[Cite as *Babyak v. DSLangdale One, Inc.*, 2009-Ohio-4212.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

George L. Babyak,	:	
Plaintiff-Appellee,	:	
		No. 08AP-996
v.	:	(C.P.C. No. 07CVH01-509)
DSLangdale One, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellants.	:	

D E C I S I O N

Rendered on August 20, 2009

Zeiger, Tigges & Little LLP, John W. Zeiger and *Bradley T. Ferrell*, for appellee.

Vorys, Sater, Seymour & Pease LLP, *Philip F. Downey*; *Chester, Willcox & Saxbe LLP*, *Frank A. Ray* and *Elizabeth J. Watters*, for appellants.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendants-appellants, DSLangdale One, Inc. ("DSLangdale One") and NCT Ventures LLC ("NCT"), appeal from a judgment entered in favor of plaintiff-appellee, George L. Babyak. For the following reasons, we affirm.

{¶2} In 1999, Babyak become the president of Digital Storage, LLC ("DSLLC"), an Ohio limited liability company that was primarily engaged in the wholesale distribution and sale of computer storage, media, and related computer supplies. At that time,

DSLLC was a wholly-owned subsidiary of NCT, which, in turn, was a wholly-owned subsidiary of Digital Storage Inc. ("DSI"). Richard Langdale was the president and majority shareholder of DSI and the manager of NCT.

{¶3} In late 2000, Langdale discussed with Babyak his desire to sell DSLLC. Langdale told Babyak that he wanted Babyak to assist in selling DSLLC, facilitate the creation of a sale contract, and operate DSLLC so as to maximize the company's value. Langdale said that if Babyak performed all three tasks, he would compensate Babyak with 3.5% of the closing cash received from a sale, plus an additional share of the purchase price. Thus, at Langdale's behest, Babyak began approaching potential purchasers. After Daisytek International Corporation ("Daisytek") expressed interest, Babyak initiated negotiations for the sale of DSLLC to Daisytek.

{¶4} In early 2001, when Daisytek emerged as the likely acquirer of DSLLC, Langdale and Babyak revisited the issue of Babyak's compensation. Langdale again promised Babyak 3.5% of the closing cash, and he also agreed to give Babyak 28.5% of the growth earnout payment portion of the purchase price.

{¶5} Ultimately, on June 29, 2001, DSLLC, DSI, NCT, Digital Storage Canada, Inc. ("DS Canada"), Langdale, DS Acquisition Corporation ("DS Acquisition"), Daisytek (Canada), Inc. ("Daisytek (Canada)"), and Daisytek entered into an Asset Purchase Agreement. Through this agreement, DS Acquisition and Daisytek (Canada) purchased substantially all the assets of DSLLC and DS Canada. The purchase price consisted of multiple components, which included an immediate cash payment and two growth earnout payments.

{¶6} In Section 3.5 of the Asset Purchase Agreement, entitled "Growth Earnout Payment," Daisytek, the parent company of DS Acquisition and Daisytek (Canada), agreed to make payments to the sellers after each of the first two years succeeding the sale. According to the formula set forth in Section 3.5, the amount of each growth earnout payment depended upon the purchased companies' profitability. The formula included several progressively higher levels of potential profitability, with the amount of the growth earnout payments increasing with each level the purchased companies attained. After calculation of each growth earnout payment, DS Acquisition and Daisytek (Canada) were obligated to wire transfer the growth earnout payment to the sellers.

{¶7} Because the sale included the right to the name "Digital Storage," DSI changed its name to DSLangdale One after the sale. Similarly, DSLLC became DSLangdale Two, LLC ("DSLangdale Two"), and DS Canada became DSLangdale Three, Inc. ("DSLangdale Three"). On the Daisytek side of the transaction, DS Acquisition became the new Digital Storage, Inc. ("Digital Storage"). Babyak continued in his role as president, signing an employment agreement with Digital Storage.

{¶8} Shortly after the parties executed the Asset Purchase Agreement, Babyak and DSI (later named DSLangdale One) entered into an "Incentive Compensation Agreement" to memorialize the terms Babyak and Langdale had discussed in late 2000 and early 2001. In relevant part, the agreement required Babyak to "continue to perform such services as may be reasonably requested by [DSI] from time to time in connection with the Daisytek Sale * * *." To compensate Babyak for his services, DSI agreed to pay Babyak "cash in an amount equal to: (a) 3.5% of * * * (i) the Net Closing Cash * * * and (b) 28.5% of each Growth Earnout Payment (as defined in the Daisytek Purchase

Agreement)." The Incentive Compensation Agreement required that Babyak's percentage of the net closing cash "shall be paid at the closing of the Daisytek Sale * * *." Additionally, the agreement specified that Babyak's percentage of each growth earnout payment was "payable upon the payment of the applicable Growth Earnout Payment." The two signatories to the Incentive Compensation Agreement were Babyak and NCT, for whom Langdale signed as a member.

{¶9} Although the Incentive Compensation Agreement entitled Babyak to his percentage of the net closing cash at the closing of the Daisytek sale, the parties subsequently amended the agreement to change that term. In an October 8, 2002 letter agreement, the parties agreed that $173,779.03, which represented Babyak's share of the net closing cash minus $2,000, was "payable in conjunction with the second year earnout payment." Babyak, however, did receive his portion of the first growth earnout payment as contemplated by the Incentive Compensation Agreement. After Daisytek made the first growth earnout payment, NCT tendered to Babyak a check for $603,960.32, or 28.5% of the first growth earnout payment.

{¶10} During the second growth earnout payment period, Digital Storage achieved the maximum possible profitability level under the formula set forth in Section 3.5. Thus, the Asset Purchase Agreement mandated that Daisytek pay the sellers—now known as DSLangdale Two and DSLangdale Three—$4,238,318. Babyak's 28.5% of the second growth earnout payment equaled $1,207,920.63.

{¶11} Daisytek, however, did not make the second growth earnout payment as specified in Section 3.5. Instead, both Daisytek and Digital Storage declared bankruptcy in the United States Bankruptcy Court for the Northern District of Texas ("bankruptcy

court").[1] DSLangdale Two and DSLangdale Three filed proofs of claim against both Daisytek and Digital Storage in the amount of $4,238,318—the amount of the second growth earnout payment.

{¶12} Additionally, DSLangdale Two and DSLangdale Three filed suit against the only purchaser not in bankruptcy—Daisytek (Canada)—in the Delaware County Court of Common Pleas. The complaint asserted two different claims for breach of contract. In the first, DSLangdale Two and DSLangdale Three asserted that Daisytek (Canada) breached Section 3.5 of the Asset Purchase Agreement by failing to transfer the second growth earnout payment. In the second, DSLangdale Two and DSLangdale Three asserted that Daisytek (Canada) breached Section 10.4(ii) of the Asset Purchase Agreement by not indemnifying them against losses sustained due to Daisytek's failure to pay the second growth earnout payment. Based upon these two claims, DSLangdale Two and DSLangdale Three sought damages in the amount of $4,238,318—the amount of the second growth earnout payment.

{¶13} Eventually, Daisytek (Canada) removed the Delaware County action to the United States Bankruptcy Court for the Southern District of Ohio, and that court subsequently transferred the action to the Texas bankruptcy court. The bankruptcy court then consolidated the action with DSLangdale Two and DSLangdale Three's adversary proceedings against Daisytek and Digital Storage. In those proceedings, DSLangdale Two and DSLangdale Three asserted against Digital Storage claims identical to those

[1] Babyak testified in his affidavit that prior to declaring bankruptcy, Digital Storage was performing well. The Daisytek organization, however, was struggling, and those struggles led to the bankruptcies of both Digital Storage and Daisytek.

contained in the Delaware County action. DSLangdale Two and DSLangdale Three also sought recovery against Daisytek, but only for Daisytek's breach of Section 3.5.

{¶14} After completing discovery, all parties moved for summary judgment. In its order resolving the summary judgment motions, the bankruptcy court concluded that Section 3.5 of the Asset Purchase Agreement only required Daisytek (Canada) and Digital Storage to *transfer* each growth earnout payment to DSLangdale Two and DSLangdale Three. Notably, nothing in the Asset Purchase Agreement obligated Daisytek (Canada) and/or Digital Storage to actually *pay* the growth earnout payments. Daisytek was the only entity required to *pay* the second growth earnout payment. Thus, the bankruptcy court granted Daisytek (Canada) and Digital Storage summary judgment to the extent that DSLangdale Two and DSLangdale Three sought to hold them liable for failure to pay the second growth earnout payment.

{¶15} Although Daisytek (Canada) and Digital Storage escaped liability under Section 3.5, they were not as lucky with regard to Section 10.4(ii), the indemnity provision. Section 10.4(ii) required Daisytek (Canada) and Digital Storage to indemnify DSLangdale Two and DSLangdale Three against losses they sustained because of "any failure of by * * * [Daisytek] to observe or perform its covenants and agreements set forth in [the Asset Purchase Agreement]." No one disputed that Daisytek caused DSLangdale Two and DSLangdale Three loss when it failed to pay the second growth earnout payment as required by Section 3.5. The bankruptcy court, thus, held that under Section 10.4(ii), Daisytek (Canada) and Digital Storage had to indemnify DSLangdale Two and DSLangdale Three for that loss. Consequently, the bankruptcy court granted DSLangdale Two and DSLangdale Three summary judgment to the extent that they

claimed that Daisytek (Canada) and Digital Storage breached the indemnity provision of the Asset Purchase Agreement.

{¶16} Unlike Daisytek (Canada) and Digital Storage, Daisytek did not contest its liability under the Asset Purchase Agreement. Rather, Daisytek only challenged the amount of the second growth earnout payment. Because the Asset Purchase Agreement did not give Daisytek the right to dispute the calculation of the growth earnout payment, the bankruptcy court entered summary judgment against it, too.

{¶17} Based upon its rulings on the motions for summary judgment, the bankruptcy court entered judgment against Daisytek (Canada) in the amount of $4,238,318. Also, the bankruptcy court allowed DSLangdale Two and DSLangdale Three a single, combined, general unsecured claim in the amount of $4,238,318 against the estates of Daisytek and Digital Storage.

{¶18} Subsequent to the bankruptcy court issuing its judgment, Synnex Canada Limited ("Synnex Canada") became the successor to Daisytek (Canada). Upon the motion of DSLangdale Two and DSLangdale Three, the trial court amended the judgment to substitute Synnex Canada for Daisytek (Canada).

{¶19} Having obtained a favorable verdict, DSLangdale Two and DSLangdale Three began to pursue attorneys' fees, costs, and interest. The parties agreed to sever those ancillary issues from the main controversy. The bankruptcy court then stayed resolution of the ancillary issues while Synnex Canada and the bankruptcy trustee, acting on behalf of the estates of Daisytek and Digital Storage, appealed the bankruptcy court's judgment to the United States District Court for the Northern District of Texas. Ultimately, the district court affirmed the bankruptcy court's judgment.

{¶20} After losing their appeal, Synnex Canada and the trustee decided to settle. In the resulting "Settlement Agreement and Mutual Release," Synnex Corporation ("Synnex"), the parent of Synnex Canada, agreed to pay DSLangdale Two and DSLangdale Three $4.6 million. In return, DSLangdale Two and DSLangdale Three agreed to file: (1) a release and satisfaction of judgment, releasing the judgment against Synnex Canada; (2) a notice of withdrawal, with prejudice, of the proofs of claim filed against Daisytek and Digital Storage; and (3) a stipulation of dismissal, with prejudice, of the severed, ancillary proceeding.

{¶21} Upon the bankruptcy court's approval of the settlement agreement, each party fulfilled its obligations under the agreement. When Babyak discovered that the litigation was settled, he contacted Langdale to discuss the payment due to him under the Incentive Compensation Agreement. Langdale told Babyak that he did not believe that Babyak deserved 28.5% of the second growth earnout payment, and he offered Babyak a lesser amount. Babyak refused the offer and filed suit in the trial court. In his complaint, Babyak asserted claims for breach of contract and unjust enrichment against DSLangdale One and NCT, and claims for tortious interference with contract and unjust enrichment against Langdale. Defendants answered and filed a counterclaim, asking the trial court to render a declaratory judgment that no payment was due to Babyak under the Incentive Compensation Agreement with respect to the second growth earnout payment.

{¶22} After the completion of discovery, all parties moved for summary judgment. Defendants sought summary judgment in their favor on all of Babyak's claims. Babyak sought summary judgment in his favor on his breach of contract claim and defendants'

declaratory judgment claim. Agreeing with Babyak's arguments, the trial court granted Babyak's motion and denied defendants' motion.[2]

{¶23} The trial court reduced its decision to judgment in its October 20, 2008 judgment entry. In relevant part, the trial court entered judgment against DSLangdale One and NCT, jointly and severally, in the amount of $1,207,920.63 for Babyak's 28.5% of the second growth earnout payment and $173,779.03 for the unpaid balance of the net closing cash, for a total judgment of $1,381,699.66. Finding that the unjust enrichment claim was moot, the trial court entered judgment on that claim in favor of DSLangdale One and NCT, and against Babyak. The trial court also awarded Babyak pre- and post-judgment interest, and it ordered DSLangdale One and NCT to pay all costs.

{¶24} DSLangdale One and NCT (collectively "appellants") now appeal from the October 20, 2008 judgment, and they assign the following errors:

> [1.] The Trial Court Erred In Denying Appellants' Motion For Summary Judgment, And In Granting Appellee's Motion For Summary Judgment On Appellee's Breach Of Contract Claim And On Appellants' Counterclaim.
>
> [2.] The Trial Court Erred In Finding Moot Appellee's *Quantum Meruit*/Unjust Enrichment Claim, Rather Than Entering Summary Judgment Against Appellee on That Claim.

{¶25} By their first assignment of error, appellants challenge the trial court's conclusion that they breached the Incentive Compensation Agreement, as well as the resulting grant of summary judgment in Babyak's favor and denial of summary judgment

[2] As a result of this ruling, Babyak's claims remained pending against Langdale. However, prior to this appeal, Babyak voluntarily dismissed those claims.

in their favor. In essence, this assignment of error consists of three arguments: (1) NCT is not a party to the Incentive Compensation Agreement, so the trial court erred in entering judgment against it for breach of that contract; (2) because the second growth earnout payment was never made, DSLangdale One never had an obligation to pay Babyak his percentage of that payment; and (3) assuming the second growth earnout payment was made, a question of fact remains as to the amount of that payment. We find all three arguments unavailing.

{¶26} Appellate review of summary judgment motions is de novo. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607. " 'When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court.' " *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶11, quoting *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103. Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6.

{¶27} In appellants' first argument, they contend that NCT is not a party to the Incentive Compensation Agreement and, consequently, the trial court erred in holding NCT liable for breach of that agreement. We disagree.

{¶28} Contract interpretation is a matter of law. *City of St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, ¶38. When interpreting a

contract, a court's principle objective is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 273, 1999-Ohio-162. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. In determining the parties' intent, a court must read the contract as a whole and give effect, if possible, to every part of the contract. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361-62, 1997-Ohio-202.

{¶29} As a general rule, "when the body of the contract purports to set out the names of the parties thereto and a person not named in the body of the contract signs the contract, and there is nothing in the contract to indicate that such [person] signed as a party, such person is not bound by the contract and hence [is] not liable thereunder." *N.R.I. Co. v. N.R. Dayton Mall, Inc.* (Mar. 30, 1994), 2d Dist. No. 13997, citing Annotation, Person Who Signs Contract But is Not Named in Body Thereof as Party to Contract and Liable Thereunder (1964), 94 A.L.R.2d 691. See also 17A American Jurisprudence 2d (1991) 447-48, Contracts, Section 423. However, if the face of the contract contains an ambiguity as to whether the person signed as a party, then a court may consider extrinsic evidence to resolve that ambiguity. *St. Regis Apt. Corp. v. Sweitzer* (1966), 32 Wis.2d 426, 434. Review of extrinsic evidence in these circumstances is consistent with Ohio law, which permits consideration of extrinsic evidence to give effect to the parties' intentions if a contract is ambiguous. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶12; *Shifrin v. Forest City Enterprises, Inc.*, 64 Ohio St.3d 635, 638, 1992-Ohio-28. A contract is ambiguous if its meaning cannot be determined from the four

corners of the agreement, or if the contract is susceptible to two or more conflicting, but reasonable, interpretations. *Covington v. Lucia*, 151 Ohio App.3d 409, 2003-Ohio-346, ¶18.

{¶30} In the case at bar, we find that the Incentive Compensation Agreement contains an ambiguity as to whether NCT is a party to the contract. As appellants point out, the agreement identifies only Babyak and DSI (now known as DSLangdale One) as parties. Additionally, the agreement obligates DSI—not NCT—to make the various payments to Babyak. Thus, according to appellants' reading of the Incentive Compensation Agreement, NCT is not a party to the contract. On the other hand, NCT was the only Langdale-controlled entity to sign the Incentive Compensation Agreement. Moreover, the agreement itself sets out the relationship between the relevant Langdale-controlled entities: DSLLC (Babyak's employer) was the wholly-owned subsidiary of NCT, which was the wholly-owned subsidiary of DSI. Based upon this information, it becomes clear that the work the agreement was compensating Babyak for—facilitating the sale of DSLLC—benefited both NCT (DSLLC's parent) and DSI (DSLLC's parent's parent). Given the relationship between the corporate entities and the purpose of the contract, a question arises as to whether DSI intended NCT, as the sole Langdale-controlled signatory to the Incentive Compensation Agreement, to become a party to the agreement.

{¶31} In light of the ambiguity in the Incentive Compensation Agreement, we must examine the extrinsic evidence regarding the parties' intent. That evidence leaves no doubt that NCT is a party to the contract. NCT—not DSLangdale One—issued to Babyak

a check for each payment due to him under the agreement. Even more telling, Langdale, who signed the agreement as a member of NCT, testified as follows in his deposition:

> Q: Let's talk about this for a second and be clear. On the [I]ncentive [C]ompensation [A]greement with Mr. Babyak, you read it carefully before you signed it.
>
> A: Yes.
>
> Q: You signed it on behalf of the entity indicated on the signatory page.
>
> A: I think there's some confusion over that but, yes, I would have signed it on behalf of the entity indicated on the signatory page, yes.
>
> Q: All right. And you understood you were binding that entity to paying Mr. Babyak what was set forth in that agreement * * *?
>
> A: Yes.

Langdale deposition, at 46. Based upon this evidence, reasonable minds could only conclude that NCT is a party to the Incentive Compensation Agreement. Accordingly, the trial court did not err in so finding.

{¶32} In appellants' second argument, they contend that the second growth earnout payment was never made, and thus, they do not owe Babyak his share of that payment or his deferred share of the net closing cash. We disagree.

{¶33} Appellants admit that DSLangdale Two and DSLangdale Three received $4.6 million to settle all claims arising from Daisytek's failure to pay the second growth earnout payment. Appellants stress, however, that Synnex made the settlement payment. Appellants also emphasize that the payment resolved claims against Synnex Canada for indemnification that only existed because the second growth earnout payment was *not* made. Because the Incentive Compensation Agreement does not entitle Babyak

to a percentage of any indemnity payments, appellants reason that they do not owe Babyak anything under the agreement.

{¶34} Appellants' argument is based upon a flawed premise. The nature of the settlement payment depends upon the character of the entire dispute resolved, not just upon one claim. Here, the scope of the Settlement Agreement and Mutual Release extended beyond the resolution of DSLangdale Two and DSLangdale Three's indemnification claim against Synnex Canada. The Settlement Agreement and Mutual Release also resolved DSLangdale Two and DSLangdale Three's claim against Daisytek for its breach of the growth earnout payment provision. Thus, appellants mischaracterize the settlement monies as solely an "indemnity payment." Given the two different claims resolved through the settlement, the settlement monies have a dual nature. They are both an indemnity payment *and* the second growth earnout payment. Consequently, we conclude that by the settlement payment, DSLangdale Two and DSLangdale Three received the second growth earnout payment.

{¶35} As DSLangdale Two and DSLangdale Three recovered the second growth earnout payment, the Incentive Compensation Agreement mandates that appellants pay Babyak his share of that payment. Likewise, the October 8, 2002 amendment to the Incentive Compensation Agreement mandates that appellants pay Babyak his share of the net closing cash. Accordingly, the trial court did not err in concluding that the second growth earnout payment was made, thus triggering appellants' contractual obligations.

{¶36} In appellants' third argument, they contend that even if the second growth earnout payment was made, a question of fact remains as to how much of that payment DSLangdale Two and DSLangdale Three actually recovered. We disagree.

{¶37} Essentially, appellants argue that the $4.6 million settlement did not compensate DSLangdale Two and DSLangdale Three for the entire $4,238,318 second growth earnout payment. Appellants point out that in addition to resolving claims for breach of the Asset Purchase Agreement, the settlement also resolved DSLangdale Two and DSLangdale Three's claims for fees, expenses, and interest. According to their attorney, DSLangdale Two and DSLangdale Three incurred fees and expenses totaling in excess of $650,000 and sought pre- and post-judgment interest in excess of $450,000. Appellants thus assert that, at best, only $3.0 million of the $4.6 settlement constitutes the second growth earnout payment, while the remainder consists of recovered fees, expenses, and interest.[3] Appellants maintain that a jury must allocate the settlement money, splitting the $4.6 million into the amount attributable to the second growth earnout payment and the amount attributable to the recovery of fees, expenses, and interest.

{¶38} The evidence in the record belies appellants' assertion that a question of fact exists. First, in the Settlement Agreement and Mutual Release, DSLangdale Two and DSLangdale Three agreed to "the payment and satisfaction" of the $4,238,318 judgment against Synnex Canada. Although the judgment against Synnex Canada was based solely upon the breach of the indemnity provision, the amount of that judgment was the same as the amount due for the second growth earnout payment. Thus, by agreeing that the settlement monies paid and satisfied the $4,238,318 judgment arising from breach of the indemnity provision, DSLangdale Two and DSLangdale Three

[3] The attorney's affidavit testimony establishes that DSLangdale Two and DSLangdale Three had a claim for fees, expenses, and interest that exceeded $1.1 million. The record does not support appellants' assertion on appeal that DSLangdale Two and DSLangdale Three could claim the sum of $1.6 million in fees, expenses, and interest.

necessarily also agreed that the entire $4,238,318 second growth earnout payment was paid.

{¶39} Second, in the release of judgment that DSLangdale Two and DSLangdale Three filed with the bankruptcy court, DSLangdale Two and DSLangdale Three represented to the court that the judgment against Digital Storage, Synnex Canada, and Daisytek was "satisfied." Thus, DSLangdale Two and DSLangdale Three admitted satisfaction of their allowed claim against Daisytek for failure to pay the $4,238,318 second growth earnout payment.

{¶40} On the other side of the equation, appellants have not presented any evidence to rebut the above evidence. Although the settlement did not pay DSLangdale Two and DSLangdale Three all the monies they claimed entitlement to, no evidence establishes how they discounted the various amounts due to arrive at the $4.6 million settlement. The mere fact that DSLangdale Two and DSLangdale Three sought recovery of over a million dollars in fees, expenses, and interest does not prove, as appellants claim, that DSLangdale Two and DSLangdale Three allocated $1.6 million of the settlement monies to fees, expenses, and interest, leaving only $3.0 million for the second growth earnout payment. All the record contains is evidence that DSLangdale Two and DSLangdale Three considered their demand for $4,238,318 paid and satisfied. Accordingly, absent sufficient evidence to create an issue of fact, we conclude that the trial court did not err in finding that Babyak was due his share of the entire $4,238,318 second growth earnout payment.

{¶41} Although not articulated as an argument in appellants' brief, we next consider whether Babyak failed to perform his own obligations under the Incentive

Compensation Agreement. In the "Statement of Facts" section of appellants' brief, appellants state that Babyak failed to perform under the Incentive Compensation Agreement. Notably, appellants never actually argue that Babyak's alleged nonperformance is a reason for this court to reverse the trial court's judgment. Nevertheless, Babyak treats appellants' self-serving recounting of the facts as argument, and thus, for the sake of completeness, we will address whether the evidence creates a question of fact as to whether Babyak failed to perform as required by the Incentive Compensation Agreement.

{¶42} To recover on a breach of contract claim, a plaintiff must demonstrate: (1) the existence of a contract, (2) performance by the plaintiff, (3) breach by the defendant, and (4) damage or loss to the plaintiff. *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶18. Here, appellants contend that Babyak cannot prove the second element—that he performed under the Incentive Compensation Agreement. As we stated above, the Incentive Compensation Agreement required Babyak to "continue to perform such services as may be reasonably requested by [DSI (now known as DSLangdale One)] from time to time in connection with the Daisytek Sale * * *." Babyak testified that Langdale[4] made three requests for services in connection with the Daisytek sale: (1) that Babyak operate Digital Services in such a way that Daisytek was prevented from using the "clawback" provision of the Asset Purchase Agreement to recover part of the purchase price, (2) that Babyak operate Digital Services in such a way that DSLangdale Two and DSLangdale Three could obtain the "holdback" portion of the purchase price,

[4] Because Langdale holds 99.9446% of the stock of DSLangdale One, we will construe any requests from him as requests from DSLangdale One.

and (3) that Babyak operate Digital Services in such a way that the growth earnout payment was maximized. Babyak stated that he complied with each request.

{¶43} As to the last request, appellants argue that Babyak's actions "jeopardized" the receipt of the maximum possible growth earnout payment. Although Babyak may have performed poorly in Langdale's estimation, Langdale admitted that Digital Storage reached the level of profitably necessary for DSLangdale Two and DSLangdale Three to receive the maximum total growth earnout payment. Thus, Babyak did as requested.

{¶44} Appellants also contend that Langdale made one further request of Babyak. When asked what services he requested of Babyak in connection with the Daisytek sale, Langdale stated:

> I would say that at the time that we had not received our second growth earnout payment, it was obvious that [Daisytek] was going into bankruptcy. [Babyak] and I entered into agreements and discussions about buying [Digital Storage] to try to recoup the money which would be related to this agreement.
>
> As I said, in my opinion, the way the Daisytek sale is stated, and it's revolving around the purchase of these assets, and [Babyak] subsequently reneged on that commitment and put in his own offer to buy [Digital Storage] at the last minute, which cost a lot of people jobs and money.

Langdale deposition, at 220-21. In this answer, Langdale refers to his unsuccessful bid to purchase Digital Storage's assets back from Daisytek after it appeared that Daisytek would declare bankruptcy. At that time, Daisytek was only days away from owing the second growth earnout payment.

{¶45} This court cannot determine from Langdale's answer exactly what he wanted Babyak to do. Assuming, as appellants do, that Langdale requested that Babyak participate in Langdale's bid to purchase Digital Storage's assets, we fail to see how the

service requested relates to the original Daisytek sale. Appellants contend that a successful bid to purchase Digital Storage's assets "would have provided for a full recovery of the second Growth Earnout [Payment]." Appellants' brief, at 10. While we agree that ensuring the receipt of the second growth earnout payment is connected to the original sale, we cannot find any evidence to support appellants' assertion that a successful bid would have actually resulted in payment.

{¶46} Accordingly, we conclude that the evidence establishes that Babyak complied with all requests to perform services in connection with the Daisytek sale. Thus, reasonable minds could only conclude that Babyak performed under the Incentive Compensation Agreement, and the trial court did not err in so finding.

{¶47} In sum, we reject each of the arguments underlying appellants' first assignment of error. Therefore, we overrule the first assignment of error.

{¶48} By appellants' second assignment of error, they argue that the trial court erred in finding Babyak's unjust enrichment claim moot, rather than entering summary judgment against Babyak on that claim. As the error in the trial court's ruling on the unjust enrichment claim does not materially prejudice appellants, we find this argument unavailing.

{¶49} Appellants sought summary judgment on all Babyak's claims, including his unjust enrichment claim. The trial court denied appellants' summary judgment motion in its entirety. Nevertheless, the trial court recognized that Babyak's recovery on his breach of contract claim precluded recovery on his unjust enrichment claim. Thus, the trial court found the unjust enrichment claim moot, and in its October 20, 2008 judgment entry, it entered judgment on that claim in favor of appellants and against Babyak.

{¶50} Technically, the trial court should have granted appellants' motion to the extent that they sought summary judgment on Babyak's unjust enrichment claim. However, in entering judgment in favor of appellants and against Babyak on that claim, the trial court eliminated any prejudice appellants might have suffered. "A reviewing court will not disturb a judgment unless the error contained within is materially prejudicial to the complaining party." *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶17, affirmed, 111 Ohio St.3d 541, 2006-Ohio-6208. Accordingly, as appellants suffered no material prejudice, we overrule their second assignment of error.

{¶51} For the foregoing reasons, we overrule appellants' first and second assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.