2013 IL App (5th) 120261-U

CONSOLIDATED NOS. 5-12-0261 & 5-12-0437

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

VINOD C. GUPTA, Plaintiff-Appellant, v. AIRBRUSH ALLEY, BATH & BODY WORKS, CLAIRE'S BOUTIQUE, COFFEE BREAK, COMBINED MARTIAL ARTS, COUNTRY GOURMET, COUNTRY PORCH, COVER CRAZY, DEB SHOP, EARTHBOUND TRADING CO., FASHION BUG, FINISHLINE, FISH TALES PET SHOP, FOX'S FLOWERS, FUJIYAMA, GAMESTOP, GNC, GUSTO DI ITALIA, HEARTLAND REGIONAL MEDICAL, HIBBETT SPORTS, HIGHLIGHTS SALON & GIFTS, HONG KONG BUFFET, ILLINOIS STAR CENTRE, LLC, INCREDIBLE COOKIE, KAS WINDOWS, KAY JEWELERS, LANE BRYANT, LOCKHART & CO., MAJESTIC RESTORATION SERVICES, MAN-TRA-CON, MASTERCUTS, ORIENTAL WORLD, PAYLESS SHOE SOURCE, PIRATE PETE'S, REGIS HAIRSTYLES, RSP HEATING & COOLING, SHOE SENSATION, SISTERS THREE, SOUTHERN ILLINOISAN, SUBWAY, THE HEARING PLACE, THE LEARNING ZONE, THE SALUKI CONNECTION, THINGS REMEMBERED, THREE CHICKS, WORLDWIDE TRAVEL, and WPSD TV-CHANNEL 6, Defendants-Appellees.	)	Appeal from the Circuit Court of Williamson County. No. 11-CH-97 Honorable James R. Moore, Judge, presiding.

VINOD C. GUPTA, Plaintiff-Appellant,	)	Appeal from the Circuit Court of Williamson County.

v.	)	No. 11-CH-63
	)	
SEARS, ROEBUCK & CO.,	)	
	)	
Defendant-Appellee,	)	
	)	
and	)	
	)	
GE COMMERCIAL FINANCE BUSINESS PROPERTY CORPORATION,	)	
	)	
	)	
Intervenor-Appellee,	)	
	)	
v.	)	
	)	
VINOD C. GUPTA,	)	Honorable
	)	Carolyn B. Smoot,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Welch and Justice Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: Where an easement for use of a parking lot and common areas was recorded and filed in Williamson County, later purchase of the underlying property by tax sale did not void that easement.

¶ 2 FACTS

¶ 3 This appeal involves a shopping mall in the City of Marion, Illinois. The mall, originally known as the Illinois Centre Mall, is now the Illinois Star Centre Mall. Illinois Star Centre, LLC, is the present owner of the mall building. A Dillard's department store and a Target store are adjacent and attached to the mall. Neither is involved in these cases. A Sears, Roebuck & Co. department store is in a separate building adjacent to the mall. The Sears building owner went into mortgage foreclosure. Upon completion of the foreclosure process, title to the Sears building was with GE Commercial Finance Business Property Corporation.

¶ 4 The mall and Sears building have a parking lot consisting of approximately 28.5 acres. An easement was filed with the Williamson County recorder of deeds office in 1991, which

provided that after construction of the buildings and common areas was complete, each party would grant an easement to every other party allowing all to use the parking area "for the parking and passage of passenger motor vehicles *** and passage by pedestrians." The term "party" is defined in the agreement to include any signatory to the agreement and any person who acquired an interest in or to any part of the shopping center site.

¶ 5 The mall and the parking lot were separate parcels of land. At the time that the project was developed, Illinois Centre Associates owned both parcels. Illinois Centre Associates did not keep current with real estate taxes, and the two parcels were subject to a tax sale by Williamson County. Vinod C. Gupta purchased the parking lot pursuant to the tax sale process in November 2007 and obtained a tax deed in late 2010. Illinois Star Centre, LLC, purchased the parcel containing the mall property at the tax sale. On approximately November 15, 2010, Gupta began billing Sears and the mall tenants for use of his parking lot. The bills or assessments are not included in the record. The tenants did not pay the bills, citing to the easement agreement. Gupta filed two lawsuits asking the court for injunctive relief barring Sears and the mall tenants from using his property, or for damages for failing to pay rent for its usage. Sears and the mall tenants asked the court to dismiss each complaint because of the existence and application of the easement. The trial court dismissed the complaint in the Sears case, holding that the easement affirmatively defeated Gupta's claim. In Gupta's case against the mall tenants, the trial court dismissed the complaint as barred by collateral estoppel. Gupta appeals both dismissals. By court order dated November 9, 2012, we consolidated these two appeals.

¶ 6 Detailed Background of the Parties

¶ 7 The mall project began in the early 1990s. The developer was Illinois Centre Associates. Illinois Centre owned certain parcels of land in Marion. Construction Developers, Incorporated, purchased some of this land from Illinois Centre for construction

of a Dillard's department store. Dayton Hudson, doing business as Target, also purchased some of this land for construction of a Target store. Illinois Centre owned the balance of the parcel. While unclear from the record on appeal, Sears, Roebuck & Co. had a lease with Illinois Centre Group. That lease is not in the record. The Sears store predated other department stores on the shopping mall parcel. Dillard's and Target built their stores adjacent to the shopping mall. At that time, Illinois Centre owned the parking lot surrounding the department stores and the mall. The development contract required Dillard's and Target to have an entrance to the mall shopping space from inside each store. The developer was responsible for all construction work on the mall and on the common areas, including the parking lot.

¶ 8 In September 1999, Illinois Centre Group, LLC, conveyed the Sears building property to Illinois Centre SRCO 500, LLC. This new entity became Sears's landlord. This lease required Illinois Centre SRCO to provide parking necessary for the operation of the Sears store.

¶ 9 The mall parcel of land was separate from the parking lot parcel of land. In 1991, the mall parcel and the parking lot parcel had the same owner–Illinois Centre Associates, LLC. Illinois Centre Associates did not pay the property taxes on either parcel in 2006. Williamson County sold both parcels at a tax sale. Gupta purchased the parking lot parcel. Illinois Star Centre, LLC, purchased the mall parcel.

¶ 10 Suit Against Sears, Roebuck & Co.

¶ 11 In his complaint filed on April 28, 2011, Gupta alleged that on November 15, 2010, he notified Sears, Roebuck & Co. that he was the owner of the parking lot. Gupta notified Sears that if Sears was paying for the use of the parking lot, from that date forward, Sears must pay Gupta instead. Alternatively, he asked a Sears representative to contact him if Sears wanted to lease the parking lot from him. Gupta alleged that Sears owed him $18,000

for rent plus unspecified out-of-pocket expenses for real estate taxes, utilities, maintenance, and repair. Count I of the complaint pursued compensatory damages. In count II of his complaint, Gupta asked the court for injunctive relief barring Sears from using his parking lot for any reason. In his prayer for injunctive relief, Gupta asked the court to order compensatory damages of $18,000, plus the unspecified other expenses incurred.

¶ 12 Sears filed a motion to dismiss Gupta's complaint on July 15, 2011. Sears argued that the court should dismiss Gupta's complaint for several reasons. Sears argued that there was no relationship between Sears and Gupta. Without a relationship, Sears contended that Gupta could not have an expectation of and an entitlement to damages. Sears also argued that Gupta was a party to the parking lot easement because the definition of a "party" within the easement document included persons who acquired an interest in the parking lot. Sears explained that it held a right as a permitee under the easement agreement. Sears contended that the recorded easement agreement labels the easement as one that runs with the land, and relevant Illinois law states that a tax deed issued on a parcel will not destroy an easement that runs with the land.

¶ 13 On July 22, 2011, the receiver for Illinois Centre SRCO 500, LLC, Richard Robey, filed a motion to intervene in Gupta's case against Sears. Illinois Centre, who owned the building leased to Sears, was currently in bankruptcy. In a declaratory judgment complaint, the receiver alleged that the parking lot easement was a perpetual easement with termination only possible if a party abandoned the easement for four continuous years, and if the easement was not important to any contemplated use by the grantee of the easement. The receiver also sought reimbursement of $10,000 from Gupta that the receiver paid for maintenance of the parking lot on behalf of Illinois Centre SRCO 500, LLC.

¶ 14 On August 8, 2011, Gupta responded to Sears's motion to dismiss. Gupta claimed that Sears was relying upon the wrong easement statute and after the county issued a new tax

deed following a sale for unpaid taxes, issuance of the new deed extinguished the easement. Gupta also argued that Sears was a third-party beneficiary to the original easement agreement, and third-party beneficiaries were not entitled to enforce the covenants of the agreement.

¶ 15 One week later, Gupta filed a motion for leave to amend his complaint against Sears. His proposed amended complaint added several counts. In count I, Gupta asked the trial court to award damages for use of his parking lot. Count II contained similar allegations and sought damages for unjust enrichment. Count III sought a declaratory judgment that the easement was void and that Sears could not take advantage of the easement. Counts IV, V, VI, and VII alleged that the "parties" to the easement agreement breached the agreement by not paying taxes, by not taking some action to avoid foreclosure, by neglecting the "time is of the essence" clause in the performance of terms and conditions, and by failing to comply with all applicable laws. In count VIII, Gupta alleged that the "parties" to the easement breached the implied covenant of good faith and fair dealing. Finally, in count IX, Gupta alleged that the court should declare the easement void because when the parties filed the easement, both parcels of land had a common owner. The trial court granted leave to file the amended complaint on August 29, 2011.

¶ 16 On September 30, 2011, Gupta filed an answer as well as a counterclaim to Richard Robey's declaratory judgment complaint. In this counterclaim against the receiver, Gupta argued the same points he raised in his amended complaint. Gupta sought an award of damages for unpaid rent and other out-of-pocket expenses. He asked the court to find that the easement is void on a general basis and because the original owner of both parcels created the easement. He asked the court to find that the "parties" to the original agreement were in breach of that agreement, and that the receiver was in breach of an implied covenant of good faith and fair dealing.

¶ 17 Sears filed another motion to dismiss in response to the amended complaint. Gupta responded to this motion, and Sears replied to that response. On February 1, 2012, the trial court issued the following ruling on Sears's motion to dismiss and on Gupta's counterclaims to the receiver's complaint:

> "The Court, having considered this matter, has determined that the 'Motion to Dismiss' filed by Defendant Sears Roebuck and Co., on July 15, 2011, pursuant to 735 ILCS 5/2-619(9), should be and hereby is Granted. Plaintiff's Amended Complaint is hereby dismissed. The Court has further determined that the 'Motion to Dismiss Counterclaims Filed by Vinod C. Gupta,' filed by Richard Robey, Intervenor, on November 1, 2011 pursuant to 735 ILCS 5/2-619, should be and hereby is Granted. Plaintiff's Counterclaim is hereby dismissed. ***"

¶ 18 Gupta filed his notice of appeal on October 12, 2012.

¶ 19 Suit Against Illinois Star Centre, LLC, and Tenants

¶ 20 On June 20, 2011, Gupta filed his second complaint in Williamson County circuit court. The complaint was similarly styled to the suit against Sears in that he alternatively asked the court to award damages and/or to grant injunctive relief. He named the owner of the mall property, Illinois Star Centre, LLC, as a defendant. Gupta also named every mall tenant as defendants. He alleged that collectively the defendants owed him $140,000 and unspecified out-of-pocket expenses for real estate taxes, utilities, maintenance, and repairs.

¶ 21 The majority of the defendants filed a joint motion to dismiss Gupta's complaint, citing the easement agreement. Heartland Regional Medical Center, Mastercuts, and Regis Hairstyles filed their own motions to dismiss based on the easement. Defendants argued that Gupta's tax sale purchase was subject to this easement. Gupta filed his response to these motions and made several arguments. He contended that the easement did not run with the land. Because the present tenants are "third-party beneficiaries" of the original easement

agreement, Gupta claimed that they could not enforce the covenants. Gupta also argued that the original parties to the easement agreement committed actions that constituted material breaches of the agreement, with the result that the agreement may not be enforced. Finally, Gupta claimed unjust enrichment if all defendants used the parking lot without paying for the privilege.

¶ 22 In reply to Gupta's response, the defendants contended that the easement at issue was an appurtenant easement, and that it ran with the land because the original parties intended for Gupta's property to be used for ingress, egress, and parking. Additionally, the easement touched and concerned the land, and there was privity between the parties. Defendants also cited to the easement definition of a "party," which included any successor person acquiring any interest in the site.

¶ 23 On October 3, 2011, the trial court entered an order dismissing Gupta's complaint against all defendants. Thereafter, the court only authorized Gupta to file an amended complaint against Illinois Star Centre.

¶ 24 Gupta filed an amended complaint on October 25, 2011, and alleged facts virtually identical to his amended complaint against Sears. Gupta alleged that the mall tenants' rent payments to Illinois Star Centre included rent for use of the parking lot. On the date Gupta filed his amended complaint, he alleged damages of $240,000.

¶ 25 Illinois Star Centre filed a motion to dismiss the amended complaint on February 21, 2012. The basis of the motion was that Gupta had made nearly identical claims against Sears in a separate suit and that on February 1, 2012, the judge presiding over the Sears case dismissed the complaint. Defendant argued that because of this dismissal, the doctrine of collateral estoppel prevented Gupta from making the identical claims against it. Gupta responded on March 29, 2012, arguing that the court should not enforce the easement agreement because the provision releasing parties from liability for parking space rental

constituted an exculpatory clause. He claimed that exculpatory clauses are not favored in Illinois and are contrary to public policy. Gupta also argued that the easement agreement is void because Illinois tax deeds should convey merchantable title, and if the easement stands, he will own property and incur taxes and expenses, with no corresponding ability to earn income from the property. One month later, Gupta filed a supplemental response in which he argued that this case was distinguishable from the case against Sears and therefore collateral estoppel should not apply. He distinguished Sears from Illinois Star Centre, on the basis that Sears was merely a tenant and did not own the building in which it operated, while Illinois Star Centre was the owner of the mall.

¶ 26 On May 17, 2012, the trial court dismissed Gupta's complaint against Illinois Star Centre on the basis that his earlier suit against Sears contained the same allegations as in this case, and that based upon the dismissal of the Sears case, he was not able to bring a claim against Illinois Star Centre on the basis of collateral estoppel.

¶ 27 Gupta appealed both orders dismissing his complaint against Illinois Star Centre and against the mall tenants on June 14, 2012.

¶ 28 The Easement Language

¶ 29 The easement agreement is central to the arguments made in response to Gupta's complaint. We include the applicable language in this order.

¶ 30 Section 3.3, titled "Easements for Use of Common Area," provides that:

> "(a) Commencing upon completion of construction of each portion of the Common Area on its respective Parcel, each Party grants to the other Parties and their respective Permittees until the Termination Date[1] easements to each portion of the

[1]Article II of the easement agreement contains the termination date of the agreement. The termination date is December 31, 2041, except for certain perpetual easements, which

Common Area so constructed on the Grantor's Parcel ***. Included with the easement granted by this Section 3.3 are, without limitation:

(i) easements to use the Parking Area for the parking and passage of passenger motor vehicles (and trucks, so long as there is no unreasonable interference with Permittee parking) and passage by the pedestrians;

(ii) easements to use the various walkways and all other portions of the Common Area for the general use of the Grantee, the Grantor and the Permitees of either ***."

¶ 31 The contract defines a "party" as a signatory to the easement agreement "and any successor Person acquiring any interest in or to any portion of the Shopping Center site." The contract defines a "permittee" to include the parties, their officers, directors, employees, agents, contractors, customers, visitors, invitees, licensees, tenants, subtenants, and concessionaires.

¶ 32 The contract defines "Common Area" to include "the Parking Area, roadways, if any, Shopping Center pylon and identification signs, the Common Utility Facilities, sidewalks and walkways, including Perimeter Sidewalks, landscaped and planted areas outside of the exterior walls of the Buildings, the Mall and fire corridors leading from the Mall or between Developer Buildings and a Department Store Building or Buildings; excepting and excluding, however, from Common Area, any of the foregoing within the Buildings (except the Mall) and other Floor Area of the Parties and excluding Truck Facilities." The contract defines "Parking Area" as follows:

" 'Parking Area' means all portions of the Shopping Center Site designated as such *** which are currently or in the future set apart or used from time to time for the passage and or parking of motor vehicles and for pedestrian traffic incidental thereto

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by their nature never end.

including, without limitation, all interior roads, curbs, aisles, walkways, sidewalks, traffic lanes, traffic and directional signs, lighting standards, vehicular parking stalls, landscaped areas and all other improvements which at any time are erected on such areas for the foregoing purposes, excepting and excluding, however, Perimeter sidewalks (which are Common Area) and all Truck Facilities (which are a part of each respective Party's Building).

¶ 33 LAW AND ANALYSIS

¶ 34 On appeal from a trial court's involuntary dismissal of a complaint pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), the appellate court must determine "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." (Internal quotation marks omitted.) *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 109-10, 708 N.E.2d 1140, 1144 (1999). The trial court must consider all well-pled facts in the complaint to be true. *Downey v. Wood Dale Park District*, 286 Ill. App. 3d 194, 200, 675 N.E.2d 973, 978 (1997). Our review is *de novo*. *In re Estate of Mayfield*, 288 Ill. App. 3d 534, 542, 680 N.E.2d 784, 789 (1997).

¶ 35 The complaint against Illinois Star Centre was dismissed on the basis of collateral estoppel. The basis of the earlier dismissal of the complaint against Sears and presumably the complaint against the mall tenants was the existence of the easement. Essentially, the trial court dismissed all of Gupta's complaints because of the existence of the easement. Therefore, we must review the basic rules governing easements in Illinois.

¶ 36 Courts construe an easement as "a right or privilege in the land of another." *Schnuck Markets, Inc. v. Soffer*, 213 Ill. App. 3d 957, 974, 572 N.E.2d 1169, 1182 (1991). An express easement is one that the parties create by a written instrument and "must be construed in accordance with the intent of the parties." *Id.* To determine the intent of the parties, the

court must carefully consider the words of the easement document and the circumstances that existed when the parties created the easement. *Id.*

¶ 37 When an easement will be used in connection with land occupancy, or if the easement otherwise touches the property, the easement is an appurtenant easement. *Id*. (citing *Beloit Foundry Co. v. Ryan*, 28 Ill. 2d 379, 388, 192 N.E.2d 384, 390 (1963)). An appurtenant easement has the same meaning as an easement that runs with the land. If some other person or entity acquires the land, the appurtenant easement passes with the land. *Id.*

¶ 38 Although Gupta argues otherwise, separation of the two parcels of land to two different buyers via the tax sale does not automatically void the recorded appurtenant easement. See *In re Application of the County Collector for Judgment & Sale Against Lands & Lots Returned Deliquent for the Nonpayment of General Taxes and/or Special Assessments for the Year 1990 & Prior Years*, 285 Ill. App. 3d 518, 519, 674 N.E.2d 123, 123 (1996); *SI Securities v. Bank of Edwardsville*, 362 Ill. App. 3d 925, 929, 841 N.E.2d 995, 999 (2005).

¶ 39 In the case of *In re Application of the County*, National Indemnity Corporation purchased two parcels of land in Cook County at a tax sale only to later discover that it could not develop the parcels as planned because there were existing easements on the properties. *In re Application of the County*, 285 Ill. App. 3d at 518, 674 N.E.2d at 124. National Indemnity Corporation asked the court for equitable relief in the form of reimbursement of the amount it paid the county for the two parcels. *Id.* The court held that the Property Tax Code expressly stated that issuance of a tax deed does not void existing easements. *Id.* at 519, 674 N.E.2d at 124. In concluding that the court had no ability to declare that National Indemnity made its purchases in error, the court quoted *People ex rel. Edgcomb v. Wolfe*, 226 Ill. App. 3d 995, 998-99, 589 N.E.2d 811, 813 (1992), as follows:

> " 'If it is the public policy of this State to protect purchasers from encumbrances on property which could be discovered from an inspection of the record, this protection

should come from the legislature.' " *Id.*

The court noted that if National Indemnity Corporation had done a title search before bidding on the property, National would have discovered the easements. *Id.*

¶ 40 This court's holding in *SI Securities v. Bank of Edwardsville*, although dealing with the related category of covenants rather than with an easement, is applicable and also defeats Gupta's theory that we should declare that the easement is void. In *SI Securities*, a purchaser bought property at a tax sale only to discover the existence of restrictive subdivision covenants on the property impeding its building plans. *SI Securities*, 362 Ill. App. 3d at 926, 841 N.E.2d at 996-97. SI Securities filed suit against the developer of the subdivision alleging that its purchase by tax sale extinguished the restrictive building covenants. *Id.*, 841 N.E.2d at 997. We examined section 22-70 of the Property Tax Code (35 ILCS 200/22-70 (West 2004)) and concluded that the plain language of that section explicitly stated, "tax deeds shall not extinguish covenants running with the land, regardless of their type." *Id.* at 929, 841 N.E.2d at 999. We also found that this section of the Code did not violate the overall policy that tax deeds convey merchantable title. *Id.* at 930, 841 N.E.2d at 1000 (citing 35 ILCS 200/22-55 (West 2004)). The legal definition of "merchantable title" does not indicate title free of covenants. *Id.* We stated that a main purpose of covenants is the enhancement of property value. *Id.* We held that except in situations of adverse possession, a tax sale purchaser should obtain no better title than enjoyed by a prior owner. *Id.* at 931, 841 N.E.2d at 1000-01.

¶ 41 In this case, at the time when the two parcels had a common owner and the common owner entered into contracts with others for development of the shopping center, the original parties to the easement agreement clearly intended that the parking lots and the roadways were for use by customers, delivery persons, and employees. The parties to the easement agreement explicitly stated that they intended the parties and customers to use the easement

in connection with the shopping center. In that sense, the easement "touched" and was connected to use of the land. Furthermore, the parties to the agreement were explicit in their intention that the easement would last beyond its original signatories. The very nature of an easement for use of a parking lot is that the tenants and store customers will use the easement in connection with occupancy of the land–in this case, the mall parcel of land.

¶ 42 We find that the terms of the easement agreement support its applicability to individuals and companies other than those named in the 1991 document. The easement defines a party to include any successor who acquires "any interest in *** any portion of the Shopping Center Site." With this inclusive definition, Illinois Centre SRCO 500, LLC, who obtained the Sears building and land from Illinois Centre Group, LLC, became a party to the easement. GE Commercial Finance Business Property Corporation, the present owner of that property, is also a party to the easement. Sears, as GE Commercial Finance Business Property Corporation's tenant, clearly meets the definition of an easement permittee. Similarly, Illinois Star Centre, who by way of the tax sale obtained a full ownership interest in the mall property, is a successor to Illinois Centre Group, LLC. All of the named defendants who are tenants of the mall, and thus tenants of Illinois Star Centre, are permittees of the easement agreement, and therefore entitled to all associated rights.

¶ 43 For the first time on appeal, Gupta argues that the easement agreement only provided easement benefits to Dillard's, Target, and their officers, directors, employees, agents, contractors, customers, visitors, invitees, licensees, tenants, subtenants, and concessionaires. From this argument, Gupta seems to recognize that Target and Dillard's have an easement to use the parking lot. Although Target and Dillard's own their own buildings and parking areas, presumably employees, delivery persons, and customers would still utilize portions of Gupta's parcel. He does not believe, however, that Sears, Illinois Star Centre, and all remaining mall tenants have easement rights pursuant to the agreement. We disagree. In

considering the easement agreement in its entirety, we find that the parties' intent was clear. The agreement states that each party to the agreement grants to the other parties and to their permittees the right to use the parking areas for parking, as well as for the passage of vehicles and pedestrians. Although Illinois Star Centre and GE Commercial Finance were not original parties to the easement agreement, they are parties to the easement by definition. Illinois Star Centre and GE Commercial Finance are successor persons to the original party, Illinois Centre Associates. Sears and the other defendants to the second suit are all tenants, and thus, according to the easement agreement terms, they are "permittees." Nothing in Illinois law or any provision of the easement agreement voids the easement after the original parties to the agreement are no longer associated with the property. The easement agreement is enforceable, and all successor parties, as well as the permittees, have rights pursuant to that agreement.

¶ 44 Alternatively, Gupta argues that the easement does not apply to the defendants because the original parties to the easement cannot be both the grantor and the grantee of the easement. To reach this conclusion, Gupta uses the language of the agreement and reaches a conclusion that the "other Parties" to the agreement are only Dillard's and Target. He then argues that because Dillard's and Target still own their parcels, there are no "successors," and thus no one can claim the parking lot easement. To make this argument, Gupta isolates one clause of a sentence in the agreement that provides that "each Party grants to the other Parties and their respective Permittees *** easements to each portion of the Common Area." His contention is that "each Party" only refers to the developer, Illinois Centre Associates, and that the "other Parties" can only refer to Dillard's and Target. Thus, only the "other Parties" would have "permitees," and because Dillard's and Target are not the landlords for the tenant defendants, he contends that there are no permittees. Gupta's argument is flawed. We cannot consider the clause Gupta quotes in isolation from the rest of the agreement. This argument

is defeated by looking no further than the definition of the term "Party," which extends beyond Illinois Centre Associates, and includes any "signatory to this Agreement." Dillard's and Target are both signatories to the agreement, and thus are parties to the agreement. The use of the phrase "other Parties" has the uncomplicated intent that all signatories to the agreement grant rights to each other. The court must consider the entire easement agreement, and not only an isolated section. *Spectramed Inc. v. Gould Inc.*, 304 Ill. App. 3d 762, 770, 710 N.E.2d 1, 6 (1998).

¶ 45 This argument leads to another point asserted by Gupta on appeal–that no one can grant an easement to oneself. See *Copeland v. Copeland*, 16 Ill. 2d 11, 21, 156 N.E.2d 524, 530 (1959); *Walker v. Witt*, 4 Ill. 2d 16, 20, 122 N.E.2d 175, 177 (1954). This statement is generally correct, but Illinois law allows an owner of land to arrange his property holdings in a way that one portion of the land receives a benefit from another portion. *Beloit Foundry Co. v. Ryan*, 28 Ill. 2d 379, 389, 192 N.E.2d 384, 390 (1963).

¶ 46 In *Beloit Foundry Co.*, one person–Janvrin–owned lot 40. *Id.* at 381, 192 N.E.2d at 386. Janvrin conveyed a portion of lot 40 to Goodall. *Id.* The deed created two separate but contiguous easements–one for the benefit of Janvrin and one for the benefit of Goodall. *Id.*, 192 N.E.2d at 386-87. Many years later, Goodall's relative, who owned a portion of the original land, built on the easement, and Beloit Foundry Company, who also owned a portion of the original land, sued to enjoin obstruction of the easement. *Id.* The Illinois Supreme Court concluded that it was legal for Janvrin to arrange his property in a manner that one portion of the property conveyed a benefit to the other portion of the property. *Id.* at 386, 192 N.E.2d at 389-90. The court found that in 1925, the date of the original conveyance, Janvrin and Goodall intended to create the easement for the benefit of their properties. *Id.* at 388, 192 N.E.2d at 390. The court also stated that the parties intended that the easement should serve the dominant tracts, but also serve their own lands. *Id.* at 388-89, 192 N.E.2d

at 390. The court noted the general rule that creation of an easement over a person's own land is not allowed. *Id.* at 389, 192 N.E.2d at 390. The court confirmed, however, that an easement could be created on a person's own land in order to "arrange his property in such a manner that one portion thereof derives a benefit from another, and upon the severance of such common ownership, easements and servitudes arise which correspond with the benefits and burdens existing at time of sale." *Id.*; see also *Ellis v. McClung*, 291 Ill. App. 3d 448, 456-59, 683 N.E.2d 911, 915-18 (1997) (citing to the holding in *Beloit Foundry Co. v. Ryan*, the court held that three easements granted by a common owner to benefit a portion of the land are easements that run with the land).

¶ 47 In this case, the easement agreement clearly indicated the intent of the parties to arrange the property in such a manner that one portion derived a benefit from another portion. After common ownership of the building and parking lot parcels was severed, the benefits and burdens of the easement remained attached to the property. The easement ran with the land and subsequent purchases of the parcels were subject to that easement. As stated earlier in this order, when a new party purchases the land subject to an easement, the new ownership does not render the easement void. *In re Application of the County*, 285 Ill. App. 3d at 519, 674 N.E.2d at 124; *SI Securities*, 362 Ill. App. 3d at 929-30, 841 N.E.2d at 999-1000.

¶ 48 Gupta also argues that all defendants financially benefited by not paying for use of the parking lot. To state a cause of action for unjust enrichment, a plaintiff must allege that a defendant unjustly retained a benefit to the plaintiff's detriment and that defendant's retention of that benefit violates fundamental principles of justice and equity. *HPI Health Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 160, 545 N.E.2d 672, 679 (1989). Gupta argues that even though there is no landlord/tenant relationship in existence, a contract to pay rent should arise by inference. The problem with Gupta's theory is the existence of the

easement agreement. The easement grants rights to all of the defendants for use of the common areas. When an agreement defines and governs the issue, unjust enrichment does not occur. *F.H. Prince & Co. v. Towers Financial Corp.*, 275 Ill. App. 3d 792, 804, 656 N.E.2d 142, 151 (1995).

¶ 49 Gupta next argues that he is the joint successor of the developer Illinois Centre with Illinois Star Centre. He raises this argument for the first time on appeal. He contends that as joint successors, he and Illinois Star Centre are joint landlords of the shopping center, and thus jointly entitled to rent. He argues that he is "just as entitled to say who is a tenant and who is not." He asks for his portion of the rental income Illinois Star Centre receives from its tenants.

¶ 50 Illinois law is clear that a plaintiff cannot raise a new theory of recovery for the first time on appeal. *Hudkins v. Egan*, 364 Ill. App. 3d 587, 592, 847 N.E.2d 145, 150 (2006) (citing *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905, 911, 629 N.E.2d 569, 574 (1994)). By not raising the issue in the trial court, the party has not properly preserved the issue for appeal. *Federal Insurance Co. v. Turner Construction Co.*, 277 Ill. App. 3d 262, 268, 660 N.E.2d 127, 131 (1995). Consequently, appellate courts can consider the new issue or theory of recovery forfeited. *Id.* We have thoroughly reviewed the record on appeal in Gupta's lawsuit against Illinois Star Centre. He alleged trespass and unjust enrichment, sought injunctive relief and damages, but he did not claim to be a joint successor with Illinois Star Centre and entitled to rental income for the mall space. We conclude that Gupta has forfeited this issue. However, even if Gupta had not forfeited the issue on appeal, his claim would fail because he does not own any portion of the mall in which the tenants have leased space. Therefore, Gupta has no right to determine who leases the space, nor is he entitled to rental income for property owned by another party.

¶ 51 Gupta finally argues that the trial court erred in dismissing his case against Illinois

Star Centre based on collateral estoppel. He claims that so long as the Sears case was not final and could be appealed, dismissal was improper under a theory of collateral estoppel or *res judicata*. *Ballweg v. City of Springfield*, 114 Ill. 2d 107, 113, 499 N.E.2d 1373, 1375 (1986) (collateral estoppel); *Fidelity National Title Insurance Co. of New York v. Westhaven Properties Partnership*, 386 Ill. App. 3d 201, 211, 898 N.E.2d 1051, 1061 (2007) (*res judicata*).

¶ 52 Gupta's argument is correct on the law regarding finality. However, we note that the court consolidated these two cases for purposes of appeal. Gupta did not object to this consolidation, and we find no reason to conclude that consolidation was improper. By this order, we have considered the legal sufficiency of Gupta's argument against all defendants in both cases, and found his arguments to be lacking. While the trial court could have easily addressed the underlying merits of the case against Illinois Star Centre on the same basis as it did in the Sears case and as it apparently did with respect to the mall tenants, the court did not do so. The appellate process on the Sears case had not even begun when the court used the collateral estoppel doctrine, and so the Sears case was not final. Despite the court's premature use of collateral estoppel, we conclude that dismissal of the claims against Illinois Star Centre was proper. We can affirm a trial judge's decision on any basis that appears of record. *People v. Huff*, 195 Ill. 2d 87, 91, 744 N.E.2d 841, 843 (2001); *People v. Yarber*, 279 Ill. App. 3d 519, 524, 663 N.E.2d 1131, 1134 (1996). Furthermore, because our review on appeal from a section 2-619 dismissal is *de novo*, we can affirm the trial court's decision on other grounds. *Estate of Johnson v. Condell Memorial Hospital*, 119 Ill. 2d 496, 502, 520 N.E.2d 37, 39 (1988).

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, we hereby affirm the judgments of the circuit court of Williamson County.

¶ 55 Affirmed.