[Cite as *Zoar View Wilkshire, L.L.C. v. Wilkshire Golf, Inc.*, 2023-Ohio-2848.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ZOAR VIEW WILKSHIRE, LLC

Plaintiff-Appellant

-vs-

WILKSHIRE GOLF, INC. nka EASTERDAY GOLF, INC., et al.

Defendants-Appellees

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2022 AP 11 0052

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2022nCV 06 0373
JUDGMENT:	Affirmed in Part; Reversed in Part and Remanded
DATE OF JUDGMENT ENTRY:	August 14, 2023

APPEARANCES:

For Plaintiff-Appellant

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Wise, J.

{¶1} Plaintiff-Appellant, Zoar View Wilkshire, LLC, appeals from the November 1, 2022, Judgment Entry by the Tuscarawas County Court of Common Pleas. Plaintiffs-Appellees are Wilkshire Golf, Inc. n/k/a Easterday Golf, Inc., Elizabeth Easterday Futryk, and Holly Adams. The relevant facts leading to this appeal are as follows.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 2, 2021, Appellant and Appellee Easterday Golf entered into an Asset Purchase Agreement.

{¶3} On June 21, 2022, Appellant filed a Complaint against Appellees for breach of contract, unjust enrichment, and fraudulent misrepresentation.

{¶4} On August 19, 2022, Appellees filed an Answer to Appellant's Complaint. In Appellees' Answer, the Appellees acknowledge the accuracy of the documents, but deny the allegations of wrongdoing and legal conclusions of Appellant.

{¶5} On September 13, 2022, Appellees filed a Motion for Judgment on the Pleadings.

{¶6} On September 26, 2022, Appellant filed a Brief in Opposition to Appellees' Motion for Judgment on the Pleadings.

{¶7} On October 3, 2022, Appellees filed a Reply Brief in Support of their Motion for Judgment on the Pleadings.

{¶8} On November 1, 2022, the trial court granted Appellees' Motion for Judgment on the Pleadings. In its judgment entry, the trial court found the deposits and golf carts sold were not a part of the Asset Purchase Agreement, Appellees had no further obligations under the rental agreement with South East Golf Car Company, that the

admission of a valid contract precludes Appellant's recovery on an unjust enrichment theory, and that Appellant's fraud claim was barred by reliance on statements made outside the Asset Purchase Agreement.

ASSIGNMENTS OF ERROR

{¶9} Appellant filed a timely notice of appeal and herein raise the following four Assignments of Error:

{¶10} "I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO CIV.R. 12(C) AND DISMISSING THE COMPLAINT.

{¶11} "II. THE TRIAL COURT ERRED IN DISMISSING THE PLAINTIFF'S BREACH OF CONTRACT CLAIM AS A MATTER OF LAW WHERE, CONSTRUING THE ALLEGATIONS MOST STRONGLY IN FAVOR OF THE PLAINTIFF AND RESOLVING ALL DOUBTS IN FAVOR OF THE PLAINTIFF, THERE WERE AMBIGUITIES IN THE CONTRACT SUFFICIENT TO JUSTIFY DENIAL OF THE MOTION FOR JUDGMENT ON THE PLEADINGS.

{¶12} "III. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S UNJUST ENRICHMENT CLAIM WHERE THE CIVIL RULES PERMIT ALTERNATIVE OR INCONSISTENT PLEADINGS, AND PLAINTIFF SET FORTH ALTERNATIVE CAUSES OF ACTION, ANY ONE OF WHICH INDEPENDENTLY WOULD SUPPORT A CLAIM AGAINST THE DEFENDANT.

{¶13} "IV. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFF'S CLAIM OF FRAUDULENT MISREPRESENTATION."

Standard of Review

{¶14} Civ.R. 12(C) provides, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." The standard of review of the grant of a motion for judgment on the pleadings is the same as the standard of review for a Civ.R. 12(B)(6) motion. "Civ.R. 12(C) requires a determination that no material factual issues exist and that the movant is entitled to judgment as a matter of law." *Bank of Am., N.A. v. Michko*, 8th Dist. Cuyahoga No. 101513, 2015-Ohio-3137, ¶37. As the reviewing court, our review of a dismissal of a complaint based upon a judgment on the pleadings requires us to independently review the complaint and determine if the dismissal was appropriate. *Rich v. Erie County Department of Human Resources*, 106 Ohio App.3d 88, 91, 665 N.E.2d 278 (1995). A reviewing court need not defer to the trial court's decision in such cases. *Id*.

{¶15} A motion for a judgment on the pleadings, pursuant to CivR. 12(C), presents only questions of law. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 156-166, 297 N.E.2d 113 (1973). The determination of a motion under Civ.R. 12(C) is restricted solely to the allegations in the pleadings and the nonmoving party is entitled to have all material allegations in the complaint, with all reasonable inferences to be drawn therefrom, construed in its favor. *Id*. Evidence in any form cannot be considered. *Conant v. Johnson*, 1 Ohio App.2d 133, 135, 204 N.E.2d 100 (1964). "In order to grant such a motion, it must appear, considering all the averments of the pleadings, that simply a question of law is presented. *If an issue of fact*, or a direct issue joined *on any single material proposition is made, requiring the introduction of testimony by the moving party to sustain such issue*, the motion will be denied." *Wilhelms v. ProMedica Health Sys., Inc.*, 6th Dist. Lucas No.

L-22-1085, 2023-Ohio-143, 205 N.E.3d 1159, ¶13, *appeal not allowed*, 170 Ohio St.3d 1420, 2023-Ohio-1507, 208 N.E.3d, ¶13. (Citation omitted. Emphasis added by 6th Dist.) In considering such a motion, one must look only to the face of the complaint. *Nelson v. Pleasant*, 73 Ohio App.3d 479, 597 N.E.2d 1137 (1991).

{¶16} For the purpose of judicial economy, we will address the assignments of error out of order.

II.

{¶17} In Appellant's second Assignment of Error, Appellant argues the trial court erred in dismissing Appellant's breach of contract claim under Civ.R. 12(C) as material factual issues still exist. We agree.

{¶18} To recover on a breach of contract claim, the claimant must prove not only that the contract was breached, but that the claimant was thereby damaged. *Munoz v. Flower Hosp.* (1985), 30 Ohio App.3d 162, 168, 30 OBR 303, 309-310, 507 N.E.2d 360, 366.

{¶19} " '[B]reach,' as applied to contracts is defined as a failure without legal excuse to perform any promise which forms a whole or part of a contract, including the refusal of a party to recognize the existence of the contract or the doing of something inconsistent with its existence." *Natl. City Bank of Cleveland v. Erskine & Sons, Inc.*, 158 Ohio St. 450, 110 N.E.2d 598 (1953), paragraph one of the syllabus.

{¶20} In the case *sub judice*, Appellant alleges Appellees sold ten golf carts and retained the proceeds in contravention of the Asset Purchase Agreement.

{¶21} The Asset Purchase Agreement states:

> 1.1 On the Closing Date . . . Seller will sell to Buyer, and Buyer will purchase from Seller, all of Seller's right, title and interest in and to its assets used in or related to the operation of the Golf Course (collectively, the "Acquired Assets") including the following:
>
> * * *
>
> (b) tangible personal property utilized in the Golf Course other than Inventory, including the equipment, machinery, spare parts, furniture, fixtures, and other fixed assets listed on Schedule 1.1(b) attached hereto;

{¶22} Line items 49 – 51 Schedule 1.1(b) lists three golf carts included in the assets purchased. To determine if the ten golf carts sold included those listed as "Acquired Assets" on the Asset Purchase Agreement, evidence outside the pleadings and Asset Purchase Agreement would have to be submitted. As evidence in any form cannot be considered when granting a Motion for Judgment on the Pleadings, dismissal of the Breach of Contract claim was premature.

{¶23} Appellant's first Assignment of Error is sustained.

III.

{¶24} In Appellant's third Assignment of Error, Appellant argues the trial court erred in dismissing plaintiff's unjust enrichment claim as alternative and inconsistent pleadings are permitted. We disagree.

{¶25} Civ.R. 8(E)(2) provides:

> A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate

> counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.

{¶26} Unjust enrichment "is an equitable claim based on a contract implied in law[.]" *Bunta v. Superior VacuPress, L.L.C.*, --- Ohio St.3d ----, 2022-Ohio-4363, --- N.E.3d ----, ¶36. "A successful claim of unjust enrichment requires a showing that (1) a benefit was conferred by the plaintiff on the defendant, (2) the defendant had knowledge of the benefit, and (3) the defendant retained the benefit under circumstances in which it was unjust to do so without payment." *Id*. "Ohio law does not permit recovery under the theory of unjust enrichment when an express contract covers the same subject. *Padula v. Wagner*, 9th Dist. Summit No. 27509, 2015-Ohio-2374, 37 N.E.3d 799, ¶48, citing *Ulmann v. May*, 147 Ohio St. 468, 475, 478-79, 72 N.E.2d 63 (1947).

{¶27} In the case *sub judice*, paragraphs five and under General Allegations of Appellant's Complaint states Appellant and Appellees entered into an Asset Purchase Agreement for $1,600,000 in exchange for certain assets.

{¶28} Paragraph 19 under Appellant's second claim, the Unjust Enrichment section of Appellant's Complaint, restates every allegation already contained in the Complaint. This section never refutes, contends, or alternatively pleads that Appellees received $1,600,000 for anything other than the assets covered in the Asset Purchase

Agreement. Therefore, even though Civ.R. 8(E)(2) allows for alternative and inconsistent pleadings, Appellant failed to plead that the subject of his claim of unjust enrichment is not covered by the Asset Purchase Agreement. Since "Ohio law does not permit recovery under the theory of unjust enrichment when an express contract covers the same subject, the trial court did not err by dismissing this claim.

{¶29} Appellant's third Assignment of Error is overruled.

IV.

{¶30} In Appellant's fourth Assignment of Error, Appellant argues the trial court erred in dismissing Appellant's fraudulent misrepresentation claim as ten golf carts, the basis for the breach of contract claim, were sold by Appellees, and that Appellees misrepresented that the golf prepaid fees Appellees were maintaining were minimal. We disagree.

{¶31} Civ.R. 9(B) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The pleading must contain allegations of fact which tend to show each and every element of a cause of action for fraud. *Riieger v. Podeweltz*, 2nd Dist. Montgomery No. 23520, 2010-Ohio-2509, ¶9. "Failure to specifically plead the operative facts constituting an alleged fraud presents a defective claim that may be dismissed." *Id*.

{¶32} The elements of fraudulent misrepresentation are (1) a representation on or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) followed by

justifiable reliance upon the representation or concealment by the other party, and (6) resulting injury proximately caused by the reliance. *Funk v. Durant*, 5th Dist. Muskingum No. CT2002-0032, 155 Ohio App.3d 99, 2003-Ohio-5591, 799 N.E.2d 221, ¶20. *See also Friedland v. Lipman* (1980), 68 Ohio App.2d 255, 22 O.O.3d 422, 429 N.E.2d 456.

{¶33} In Ohio, the existence of a contract action generally excludes the opportunity to present the same case as a tort claim. *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151, 684 N.E.2d 1261, 1270 (9th Dist.1996). "A tort claim based upon the same actions as those upon which a claim of contract breach is based will exist independently of the contract action only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed." *Id*.

{¶34} In the case *sub judice*, Appellant's fourth Assignment of Error alleges fraudulent misrepresentation that Appellees sold golf carts Appellant claims were part of the contract prior to closing, retaining the profits, and that Appellees misrepresented that any deposits were minimal but were actually in excess of $21,000.

{¶35} Appellant's claim that Appellees owed them a duty to disclose the sale of the ten golf carts is not independent of the contract itself. Thus, Appellant is excluded from presenting a tort claim regarding the subject of a breach of contract claim unless they show the tort claim exists independently of the contract action.

{¶36} Appellant also argues the court erred by dismissing Appellant's claim of fraudulent misrepresentation that the deposits not included in the Asset Purchase Agreement amounting to over $21,700, but Appellees described them as minimal. Appellant's Complaint has failed to adequately show with particularity that Appellees

owed Appellant a duty to disclose information about an asset which was not acquired by Appellant as required by Civ.R. 9(B).

{¶37} Therefore, we find the trial court did not err in granting Appellant's Motion for Judgment on the Pleadings with respect to Appellant's claim of fraudulent misrepresentation.

{¶38} Accordingly, Appellant's fourth Assignment of Error is overruled.

I.

{¶39} In Appellant's first Assignment of Error Appellant generally argues the trial court erred in granting Appellees Motion for Judgment on the Pleadings. For the reasons stated in Assignments of Error II, III, and IV, the trial court is affirmed in part and reversed in part.

{¶40} For the foregoing reasons, the judgment of the Court of Common Pleas of Tuscarawas County, Ohio, is affirmed in part and reversed in part. This matter is remanded for further proceedings consistent with this opinion.

By: Wise, J.

Delaney, concurs.

Hoffman, P. J., concurs separately.

JWW/br 0802

Hoffman, P.J., concurring

{¶41} I concur in the majority's analysis and disposition of Appellant's Assignments of Error I and III.

{¶42} I also concur in the majority's disposition of Appellant's Assignment of Error II. However, regardless of whether any of the three listed golf carts in Schedule 1.1(b) of the Acquired Assets were included among the ten golf carts Appellant claims were not transferred pursuant to Section 1.1 of the Asset Purchase Agreement, I find the ten golf carts were included in the agreement despite not being separately listed in Schedule 1.1(b) attached to the agreement.

{¶43} I further concur in the majority's analysis and disposition of Appellant's Assignment of Error IV as it relates to the ten golf carts. As it relates to the deposits of prepaid golf memberships, I would overrule this portion of the assigned error as I find the same to have been specifically listed as Excluded Assets under the agreement.