in any capacity, in the industry in which" plaintiffs did business. See *Arcor, Inc. v. Haas*, 363 Ill. App. 3d 396, 405-06 (2005). Thus, these provisions would have caused undue hardship on defendant. See *Arcor*, 363 Ill. App. 3d at 405-06. Further, the provisions were blanket prohibitions on competition and, thus, would have injured the public. See *Arcor*, 363 Ill. App. 3d at 405-06. Because the restrictive covenants plaintiffs purportedly released defendant from were not valid as a matter of law, plaintiffs failed to establish that the 2005 Separation Agreement was supported by consideration.

Plaintiffs cite *Kalis v. Colgate-Palmolive Co.*, 337 Ill. App. 3d 898 (2003); *F.H. Prince & Co. v. Towers Financial Corp.*, 275 Ill. App. 3d 792 (1995); and *Keller v. State Farm Insurance Co.*, 180 Ill. App. 3d 539 (1989), to support their argument that the agreement to forgo a legal claim, even a potentially losing one, is valid consideration, as long as the claim is asserted in good faith. However, these cases are distinguishable from the case at bar. In *Kalis*, the appellate court held that a plaintiff's promise to settle an ongoing lawsuit against a defendant is valid consideration. *Kalis*, 337 Ill. App. at 899-900. Similarly, in *F.H. Prince*, the parties settled an ongoing lawsuit. *F.H. Prince*, 275 Ill. App. 3d at 794-95. There was no indication in either *Kalis* or *F.H. Prince* that the party claiming consideration retained the right to sue. In contrast, in this case, there was no ongoing lawsuit when the parties entered into the 2005 Separation Agreement. Further, in this case, plaintiffs retained their right to enforce the 2002 Non-Solicitation Agreement and to prohibit defendant from competing with them. In addition, in *Keller*, plaintiff agreed to accept money from the defendant/insurance company for his entire claim and not to seek additional money for his claim under defendant's policy. *Keller*, 180 Ill. App. 3d at 547. In this case, plaintiffs cite to no language in the 2005 Separation Agreement where they forgo any claim or claims against defendant; in fact, the 2005 Separation Agreement permits them to enforce the 2002 Non-Solicitation Agreement and to prohibit defendant from competing with plaintiffs. Therefore, the cases cited by plaintiffs are distinguishable from the case at bar.

I also note that plaintiffs cite *LeMaster v. Armsted Industries, Inc.*, 110 Ill. App. 3d 729, 736 (1982), wherein the appellate court held that the forbearance of a claim that is not valid may serve as consideration for a contract as long as the claim is not "entirely without merit." In this case, for the reasons I have established above, plaintiffs' forbearance does not serve as consideration because its claim against defendant is entirely without merit.