2016 IL App (2d) 160073-U
No. 2-16-0073
Order filed October 17, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GREGORY W. BAIRD, Plaintiff-Appellee, v. OGDEN LINCOLN MERCURY, INC., OGDEN CHEVROLET, INC., MARC IOZZO, individually and d/b/a OGDEN AUTO GROUP, Defendants (Marc Iozzo, individually and d/b/a Ogden Auto Group, defendants-appellants).	)	Appeal from the Circuit Court of Du Page County. No. 11-CH-3899 Honorable Terence M. Sheen, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The March 19, 2012, order, in which Ogden Lincoln and Ogden Chevrolet confessed to the entry of a judgment against them, jointly and severally, only as to count III for *quantum meruit*, did not merge all other pending counts; the issue concerning the trial court's refusal to certify a question for interlocutory appeal is moot; and the trial court properly denied Iozzo's motion for summary judgment as to counts I and II for breach of contract; affirmed.

¶ 2 Plaintiff, Gregory W. Baird, filed a five-count complaint against defendants, Ogden Lincoln Mercury, Inc., Ogden Chevrolet, Inc., and Marc Iozzo, individually and doing business

as Ogden Auto Group, resulting from the failure to repay two loans. Ogden Lincoln and Ogden Chevrolet confessed to the entry of a judgment against them as to count III for *quantum meruit*, and the trial court entered the order on March 19, 2012. The trial court denied Iozzo's motion for summary judgment as to counts I through IV and granted it as to count V. Thereafter, the court granted Baird's motion for judgment on the pleadings against Iozzo, individually and doing business as Ogden Auto Group, based on Iozzo's judicial admissions of his personal liability for breach of contract, as set forth in counts I and II. Baird voluntarily dismissed count IV for fraudulent misrepresentation.

¶ 3 On appeal, Iozzo contends (1) the March order disposing of count III against Ogden Lincoln and Ogden Chevrolet merged all other pending counts and was a final order as to all counts; (2) the trial court abused its discretion by refusing to certify a question for interlocutory appeal; and (3) the trial court erred in denying his summary judgment motion on count I and II for breach of contract. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The following relevant facts are undisputed. Iozzo owned several automobile dealerships in the Chicago area, including but not limited to Ogden Lincoln and Ogden Chevrolet, which were both Illinois corporations. Iozzo has done business under the name Ogden Auto Group, which is not a registered entity in Illinois.

¶ 6 A. 2006 Agreement

¶ 7 In late 2006, Iozzo asked Baird for a loan. Iozzo told Baird that the loan would be used for his business, Ogden Auto Group. Iozzo stated that he intended the loan to finance a "floor plan" of Ford automobiles. Baird believed that Iozzo would repay the loan with funds generated from the sale of automobiles, which were funded by the floor plan. Baird orally agreed to lend

Ogden Auto Group $2 million with the condition that the money would be callable with 24-hours' business notice and that interest would be paid at an amount of 1% over the prime interest rate as published in the Wall Street Journal. Baird wired $2 million to Ogden Lincoln. On December 20, 2006, Ogden Auto Group transmitted a confirmation letter to Baird memorializing the terms of the agreement (2006 Agreement). Iozzo signed the letter as "President" of Ogden Auto Group. In the letter, Iozzo stated that the loan would be placed in the "Ford Cash Management Account."

¶ 8 Baird alleged that by November 2008, Ogden Lincoln and/or Ogden Chevrolet held $2 million of Baird's funds pursuant to the 2006 Agreement. Iozzo, through various business entities, made interest payments on the loan, but the payments ceased in June 2010. Neither Iozzo nor any other business entity repaid the loan principal of $2 million.

¶ 9 B. 2009 Agreement

¶ 10 In April 2009, Iozzo asked and Baird agreed to lend Ogden Auto Group an additional $4 million. In return, Iozzo, as president of Ogden Auto Group, agreed to pay 9% annual interest on a monthly basis and to pay the loan in full by April 9, 2010. On May 1, 2009, Baird wired the money to Ogden Chevrolet. That same day, Iozzo transmitted a confirmation letter to Baird on Ogden Auto Group letterhead, memorializing the terms of the agreement (2009 Agreement).

¶ 11 Baird received monthly interest payments, but in June 2010, the payments ceased. Neither Iozzo nor any other business entity repaid the $4 million loan by April 9, 2010.

¶ 12 C. Court Proceedings

¶ 13 On August 17, 2011, Baird filed a five-count complaint. Counts I and II alleged breach of contract against Iozzo, individually and doing business as Ogden Auto Group, based on the 2006 and 2009 Agreements. Count III, pled in the alternative to counts I and II, raised a claim of

quantum meruit against Ogden Lincoln and Ogden Chevrolet. Count IV alleged fraudulent misrepresentation against Iozzo. Count V alleged a claim of consumer fraud against Iozzo.

¶ 14 As a consequence of a settlement conference, Ogden Lincoln and Ogden Chevrolet confessed to the entry of a judgment against them, jointly and severally, but only as to count III for *quantum meruit* for the sum of $6,787,608. The order was entered on March 19, 2012. The March order states "[t]his judgment constitutes a final and appealable order," and it is stamped "case closed." However, the order does not refer to the remaining counts against Iozzo, individually or doing business as Ogden Auto Group. Citation proceedings commenced against Ogden Lincoln and Ogden Chevrolet, but those proceedings were discharged on October 31, 2013, pending a resolution of the remaining counts against Iozzo, individually and doing business as Ogden Auto Group.

¶ 15 On July 8, 2015, Iozzo filed a motion for summary judgment, which was granted in part and denied in part. The trial court granted the motion in favor of Iozzo as to count V (consumer fraud) but denied it as to counts I, II (breach of contract), and IV (fraudulent misrepresentation). The court found count III was rendered moot based on the March order.

¶ 16 On December 29, 2015, Baird filed a motion for judgment on the pleadings as to counts I and II, which was granted on the basis of Iozzo's judicial admissions in his verified answers. Baird voluntarily dismissed count IV. Iozzo timely appeals.

¶ 17 II. ANALYSIS

¶ 18 A. March 19, 2012, Order

¶ 19 Iozzo first challenges the March 19, 2012, order disposing of count III against Ogden Lincoln and Ogden Chevrolet. The March order, which followed a settlement conference, was based on a judgment of confession against Ogden Lincoln and Ogden Chevrolet, jointly and

severally, for the *quantum meruit* claim set forth in count III. The order states: "This judgment constitutes a final and appeallable [*sic*] order," and was stamped "case closed." The order does not refer to any of the other remaining counts against Iozzo, individually or doing business as Ogden Auto Group, and a judgment on the remaining counts was not rendered until January 21, 2016.

¶ 20 Iozzo argues that the March order merged all other pending counts and was a final order as to all counts because (1) there was no operative Supreme Court Rule 304(a) (eff. March 8, 2016) language making the order subject to an interlocutory appeal; (2) Baird began supplementary proceedings, which are only allowed on a final judgment; and (3) Baird cannot proceed on both *quantum meruit* and breach of contract in the same action.

¶ 21 The fact that the trial court declared that the March order was "final and appeallable [*sic*]," closed the case, and allowed for supplementary proceedings to begin does not make a non-final order final. See *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 544 (2011) ("a circuit court's declaration that an order is 'final and appealable' amounts to nothing more than a non-binding interpretation."). Here, the order only disposed of one count against two named defendants. The order left multiple counts against Iozzo, individually and doing business as Ogden Auto Group unresolved.

¶ 22 Contrary to Iozzo's assertion, Baird did not abandon his breach of contract claims by accepting the judgment on his *quantum meruit* claim. It is true that a plaintiff cannot pursue a quasi-contractual claim where there is an enforceable express contract between the parties. See, *e.g.*, *Zadrozny v. City Colleges of Chicago*, 220 Ill. App. 3d 290, 295 (1991). However, this maxim does not apply here because Baird sought recovery under *quantum meruit* against Ogden Lincoln and Ogden Chevrolet. He had no express contracts with these entities. Baird sought

recovery under a breach of contract theory against the parties with whom he had contracted. There is nothing improper in seeking recovery under different theories against different parties. See *Maloney v. Pihera*, 215 Ill. App. 3d 30, 46 (1991) (plaintiff properly brought unjust enrichment claim regarding one transaction while attempting to recover under a breach of contract theory for a separate transaction).

¶ 23 Section 2-1301(a) of the Illinois Code of Civil Procedure (735 ILCS 5/2-1301(a) (West 2010)) contemplates the possibility of multiple judgments in the same cause of action. As Baird points out, the March order only disposed of a single count against two of the named defendants. Had a party attempted to appeal from that order, the appellate court would have lacked jurisdiction, as it clearly adjudicated fewer than all of the claims and did not adjudicate the rights and liabilities of all parties. See *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 464 (1990).

¶ 24 Iozzo's argument that counts I and II against him merged with count III against different defendants is not well taken. In *Lincoln Park Federal Savings and Loan Ass'n. v. Carrane*, 192 Ill. App. 3d 188, 192 (1989), the First District Appellate Court held that merger did not apply where the judgment order previously obtained was in the same action, the order was obtained against another party defendant, and the order was not a final judgment. The same holding applies in this case. Accordingly, we reject Iozzo's arguments.

¶ 25 B. The October 31, 2013, Order

¶ 26 Iozzo next contends that the trial court erred in denying his motion which, pursuant to the procedure set forth in Illinois Supreme Court Rule 308 (eff. Jan. 1, 2015), asked for permission to seek appellate review of the March order. As Baird points out, however, this issue is moot because a final judgment has been entered in this cause and the correctness of the trial court's

ruling could be addressed directly. Furthermore, even if this court held that the trial court erred in denying its Rule 308 motion, we could not award any practical relief to Iozzo. See *Millburn Mutual Insurance Co. of Lake Villa v. Glaze*, 86 Ill. App. 3d 1055, 1065 (1980). Thus, we will not address the merits of this argument.

¶ 27 C. Summary Judgment

¶ 28 In the alternative, Iozzo argues that the trial court erred in denying his motion for summary judgment as to counts I and II for breach of contract. Iozzo contends that summary judgment should have been entered in his favor as to those counts because "it is exactly clear that the line-of-credit agreement" for the 2006 Agreement was between Baird and Ogden Lincoln and that the 2009 Agreement was between Baird and Ogden Chevrolet. Iozzo asserts that he should not be held personally liable by virtue of acting on behalf of Ogden Auto Group, a non-existent entity, when the existence of corporate members of the group and their identities are disclosed on the face of both agreements. We find Iozzo's contentions lack merit.

¶ 29 Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). Our review of the disposition of a case on a summary judgment is *de novo*. *National City Mortgage v. Hillside Lumber, Inc.*, 2012 IL App (2d) 101292, ¶ 5.

¶ 30 Iozzo admitted in his verified answers that he entered into the 2006 Agreement and 2009 Agreement on behalf of Ogden Auto Group. Iozzo also admitted that payments for both loans ceased. As president of Ogden Auto Group, Iozzo transmitted confirming letters to Baird on December 20, 2006, and on May 1, 2009, both on the letterhead of Ogden Auto Group,

confirming the terms of the 2006 and 2009 Agreements, as well as acknowledging the receipt of the two loans from Baird.

¶ 31 Judicial admissions conclusively bind a party. *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 115. "Judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Serrano v. Rotman*, 406 Ill. App. 3d 900, 907 (2011). Further, judicial admissions are defined as "deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *Smith v. Pavlovich*, 394 Ill. App. 3d 458, 468 (2009). A statement is not a judicial admission if it is a matter of opinion, estimate, appearance, inference, or uncertain summary. *Id*. Any admission contained in a verified pleading, which is not the product of mistake or inadvertence, is a binding, judicial admission.[1] *Nissan Motor Acceptance Corp. v. Abbas Holding I, Inc.*, 2012 IL App (1st) 111296, ¶ 19. To determine what constitutes a judicial admission, it must be decided under the circumstances in each case, and before a statement can be held to be such an admission, it must be given a meaning consistent with the context in which it is found. *Lowe v. Kang*, 167 Ill. App. 3d 772, 776 (1988). A party cannot create a factual dispute by contradicting a prior judicial admission. *Hansen v. Ruby Construction Co.*, 155 Ill. App. 3d 475, 480 (1987).

¶ 32 There is no dispute Iozzo personally entered into both agreements with Baird on behalf of Ogden Auto Group. Nor do the parties dispute that Ogden Auto Group was never a legally recognized corporate entity. An unincorporated business is an asset of the responsible individual and the liabilities of that business are also that same person's liabilities. See *Vernon v. Schuster*, 179 Ill. 2d 338, 347-48 (1997). As stated by the appellate court in *Vernon*:

[1] Iozzo does not maintain that his admissions were the product of mistake or inadvertence.

> "[A] sole proprietorship has no legal identity separate from that of the individual who owns it. The sole proprietor may do business under a fictitious name if he or she chooses. However, doing business under another name does not create an entity distinct from the person operating the business. The individual who does business as a sole proprietor under one or several names remains one person, personally liable for all his or her obligations." *Id*.

Accordingly, under Illinois law, it makes no difference whether Iozzo entered into the loan agreements on behalf of Ogden Auto Group, as he would be personally liable for breach of those agreements.

¶ 33 Finally, it is insignificant that the funds were wire transfers made to the bank accounts of specified legal entities and may have been diverted to the other legal entities of Ogden Lincoln and Ogden Chevrolet. Iozzo ignores his own admissions. Furthermore, Madeline Kiedysz, the individual who wired the money, testified that Iozzo himself specified where the money was to be wired. The parties agreed that the payments for both contracts ceased, and therefore, as pointed out by the trial court, the issue is not whether a breach occurred, but rather who bears the liability for the breach of the agreements. Clearly, Iozzo's admissions do not change the nature of the agreements merely because the funds were directed to a real corporation or a particular bank account.

¶ 34 In sum, the admissions made by Iozzo in his verified answers constituted binding judicial admissions. Consequently, the memorialization of the agreements written on Ogden Auto Group letterhead, signed by Iozzo in his capacity as president of the Ogden Auto Group, and the judicial admissions made by Iozzo in the verified answers is proof of his personal liability, as a matter of law. Additionally, it is undisputed that the loans made pursuant to the 2006 Agreement and the

2009 Agreement were never repaid by Iozzo, and thus, he is liable for the breach of both the agreements. Accordingly, the trial court did not err in denying Iozzo's motion for summary judgment on counts I and II, as the pleadings, depositions, and admissions on file, when viewed in the light most favorable to Baird, show that there is no genuine issue of material fact and that Baird is entitled to judgment as a matter of law. Although Iozzo does not challenge the trial court's order granting Baird's motion for judgment on the pleadings, based on the allegations of the complaint and Iozzo's admissions in his verified answers, we find the trial court properly granted Baird's motion.

¶ 35 III. CONCLUSION

¶ 36 Based on the preceding, the judgment of the Circuit Court of Du Page County is affirmed.

¶ 37 Affirmed.