2013 IL App (2d) 120737
No. 2-12-0737
Order filed May 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HOLLYWOOD CASINO-AURORA, INC.,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-CH-49
	)	
AURORA METROPOLITAN EXPOSITION	)	
AUDITORIUM AND OFFICE BUILDING	)	
AUTHORITY, a body politic,	)	Honorable
	)	Thomas E. Mueller,
Defendant-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justice McLaren and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing the complaint on the ground that it failed to state a cause of action for restitution and on the ground that it was time barred by the Tort Immunity Act; judgment reversed and cause remanded with directions to reinstate the complaint.

¶ 2 Plaintiff, Hollywood Casino-Aurora, Inc., appeals from the order of the circuit court of Kane County dismissing its complaint in favor of defendant, Aurora Metropolitan Exposition Auditorium and Office Building Authority. Plaintiff filed the complaint alleging that defendant had been unjustly enriched by the distribution of $709,024 from a trust fund that had been established for the purpose of administering the repayment of certain revenue bonds. The distribution was made after

the bonds had been retired, and it represented the balance of funds remaining in the trust after the bonds had been paid. Defendant filed a combined motion to dismiss plaintiff's complaint under sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2010)). Defendant argued that the existence of the parties' contracts precluded any unjust enrichment claims, that the parties' agreements clearly provided that the monies remaining in a reserve fund are defendant's, and that neither of the agreements gives plaintiff any right to or interest in the reserve fund. In addition, as the claim arose when the monies were transferred to defendant in January 2010, defendant argued that the filing of the complaint in January 2012 was time barred under the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/8-101(a) (West 2010)). The trial court granted defendant's combined motion and entered an order dismissing plaintiff's complaint on both grounds, but it gave plaintiff leave to amend. Plaintiff elected not to amend, requesting that the order be made final and appealable.

¶ 3 Plaintiff now timely appeals, contending that the trial court erred in dismissing the complaint, as it properly states a cause of action for unjust enrichment. Plaintiff further contends that the Tort Immunity Act is inapplicable to any claim brought against a governmental body where the relief requested is something other than damages. We agree with plaintiff's contentions. Accordingly, we reverse the trial court's judgment on both grounds and remand the cause with instructions that plaintiff's complaint be reinstated.

¶ 4 FACTS

¶ 5 Plaintiff is an Illinois corporation engaged in the gaming business. Its principal place of business is located in Aurora, Illinois (City). Defendant is a body politic organized under the laws of the State of Illinois, with its principal place of business also located in Aurora. Defendant is a

special purpose municipal corporation organized to undertake office, exposition, auditorium, and related functions in the City and operates the North Island Center office building and Paramount Arts Centre. Plaintiff participated in the City's redevelopment efforts by operating a casino along the river that runs through the City.

¶ 6 Complaint

¶ 7 Because this case arises in the context of an order granting a section 2-615 and 2-619 motion to dismiss, we accept all well-pleaded facts in the complaint as true, as is required when deciding a section 2-615 and 2-619 motion to dismiss (see *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003)). Accordingly, we set forth the following allegations of the complaint.

¶ 8 On June 12, 1995, plaintiff and defendant entered into a contract, entitled the North Island Center Expansion and Redevelopment Agreement (Redevelopment Agreement), and a lease agreement as part of defendant's plan to renovate a building known as the North Island Center to improve its banquet facilities, meeting rooms, and parking facilities.

¶ 9 The substance of the Redevelopment Agreement was to obligate plaintiff to demolish the existing parking structure at the North Island Center, construct and operate a new parking structure in its stead, and pay all costs associated with that project. The North Island Center redevelopment project was to be "funded by a combination of revenue bonds issued by [defendant] (hereinafter 'the Bonds') and additional financial commitments made by [plaintiff] *** , which Bonds will be repaid from the leasehold payments made by [plaintiff] to [defendant] under the lease."

¶ 10 On July 7, 1995, defendant passed Ordinance 77-95 (the ordinance) to provide for the issuance of $11.5 million in taxable revenue bonds to provide for the construction of a parking deck

and related improvements at North Island Center. Pursuant to the terms of the ordinance, the Bonds "are payable solely, first, from the revenues from the Lease (with [plaintiff]) and any subsequent lease relating to the [redevelopment project] and secondarily from other revenues of [defendant]."

¶ 11 On August 1, 1995, defendant entered into an Indenture Trust with Harris Trust and Savings Bank (Harris) in order to facilitate the issuance of the tax revenue bonds in accordance with the Redevelopment Agreement and Ordinance 77-95. Pursuant to the Indenture Trust, the $11.5 million proceeds of the sale of the taxable revenue Bonds would be used as follows: (1) $10.5 million to be used for the cost of demolition and construction; (2) approximately $300,000 to pay the expenses associated with the issuance of the Bonds; and (3) approximately $700,000 to be used to establish the "Debt Service Reserve Fund."

¶ 12 The purpose of the Debt Service Reserve Fund was to provide a source for the payment of outstanding bonds that were due and payable for which funds were not otherwise available for that purpose from the payments made by plaintiff. Harris, as trustee under the Indenture Trust, would act as the repository for the sums paid by plaintiff to defendant, which were deposited by defendant into the Bond Fund at Harris. Harris would then make payments, as required, out of the Bond Fund to bondholders whose bonds had matured, come due, or were otherwise properly presented for payment. Once all bonds were paid in full or deemed paid in full, the Indenture Trust would terminate, and any unused funds held on account by the trustee, Harris, would be returned to defendant.

¶ 13 On July 1, 2003, defendant entered into a new Indenture Trust (2003 Indenture Trust) with BNY-Midwest Trust Company (BNY), establishing BNY as the trustee in place of Harris. Pursuant to the 2003 Indenture Trust, the Debt Service Reserve Fund account was set at $710,629. The

purpose of the Debt Service Reserve Fund was not changed from the original Indenture Trust with Harris, but the 2003 Indenture Trust added the following:

> "After each January 1 Bond Payment Date, the Trustee shall make an accounting of the amount on deposit in the Debt Service Reserve Fund. To the extent amounts on deposit in the Debt Service Reserve Fund on such accounting date exceed the Debt Service Reserve Fund Requirement, the Trustee shall transfer such amount in excess of the Debt Service Reserve Fund Requirement to the [defendant], free and clear of the lien of this Indenture, to be distributed by the [defendant] in the manner described in the Lease."

It is unknown whether any such funds were returned to defendant prior to 2010 when the bonds were paid in full.

¶ 14 The 2003 Indenture Trust also provided that "[w]hen all Bonds have been paid in full or deemed paid in full *** all moneys *** in any fund or account held by the Trustee hereunder shall be paid to the Authority." Plaintiff was not a direct party to either indenture trust and was never asked to approve or accept those agreements.

¶ 15 On June 12, 1995, plaintiff and defendant entered into a 30-year lease (Redevelopment Lease). Pursuant to the terms of the lease, plaintiff was obligated to pay both basic rent, an amount for the occupancy of the garage, and supplemental rent calculated to pay off obligations pursuant to the issuance of the bonds. The supplemental rent was to cease upon full repayment of the bonds, as it states that "Supplemental Rent shall be reduced to zero upon full repayment of the Bonds." The Redevelopment Lease is silent as to the distribution of funds returned by the trustee to defendant after successful repayment of the bonds without default by plaintiff.

¶ 16 On July 8, 2003, the Redevelopment Lease was amended, which did little to change the terms and conditions of the Redevelopment Lease other than to adjust the timing and proportion of the supplemental rent payments to correspond with the quarterly payments set forth in the 2003 Indenture Trust, where they had previously been semi-annual payments to correspond with the original Indenture Trust with Harris. As in the original, the first amendment to the lease provided that supplemental rent was to be reduced to zero upon full repayment of the bonds.

¶ 17 Plaintiff made all basic rent and supplemental rent payments required by the lease, repaying the debt incurred by the issuance of the taxable revenue bonds in the entire amount of $11.5 million, and including the funds that had been used to establish the Debt Service Reserve Fund.

¶ 18 On January 4, 2010, the trustee made the final payment of principal and interest on the bonds, and all bonds issued pursuant to Ordinance 77-95 were considered paid in full. There remained $709,024 in the Debt Service Reserve Fund. As required by the 2003 Indenture Trust, on January 6, 2010, the successor trustee to Harris Bank, BNY, issued a check to defendant for $709,024, which represented the balance remaining in the Debt Service Reserve Fund.

¶ 19 On May 6, 2010, Rodney Phillipe, as vice president of plaintiff, sent a letter to one of defendant's attorneys, demanding that defendant pay to plaintiff the $709,024 that it had received from BNY. The letter stated that (a) plaintiff's obligation to pay supplemental rent had ceased when the balance on the bonds had been reduced to $709,024, the amount sitting in the Debt Service Reserve Fund; (b) the Debt Service Reserve Fund, rather than plaintiff's supplemental rent payments, should have been used to make the last $709,024 of bond payments; and (c) defendant had been unjustly benefitted in the amount of $709,024 as a result of the Debt Service Reserve Fund not being used for that purpose.

¶ 20 On January 9, 2012, plaintiff filed the complaint against defendant, alleging that defendant had been unjustly enriched by its receipt of the $709,024 distribution from the Debt Service Reserve Fund, and plaintiff sought restitution from defendant in that amount. Plaintiff alleges that, to date, defendant has refused to pay plaintiff any of the funds returned to it by BNY following the successful repayment of the full amount of $11.5 million; that defendant "has thereby been unjustly enriched in the amount of [$709,024];" and that "[u]nder the circumstances of this transaction, it would be unjust and inequitable for [defendant] to be allowed to retain the benefit of the [$709,024] returned to [defendant] as the results [*sic*] of payments made by [plaintiff]." Plaintiff requests a judgment in its favor in the amount of $709,024, "as and for restitution of the amount by which said Defendant has been unjustly enriched."

¶ 21 Motion to Dismiss

¶ 22 On March 7, 2012, defendant filed a combined motion to dismiss plaintiff's complaint pursuant to sections 2-615 and 2-619 of the Code. Defendant argued that plaintiff's complaint should be dismissed, pursuant to section 2-615, because it failed to state a cause of action for restitution. Defendant also argued, pursuant to section 2-619, that plaintiff's complaint had not been filed within one year of the time that its cause of action had accrued, and therefore it was time barred by the provisions of section 8-101(a) of the Tort Immunity Act.

¶ 23 Plaintiff responded that its complaint contained all of the allegations necessary to state a cause of action for unjust enrichment and that it was seeking restitution from defendant rather than damages. Plaintiff further argued that the Tort Immunity Act, by its express terms, is inapplicable to any claim brought against any governmental body where the relief requested is something other than damages.

¶ 24 At the conclusion of the hearing on defendant's motion, the trial court entered an order which (a) dismissed plaintiff's complaint under section 2-615 on the grounds that the complaint failed to state a cause of action for restitution; (b) dismissed the complaint under section 2-619 on the grounds that it was time barred by the Tort Immunity Act; and (c) granted plaintiff leave to file an amended complaint.

¶ 25 Plaintiff filed a motion to clarify and confirm the trial court's ruling and to make the dismissal final and appealable. Plaintiff informed the court that it wished to stand on its original complaint rather than amend the complaint. Plaintiff requested an order to clarify the grounds for the entry of the order of dismissal, and requested that the court order that the dismissal be final. Thereafter, on June 22, 2012, the trial court entered an order stating that the dismissal of May 10, 2012, was final "as of today's date." Plaintiff timely appeals.

¶ 26 ANALYSIS

¶ 27 Standard of Review

¶ 28 Because plaintiff now challenges the circuit court's decision to grant defendant's motion to dismiss his complaint, we begin by reviewing the standards for our review of that decision. A motion to dismiss may be brought under either section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) or section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)). A dismissal under section 2-615 admits all well-pleaded facts and attacks the legal sufficiency of the complaint. 735 ILCS 5/2-615 (West 2010); *La Salle National Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 790 (2001). A motion to dismiss under section 2-619, on the other hand, admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Krilich v.*

American National Bank & Trust Co. of Chicago, 334 Ill. App. 3d 563, 569-70 (2002); 735 ILCS 5/2-619(a)(9) (West 2010). A motion to dismiss under either section 2-615 or section 2-619 admits all well-pleaded allegations in the complaint and reasonable inferences to be drawn from the facts. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 184 (1997). Our review of a dismissal under either section is *de novo*. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003).

¶ 29 Dismissal under Section 2-615

¶ 30 Plaintiff contends that the trial court erred by granting the motion to dismiss its complaint pursuant to section 2-615 for failure to state a cause of action for restitution. Restitution is an equitable remedy and the basis of liability is unjust enrichment. *Independent Voters v. Illinois Commerce Commission*, 117 Ill. 2d 90, 98 (1987). Restitution is compelled where an adequate legal remedy does not exist for the aggrieved party. *Id.* We do not believe that plaintiff pleaded restitution as an independent cause of action, and we are persuaded that the trial court confused the remedy of restitution with the cause of action for unjust enrichment. The real issue is whether the allegations of plaintiff's complaint properly set forth a cause of action for unjust enrichment.

¶ 31 The doctrine of unjust enrichment underlies a number of legal and equitable actions and remedies, including restitution. *HPI Helath Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160 (1989). In order to state a cause of action for unjust enrichment, a plaintiff must plead 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. *Id*.

¶ 32 Plaintiff specifically alleges that it overpaid defendant by $709,024; that the lease between them does not contain any provision addressing the eventuality of such an overpayment; that the

overpayment resulted in defendant pocketing $709,024; and that it is unjust and inequitable for defendant to keep that money. In sum, plaintiff alleges that defendant has unjustly retained a benefit to plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of equity. Clearly, the complaint contains all of the allegations required to state a cause of action for unjust enrichment.

¶ 33 In addition to arguing that the complaint fails to allege a cause of action for restitution, defendant argues that, because there is a specific contract governing the relationship between plaintiff and defendant, plaintiff cannot maintain a cause of action for unjust enrichment. See *People v. E&H Hauling, Inc.*, 153 Ill. 2d 473, 497 (1992). This broad principle may be true, but it does not fit the present situation, as neither the agreement nor the lease address the reserve fund specifically or overpayments generally. The trust agreement specifically allows for the fund to be returned to defendant, but plaintiff is not a party to that agreement.

¶ 34 In defendant's 2-615 motion to dismiss, it states that "[t]he absence of any refund language in the lease, *** or otherwise indicates the parties' agreement that refunds were not part of their bargain." This argument is also specious because, accepting the pleaded facts as true, there is no basis for defendant to keep the overpayment. Moreover, where a contract between a plaintiff and defendant exists but does not address the issue that is in dispute between the parties, the existence of the contract does not prevent the plaintiff from successfully maintaining a cause of action for unjust enrichment. *Stark Excavating Inc. v. Carter Construction Services, Inc.*, 2012 IL App (4th) 110357, ¶ 38.

¶ 35 In any event, defendant's argument that the contractual relationship between plaintiff and defendant bars an unjust enrichment cause of action is an improper basis for a section 2-615 motion

to dismiss. This argument either would be an affirmative matter pursuant to a section 2-619 motion or an argument on a summary judgment motion where there is no material issue of fact; it is not a basis to attack the legal sufficiency of the complaint.

¶ 36 Dismissal under Section 2-619

¶ 37 Plaintiff contends that the trial court also erred in dismissing the complaint, pursuant to section 2-619, on the basis that the complaint was barred by the one-year statute of limitations set forth in section 8-101(a) of the Tort Immunity Act (745 ILCS 10/8-101(a) (West 2010)).

¶ 38 Defendant's response is founded on the argument it raises in the motion to dismiss pursuant to section 2-615, in which it argues that plaintiff's claim is time barred because the cause of action "lacks the essential elements of an unjust enrichment claim seeking restitution." While we found that plaintiff's claim clearly sets forth the elements of a cause of action for unjust enrichment, the decision in *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248 (2004), nevertheless resolves whether the complaint is barred by the Tort Immunity Act.

¶ 39 In *Raintree*, a village ordinance required the plaintiffs to pay "impact fees" in return for each building permit the village issued to them. *Id*. at 252. The plaintiffs sought a declaratory judgment that the village lacked the statutory and constitutional authority to enact such an ordinance, and they also sought a refund of the impact fees they had paid to the village. *Id*. at 253. The village moved for the dismissal of the amended complaint, pursuant to section 2-619(a)(5) of the Code (see 735 ILCS 5/2-619(a)(5) (West 2010)), arguing that the plaintiffs had not brought their action within the one-year period of limitation in section 8-101(a) of the Tort Immunity Act (see 745 ILCS 10/8-101(a) (West 2010)). *Id*. at 253. The trial court granted the motion, but we reversed the trial court's judgment. *Id*. (citing *Raintree Homes, Inc. v. Village of Long Grove*, 335 Ill. App. 3d 317, 321

(2002)). Although the supreme court did "not adopt or approve of [our] reasoning that the Tort Immunity Act categorically exclude[d] actions that [did] not sound in tort" (*Raintree*, 209 Ill. 2d at 261), the supreme court affirmed our judgment for a different reason. It held that the "[p]laintiffs' claim [was] an action which [sought] 'relief other than damages,' as set forth in the first sentence of section 2-101, and [was], therefore, excluded from the [Tort Immunity] Act." *Id*. at 256 (quoting 745 ILCS 10/2-101 (West 2002)).

¶ 40 The first sentence of section 2-101 provides: "Nothing in this Act affects the right to obtain relief other than damages against a local public entity or public employee." 745 ILCS 10/2-101 (West 2010). Because the plaintiffs in *Raintree* had brought a declaratory judgment action seeking restitution of the impact fees they had paid the village, and were not seeking damages, the supreme court held that section 2-101 made the Tort Immunity Act inapplicable to their claim. *Id*. at 256.

¶ 41 In the present case, plaintiff brings an action for unjust enrichment and it seeks restitution. As the supreme court explained in *Raintree*, restitution is measured by the defendant's unjust gain, whereas damages are measured by the plaintiff's loss. *Id*. at 257. Plaintiff's lawsuit seeks an award of restitution because its seeks the restoration of the sum of money in the possession of defendant, which in good conscience belongs to plaintiff. If the lawsuit is ultimately successful, the amount of the award will be measured by defendant's unjust gain, rather than plaintiff's loss. See *Id*. at 257. Thus, because plaintiff's complaint seeks restitution and not damages, the Tort Immunity Act does not apply. See 745 ILCS 10/2-101 (West 2010). Accordingly, we determine that the trial court erred in dismissing plaintiff's complaint on the basis that it was barred by the one-year statute of limitations in section 8-101(a) of the Tort Immunity Act.

¶ 42 Amending the Complaint

¶ 43 Because we reverse the trial court's determination, we need not address whether the cause should be remanded with instructions to the trial court to grant leave to plaintiff to file an amended complaint.

¶ 44 CONCLUSION

¶ 45 For the preceding reasons, we reverse the judgment of the circuit court of Kane County and remand the cause for further proceedings consistent with this opinion, including instructions to reinstate plaintiff's complaint.

¶ 29 Reversed and remanded with directions.