2012 IL App (2d) 110553-U
No. 2-11-0553
Order filed March 23, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARK KLEIN,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-L-0441
	)	
PHILLIP E. RUBIN and GARY J. RUBIN,	)	Honorable
	)	Eugene G. Doherty,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: The trial court erred in dismissing plaintiff's complaint alleging a claim of *quantum meruit* as being in violation of public policy; there are material issues of fact precluding dismissal on numerous grounds, including public policy. Therefore, we reversed the judgment of the trial court and remanded for further proceedings.

¶ 1 Plaintiff, Mark Klein, brought the current action against defendants, Phillip E. Rubin and Gary J. Rubin, alleging a single count of *quantum meruit*. Plaintiff was the chief financial officer of J. Rubin & Co. and Continental Real Estate Development Inc. (the companies). Defendants were the sole shareholders of the companies. Plaintiff alleged that he identified a potential buyer of the companies and, at the direction of defendants, negotiated the sale of the companies. According to

plaintiff, he discussed a fee for negotiating the sale and was advised by defendant Gary Rubin that a fee arrangement would be worked out later. After the companies were sold, defendants refused to pay plaintiff an additional fee and plaintiff filed suit. Thereafter, the trial court granted defendants' motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2010)), concluding that plaintiff's complaint was barred because it violated public policy. Plaintiff appeals, contending that the trial court erred in granting defendants' motion to dismiss. For the reasons set forth below, we reverse and remand.

¶ 2 The pleadings reflect that J. Rubin & Co. was founded in 1939 and operated as a metal service center with locations in Illinois, Wisconsin, and Minnesota. Continental Real Estate Development Inc. was subsequently incorporated and primarily served as a holding company for real estate where the companies performed operations. Defendant Phillip E. Rubin was a stockholder and president of the companies, and defendant Gary J. Rubin was a stockholder and vice president of the companies. Plaintiff was hired by J. Rubin in 1997 and was later employed by Continental. At the time the companies were sold, plaintiff was the chief financial officer of the companies and a director, but not a shareholder. Plaintiff was paid a salary of $180,000 per year and received additional compensation through an annual bonus program. Plaintiff also had a termination and severance agreement specifying that he was an at-will employee, but if the companies terminated his employment, he was entitled to severance compensation of one year's salary plus any accrued bonuses.

¶ 3 In 2005, defendants began looking for a potential buyer of the companies. To assist them, defendants retained the services of a financial services firm and, subsequently, a law firm.

According to plaintiff, defendants did not request that he undertake the services those entities were retained to perform. No sale resulted from those entities's efforts.

¶ 4 In 2009, plaintiff met with representatives from Metals USA (Metals) and suggested that Metals might be interested in buying the companies. Plaintiff regularly met with representatives from Metals as part of his duties as chief financial officer. Metals' senior vice president later contacted plaintiff and asked for information that would enable it to better assess whether it would be interested in buying the companies. According to plaintiff, he told defendants that he "hoped" there would be something in it for him if Metals purchased the companies, and defendants replied "the issue would be resolved if a sale took place." Plaintiff and representatives from Metals continued to exchange information regarding Metals' potential acquisition of the companies.

¶ 5 In May 2010, as the negotiations for the sale of the companies progressed, Metals proposed a letter of intent regarding its purchase of the companies. The letter provided that no person had acted as a broker, finder, or financial advisor to the transaction, and that no person would be entitled to a fee or commission. In his affidavit in opposition to defendants' motion to dismiss, plaintiff averred that he explained to defendants that the "no broker's fee" provision applied to outside third parties, but that he would be expecting a fee. In affidavits in support of their motion to dismiss, both defendants averred that plaintiff never suggested that the provision be removed and that they believed plaintiff was not seeking a fee resulting from the sale.

¶ 6 Plaintiff also suggested to defendants that he should receive a fee of $1 million if the net price of the sale exceeded a certain price. Pursuant to their affidavits, both defendants averred that they never agreed to pay plaintiff a fee in connection with the Metals transaction, and they believed the services plaintiff performed in connection with the sale of the companies were part of his job

responsibilities. As a result of plaintiff's fee proposal, Gary Rubin called plaintiff and advised him that the negotiations with Metals were being called off. Gary Rubin explained to plaintiff that he was not entitled to a fee because the services he was providing were part of his job, but plaintiff disagreed. Shortly thereafter, plaintiff called Gary Rubin and asked if the negotiations with Metals could proceed if plaintiff removed his fee from the equation. The next day, Gary Rubin told plaintiff to proceed with the negotiations. In response, plaintiff sent defendants an email expressing his desire to be compensated for the sale of the companies to Metals, to which Gary sent an email reply, "we will work something out and I believe we will all be satisfied." Metals acquired the companies on June 28, 2010.

¶ 7 On December 27, 2010, plaintiff filed his single-count complaint alleging *quantum meruit*. On February 7, 2011, defendants filed their motion to dismiss the complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)). Defendants' motion raised three affirmative defenses. First, defendants claimed that plaintiff was paid for his services as part of his compensation as chief financial officer. Second, defendants argued that plaintiff's fiduciary duty to the companies as an officer obligated him to bring the possibility of a sale or merger with Metals to defendants' attention. Third, defendants argued that the doctrine of "unclean hands" barred plaintiff's claim for *quantum meruit* relief.

¶ 8 On May 2, 2011, the trial court granted defendants' motion. In its written memorandum and opinion order, the trial court noted that plaintiff first suggested to Metals the possibility of purchasing the companies in 2009, but emphasized that plaintiff's initial contacts with Metals came during the course of his employment with the companies. As such, the trial court concluded that plaintiff, as chief financial officer, was under a fiduciary duty to bring the possibility of Metals

purchasing the companies to defendants' attention. Therefore, the trial court concluded that plaintiff could not earn a finder's fee for identifying Metals as potential buyer of the companies. However, the trial court concluded that "The question becomes whether [p]laintiff's additional efforts in negotiating a final deal with [Metals] can be the subject of a *quantum meruit* claim."

¶ 9 In considering whether plaintiff could sustain a *quantum meruit* claim, the trial court first noted that plaintiff had a valid and enforceable employment contract with the companies, which was in effect throughout the time he performed the services he claimed entitled him to additional compensation. The trial court stated that "[i]t is undisputed that there [was] no written employment contract which explicitly states that [p]laintiff's duties include efforts to solicit corporate buyers, or conversely[,] that his duties [did] not include such matters." The trial court further stated that the parties disagreed on whether plaintiff's services relating to the sale of the companies were part his job responsibilities and concluded:

> "Plaintiff's invocation of *quantum meruit* in this setting effectively suggests that it is the [trial court's] role to resolve that dispute. This would, in the [trial court's] view, open the [c]ourthouse doors to similar claims from any employee who feels that he or she has provided benefits to an employer beyond his normal job duties. The sentiment that one has gone above and beyond job requirements simply cannot be a rare or unusual experience, and it would be a drastic proposal to suggest that the remedy for such occasions is a claim for *quantum meruit* in the [trial court]."

The trial court continued:

> "[T]o put it more bluntly, [p]laintiff was in an employer-employee relationship. If he felt he was being asked to perform tasks beyond his duties, his choices were to: (1) reach agreement

> with his employer on an enforceable amendment to his contract to be paid greater compensation; or (2) leave the job if he did not feel his existing salary was commensurate with what his employer was asking of him."

Plaintiff timely appealed.

¶ 10 The only issue in this appeal is whether the trial court erred in dismissing plaintiff's complaint pursuant to section 2-619 of the Code. Plaintiff contends that the trial court erred in concluding that a *quantum meruit* theory of relief was not available because it violated public policy. Defendants counter that the trial court correctly held that *quantum meruit* relief should not be recognized in the present circumstances. Specifically, defendants maintain that plaintiff's actions in pursuing Metals as a purchaser of the companies was part of his responsibilities as chief financial officer, and because plaintiff had a defined bonus and severance agreement, he should not be permitted to seek additional compensation. Defendants also claim that because plaintiff had a fiduciary duty to the companies, he was not required to be compensated for disclosing to defendants Metals' interest in purchasing the companies. Finally, defendants argue that the parties' "informal agreement of good will and hope" does not create a genuine issue of fact regarding the scope of plaintiff's employment arrangement.

¶ 11 A motion for involuntary dismissal under section 2-619 of the Code admits all well-pleaded facts and reasonable inferences therefrom. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277 (2003). Section 2-619(a)(9) of the Code permits a defendant to move for the involuntary dismissal of a claim on the basis that the claim "is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). The term "affirmative matter" has been defined as " 'a type of defense that either negates an alleged cause of action completely or refutes

crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint.' " *Tkacz v. Weiner*, 368 Ill. App. 3d 610, 612 (2006) (quoting *Consumer Electric Corp. v. Cobelcomex, Inc.*, 149 Ill. App. 3d 699, 703 (1986)). The motion should be granted only if the plaintiff can prove no set of facts that would support a cause of action. *Id.* When ruling on a section 2-619 motion to dismiss, a trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). This court reviews *de novo* a section 2-619 order of dismissal. *Id.*

¶ 12 "*Quantum meruit* means, literally, 'as much as he deserves.' " *First National Bank v. Malpractice Research, Inc.*, 179 Ill. 2d 353, 365 (1997) (quoting *Romanek-Golub & Co. v. Anvan Hotel Corp.*, 168 Ill. App. 3d 1031, 1041 (1998)). *Quantum meruit* is an equitable theory under which a party can obtain restitution for the unjust enrichment of another, permitting a plaintiff to recover the value of the work performed even if the plaintiff cannot recover under a contract. *Patrick Engineering, Inc. v. City of Naperville*, 2011 IL App (2d) 100695, ¶ 47. More precisely, *quantum meruit* is an expression that describes a contract implied in law that arises from facts and circumstances independent of an agreement between the parties, and therefore, the parties' intentions are disregarded. *Barry Mogul & Associates v. Terrestris Development Co.*, 267 Ill. App. 3d 742, 750 (1994). To state a cause of action for *quantum meruit*, a plaintiff must allege facts showing the performance by the party, the conferral of a benefit on the defendant, and the unjustness of the defendant's retention of that benefit in the absence of compensation. *Roti v. Roti*, 364 Ill. App. 3d 191, 201 (2006). A party cannot, however, recover in *quantum meruit* where a valid contract governs the parties' relationship; in that situation, any remedy must be pursuant to the contract.

Patrick Engineering, 2011 IL App. (2d) 100695, ¶ 46. As such, "*quantum meruit* is based on the implied promise of a recipient of services to pay for those services which are of value to him." *In re Estate of Callahan*, 144 Ill. 2d 32, 40 (1991). In other words, *quantum meruit* relief "is available when one party has benefitted from the services of another under circumstances which, according to the dictates of equity and good conscience, he ought not to retain such benefit." *Barry Mogul & Associates*, 267 Ill. App. 3d at 750.

¶ 13 Initially, we note that the parties dispute in their briefs whether plaintiff is entitled to a jury trial. Although *quantum meruit* is an equitable remedy, plaintiff is seeking money damages. Nonetheless, that is not an issue before us on appeal, and therefore, we will not address that dispute.

¶ 14 Turning to the merits, we conclude that the trial court erred when it granted defendants' section 2-619 dismissal motion. While we are cognizant of the trial court's concern over judicial economy, denying plaintiff the opportunity to bring a *quantum meruit* claim based on the allegations here, which we must presume to be true for the purposes of this appeal (see *Porter*, 227 Ill. 2d at 352), would be contrary to the equitable nature of the doctrine. *Quantum meruit* relief is founded on the implied promise of a recipient who received services of value to pay for those services, and relief is available when the equities demand in light of the specific circumstances. *Barry Mogul & Associates*, 267 Ill. App. 3d 749-50. As we will discuss in greater detail below, plaintiff's claim is premised on the unique circumstances under which the companies were sold, including defendants' prior use of outside firms to assist with the sale and the conversations regarding plaintiff's fee, which included Gary's email comment, "we will work something out and I believe we will all be satisfied." This is the type of alleged wrong that the equitable doctrine of *quantum meruit* was intended to remedy.

¶ 15 In dismissing plaintiff's complaint, the trial court relied on *Millar v. The Lakin Law Firm, P.C.*, 2010 U.S. Dist. LEXIS 60057 (S.D. Ill. Mar. 30, 2010). In *Millar*, the plaintiff was an attorney who began working for the defendants, a law firm and the managing partner of that firm, in May 2000. *Id.* at *2. The parties disputed whether the plaintiff had a valid employment contract with the defendant law firm. The plaintiff received six annual salary increases and bonuses during his tenure with the firm. *Id.* at *5. In May 2006, the firm's supervising attorney for the class action department left the firm and the plaintiff maintained that he became the *de facto* supervisor of that department. Specifically, the plaintiff maintained that he took on the important role "firing up" class action cases and was the "go-to-guy or would advise many attorneys of how to do things in certain cases." *Id.* at *7-*8. The position was not formally recognized by the defendants. In addition, the plaintiff performed very few, if any, administrative actions for the firm's class action department. *Id.* at *8. In December 2009, the plaintiff's employment with the defendant law firm ended. *Id.* at *10.

¶ 16 Thereafter, the plaintiff filed a lawsuit alleging various causes of action, including breach of contract and *quantum meruit*. With respect to the *quantum meruit* claim, the district court granted summary judgment in the defendants' favor. The district court noted that the plaintiff did not allege that he went unpaid during his tenure at the law firm. Instead, he argued that he was not paid the reasonable value of his services in light of his role as the law firm's *de facto* supervisor of the class action department from 2007 through 2008, and that a bonus percentage several points higher than the 1-1.5% rate he was paid was a more accurate value for his services. *Id.* at *29-*30. In granting summary judgment, the district court stated:

> "The Court has a number of problems with this stance. *** [T]he vast majority of *quantum meruit* doctrine is concerned with cases in which the defendant provided *no* compensation

> to an empty-pocketed plaintiff. The instant case obviously does not comport with this body of precedent, as [the plaintiff] was paid both a handsome base salary and a bonus compensation through December 2008. *** If the Court were to buy into [the plaintiff's] *quantum meruit* theory, any employee could hypothetically work for specific compensation and later claim that he should have been paid more post-termination." *Id.* at *30.

The district court further noted that nothing suggested that the plaintiff's bonus compensation was unreasonable or made in bad faith. *Id.* The plaintiff accepted the bonuses in the specified range through his employment with the defendant law firm, and he "fully understood" that the defendants did not wish to deviate from that range. *Id.* at *30-*31. The district court concluded that it would "not allow [the plaintiff] to now act as a Monday morning quarterback on the issue," and that bonuses are at the discretion of the employer. *Id.* at *31.

¶ 17 Although we share the concerns expressed by the court in *Millar*, there are significant distinctions between the claim for *quantum meruit* relief in that case and the instant case. The plaintiff in *Millar* did not allege that he operated under an implied promise with the defendants that he would receive additional compensation for being the "*de facto*" head of the firm's class action department. The court specifically noted that there was nothing to suggest that the defendants paid the plaintiff his bonus in bad faith. *Id.* Instead, the plaintiff's *quantum meruit* claim was premised solely on his belief that he was not paid the reasonable value of his services to the defendants during the course of his employment. We agree with the court in *Millar* that a claim for *quantum meruit* relief should not be available when the theory of relief rests entirely on an employee's claim that he was not adequately compensated.

¶ 18 Plaintiff's allegations in this case, however, present different circumstances. Plaintiff's theory for *quantum meruit* relief is not based solely on his belief that defendants did not adequately compensate him for his work as chief financial officer of the companies. Attached to plaintiff's affidavit in opposition to defendants' motion to dismiss were a series of email exchanges between the parties, including an email plaintiff sent to defendants suggesting a broker fee in the range of $600,000 to $1 million based on the final sale price. Defendants responded to plaintiff by telling him to cease the negotiations, and defendant Gary Rubin later told plaintiff that defendants were upset by plaintiff's request. After more discussions, plaintiff sent Gary Rubin an email with the adjusted projected numbers without his fee, to which Gary Rubin replied "[continue] as planned please" and that "[w]e will work something out and I believe we will all be satisfied." Therefore, unlike the plaintiff in *Millar*, plaintiff's claim to *quantum meruit* relief is that the circumstances under which he brokered and finalized the sale of the companies, including his discussions with defendants about his fee and defendant Gary Rubin's statement that "we will work something out," created an implied promise that he would receive a fee for his efforts. As a result, plaintiff's theory is that the equities and good conscience dictate that defendants should not be able to retain the benefit of plaintiff's labor in bringing the sale of the companies to fruition without compensation. Given the significant distinction, we find *Millar* inapposite.

¶ 19 In reaching our determination, we take caution to emphasize that the alleged circumstances in this case do not present a situation where a disgruntled employee is seeking *quantum meruit* relief on the sole premise that he did not receive the reasonable value for his services to an employer. Rather, plaintiff here is alleging he provided a specific service to his employer that went beyond his normal and expected job responsibilities and, based on the representations made by defendants, there

was an implied promise that he would be compensated for those services. In other words, unlike the plaintiff in *Millar*, plaintiff here is not merely acting as a "Monday morning quarterback." See *id.* at *31. Therefore, in rejecting defendants' first affirmative defense, *i.e.*, that plaintiff is seeking additional compensation for performing his job duties, we are confident that our ruling does not undermine principles of judicial economy.

¶ 20 We now turn to defendants' remaining affirmative defenses. Defendants argue that because plaintiff was chief financial officer of the companies, he had a fiduciary to disclose Metals as a potential buyer the companies. Specifically, defendants argue that "[b]ecause [plaintiff's] fiduciary duties required him to disclose the [Metals] opportunity to the [c]ompanies, the fact that he fulfilled his duties by making the disclosure cannot, in itself, create any obligation to pay him for that disclosure."

¶ 21 Defendants' argument is unavailing. As discussed above, plaintiff's theory for *quantum meruit* relief is not merely based on him disclosing to defendants that Metals was interested in purchasing the companies. While that is one aspect of his theory, plaintiff's claim also rests on the efforts he put into bringing the sale to fruition and defendants' representations to him regarding a fee. Moreover, even if plaintiff breached a fiduciary duty by not disclosing Metals as a potential purchaser of the companies, prior Illinois reviewing courts have held that a plaintiff's breach of a fiduciary duty does not preclude recovery under *quantum meruit*. See *Romanek-Golub*, 168 Ill. App. 3d at 1044 ("[I]t is not at all apparent that the defense of breach of fiduciary *** would have barred plaintiffs' recovery under *quantum meruit*.").

¶ 22 Similarly, we reject defendants' argument that plaintiff is barred from seeking *quantum meruit* relief pursuant to the "unclean hands" doctrine. Defendants argue that plaintiff's statement

to Gary Rubin that the provision in Metals' letter of intent stating "no broker's or consulting fee will be owed or due" only applied to third parties demonstrates that plaintiff was aware that he was working as an employee when brokering the sale and not as a third party. In short, defendants argue "[plaintiff] cannot claim that he was acting outside the scope of his employment—in essence as a third party—while he was negotiating the *Metals* transaction *** and also claim that his representation that he was not a third party was true when made."

¶ 23 We disagree. We recognize that it is a fundamental rule that a person seeking equitable relief cannot take advantage of his or her own wrong, or stated differently, "he who comes into equity must come with clean 'hands.' " *Ellis v. Photo America Corp.*, 113 Ill. App. 3d 493, 498 (1983). In this case, however, whether plaintiff's statement to defendant Gary Rubin demonstrates that plaintiff misled defendants because he knew the services he rendered were part of his employment, or whether plaintiff reasonably thought the services he provided were beyond the scope of his employment is not appropriately decided on a section 2-619 motion to dismiss. See *id.* at 498-99 (holding that the trial court properly rejected an "unclean hands" defense pursuant to the evidence produced at trial). In addition, we emphasize that the "unclean hands" doctrine is not favored by Illinois courts and should not prevent a court from doing justice. *Id.* at 498.

¶ 24 For the foregoing reasons, we reverse the judgment of the circuit court of Winnebago County and remand for further proceedings consistent with this order.

¶ 25 Reverse and remanded.