SUMMARY
June 29, 2023

2023COA61

No. 22CA1140, *Alderman v. CSU* — Education — Board of Governors of the Colorado State University System — Temporary Suspension in Case of Fire, Fatal Diseases, or Unforeseen Calamity; Contracts — Quantum Meruit — Unjust Enrichment

This case involves an issue of continuing public interest, is the first case interpreting 23-30-111, C.R.S. 2022, and applies the law of unjust enrichment to a novel set of facts. The division considers whether, in this putative class action, plaintiff students have properly asserted claims seeking damages for breach of contract, or alternatively for unjust enrichment, against Defendants, Board of Governors of the Colorado State University (CSU), in connection with the closures of the CSU campuses in response to the COVID 19 pandemic. It affirms dismissal of the breach of contract claims but reverses the dismissal of the unjust enrichment claims. The

dissent concludes that the contract governed the same subject matter as the purported unjust enrichment claims and, thus, those claims were also properly dismissed.

COLORADO COURT OF APPEALS **2023COA61**

Court of Appeals No. 22CA1140
City and County of Denver District Court No. 20CV31410
Honorable Alex C. Myers, Judge

Renee Alderman,

Plaintiff-Appellant,

v.

Board of Governors of the Colorado State University,

Defendant-Appellee.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division B
Opinion by JUDGE RICHMAN*
Vogt*, J., concurs
Tow, J., concurs in part and dissents in part

Announced June 29, 2023

Kishinevsky & Raykin, LLC, Igor Raykin, Michael J. Nolt, Aurora, Colorado, for Plaintiff-Appellant

Philip J. Weiser, Attorney General, Jennifer H. Hunt, Senior Assistant Attorney General, Kathleen L. Spalding, Senior Assistant Attorney General, Michael D. McMaster, Assistant Solicitor General, Erica Weston, Special Assistant Attorney General, Denver, Colorado, for Defendant-Appellee

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2022.

¶ 1 Plaintiff, Renee Alderman, individually and on behalf of all others similarly situated, appeals from two district court orders dismissing her claims in this putative class action seeking damages for breach of contract, or alternatively for unjust enrichment, from defendant, the Board of Governors of the Colorado State University (CSU), in connection with the closures of the CSU campuses in response to the COVID-19 pandemic.

¶ 2 In its first order, the district court granted CSU's motion to dismiss the breach of contract claims pursuant to C.R.C.P. 12(b)(5) but denied dismissal of the unjust enrichment claims. In its subsequent order, the district court granted CSU's motion for judgment on the pleadings as to the unjust enrichment claims, thus terminating the case. Plaintiff appeals both orders. We affirm in part and reverse in part, and we remand for further proceedings.

I. Background

¶ 3 As alleged in plaintiff's consolidated complaint, in the spring of 2020, CSU cancelled in-person classes, changed all classes to online learning, closed most campus buildings, and required students to leave the campuses as a result of the COVID-19 pandemic. The campuses remained closed at least through the end

of the spring 2020 semester.[1] CSU did not provide reimbursement to students for any tuition or fees paid for the spring 2020 semester.

¶ 4 Plaintiff alleges that she and similarly situated students chose to attend CSU on an in-person basis, paid substantial tuition and fees for the use of campus facilities for the spring 2020 semester, but were precluded from obtaining in-person learning and the use of facilities because of the closure.

¶ 5 The complaint alleges, in four separate claims, that CSU breached its contracts to provide in-person learning for which plaintiff paid tuition (Claim 1) and to make available the facilities for which she paid fees (Claim 3). Plaintiff alternatively alleges that CSU's failure to refund her tuition and fees has resulted in the unjust enrichment of defendant (Claims 2 and 4).

II. The District Court's Orders

¶ 6 In its first order, issued August 25, 2021, the district court dismissed plaintiff's breach of contract claims based on its

---

[1] The complaint alleges some facts specific to the CSU campus in Fort Collins and other facts specific to the CSU campus in Pueblo, but the specific facts are not pertinent to the determination of the issues that were before the district court, or now before this court.

application of section 23-30-111, C.R.S. 2022, which provides as follows:

> The academic year may be divided into such terms by the board of governors of the Colorado state university system as in their judgment will best secure the objects for which the universities governed by the board were founded. *The board at any time may temporarily suspend a university in case of fire, the prevalence of fatal diseases, or other unforeseen calamity.*[2]

(Emphasis added.)

¶ 7 The district court concluded that because this statute was, by operation of law, part of any contract between plaintiff and CSU, CSU had the authority to close the campuses and suspend the university in the case of fatal disease; and it found that the COVID-19 pandemic, involving a highly contagious and deadly virus, was a fatal disease as referred to in the statute.

¶ 8 In the same order, the district court rejected CSU's argument that a party cannot recover for unjust enrichment where there is an

---

[2] This statutory authority appears to be unique to the Colorado State University system, as similar language is not found in the statutes authorizing the establishment of other universities in the state. *See, e.g.*, §§ 23-20-101 to -145, C.R.S. 2022 (establishing the University of Colorado); §§ 23-40-101 to -106, C.R.S. 2022 (establishing the University of Northern Colorado).

express contract addressing the subject of the alleged obligation to pay, noted that plaintiff's unjust enrichment claims were pleaded in the alternative to the breach of contract claims, and denied the motion as to the unjust enrichment claims.

¶ 9 In its order of May 19, 2022, the district court reconsidered the issue in light of the answer, filed by CSU after the initial order, in which CSU admitted the existence of an "implied-in-fact contract." Because it was now "undisputed that an implied-in-fact contract exists between the parties and its terms cover the same subject matter as Plaintiff's unjust enrichment claims," the court ruled, the unjust enrichment claims were precluded under *Interbank Investments, LLC v. Eagle River Water & Sanitation District*, 77 P.3d 814 (Colo. App. 2003).

¶ 10 In so concluding, the district court also rejected plaintiff's argument, based on an exception to the rule of preclusion referenced in *Interbank*, that she had no other available remedies given the court's dismissal of her breach of contract claims. In this regard the court stated,

> The fact that Plaintiff['s] breach of contract [claim] has been dismissed under C.R.C.P. 12(b)(5) may reflect the absence of a viable

> remedy for breach of contract, but it does not reflect the absence of an available remedy at law in this context. That is, the question of whether a party has available rights under a contract is a different question than whether their breach of contract claim is viable . . . . Moreover, the implied-in fact contract has not been rescinded or failed.

III. Dismissal of Breach of Contract Claims

A. Standard of Review and Applicable Law

¶ 11 We review a district court's order on a motion to dismiss de novo. *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 11. We also review de novo questions of statutory interpretation. *Id.*

¶ 12 To survive a Rule 12(b)(5) motion to dismiss, a party must plead sufficient facts that, if taken as true, suggest plausible grounds to support a claim for relief. *Warne v. Hall*, 2016 CO 50, ¶¶ 9, 24. For a party's claim to be deemed plausible, "the factual allegations of the complaint must be enough to raise a right to relief 'above the speculative level.'" *Id.* at ¶ 9 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A plaintiff must identify the grounds on which it is entitled to relief, and cannot simply provide "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp.*, 550 U.S. at 555. A complaint

is insufficient if it provides only bald assertions without further factual enhancement. *Id.* at 557. Plausibility requires "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

¶ 13 While the question of whether the nonmoving party has stated a plausible claim for relief must be decided from the allegations in the complaint, *see Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992), a court may also consider "the facts alleged in the pleadings" and "documents attached as exhibits or incorporated by reference, and matters proper for judicial notice." *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

B. Analysis

¶ 14 Plaintiff alleged that she contracted with CSU for in-person learning for which she had paid tuition and for use and benefit of the facilities for which she had paid fees. CSU does not apparently dispute the existence of such a contract.

¶ 15 But as the district court correctly concluded, the contract, by operation of law, necessarily included applicable statutes, and section 23-30-111 is an applicable statute. *See Keelan v. Van Waters & Rogers, Inc.*, 820 P.2d 1145, 1148 (Colo. App. 1991) ("Statutory law which pertains to the terms of a contract is considered part of that contract."), *aff'd*, 840 P.2d 1070 (Colo. 1992). Plaintiff does not disagree with that conclusion of law.

¶ 16 In addition, the district court found that the COVID-19 pandemic involved a highly contagious and deadly virus and was clearly a fatal disease as referred to in the statute. Plaintiff does not appear to disagree with that conclusion either.

¶ 17 Plaintiff does not argue that the closure of campus was not a suspension of the university, but instead argues that the terms of the statute only permit a "temporary" suspension of the operation of the university, contending that what occurred here was not a temporary, but an indefinite, suspension of the university.

¶ 18 The phrase "temporarily suspend" is not defined in the statute. Plaintiff points to a dictionary definition of "suspend," but that definition apparently is "to stop temporarily," Merriam-Webster

Dictionary, https://perma.cc/7VFU-9BNJ, which merely takes us back to the meaning of "temporarily."

¶ 19 In construing the meaning of a term of a statute, we aim to effectuate the legislature's intent. *Cisneros v. Elder*, 2022 CO 13M, ¶ 21. "To do so, 'we consider the entire statutory scheme to give consistent, harmonious, and sensible effect to all of its parts, and we construe words and phrases in accordance with their plain and ordinary meanings.'" *Id.* (quoting *Ryser v. Shelter Mut. Ins. Co.*, 2021 CO 11, ¶ 14). "If the statutory language is clear and unambiguous, then we do not resort to other rules of statutory construction." *Id.* "We presume, however, that the General Assembly intends a just and reasonable result." *Id.* "Accordingly, 'although we must give effect to the statute's plain and ordinary meaning, the intention of the legislature will prevail over a literal interpretation of the statute that leads to an absurd result.'" *Id.* (quoting *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998)).

¶ 20 We conclude that the meaning of "temporarily suspend," as used in the statute, must be discerned from the intended purpose of the statute. And the purpose of the statute is to allow the

university to take appropriate measures in the face of emergency situations, including the prevalence of a fatal disease. The extent of the suspension necessarily depends on the degree of the prevalence of the disease. Insofar as COVID-19 was concerned, it is not disputed that it is a highly contagious and deadly virus, and the isolation of persons and avoidance of group gatherings was a necessary remedy in the spring of 2020. Thus, closure of the campuses for the remainder of the spring 2020 semester was "temporary" within the contemplation of the statute under these circumstances. Accordingly, we cannot conclude that the district court erred by applying the statute to find that plaintiff did not plausibly allege that the contract was breached given all the circumstances alleged in her complaint, taken together with the statutory authority of CSU.

IV. Dismissal of Unjust Enrichment Claims

A. Standard of Review and Applicable Law

¶ 21 We review de novo a ruling on a motion for judgment on the pleadings. *Melat, Pressman & Higbie, L.L.P. v. Hannon L. Firm, L.L.C.*, 2012 CO 61, ¶ 17. "Judgment on the pleadings is appropriate if, from the pleadings, the moving party is entitled to

judgment as a matter of law." *City & Cnty. of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001).

¶ 22 Generally, a claim for quantum meruit (or unjust enrichment) does not depend on the existence of a contract; rather, it arises out of the need to avoid unjust enrichment to a party even in the absence of an actual agreement to pay for the services rendered. *Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 444 (Colo. 2000). Although this is not a classic case of unjust enrichment, as CSU is not being called upon to "pay for services rendered," the doctrine of unjust enrichment may still be applied as it seeks to restore fairness when a contract fails. *Id.* at 444-45.

¶ 23 A plaintiff is entitled to recover based on the unjust enrichment of a defendant when the plaintiff has no alternative right under an enforceable contract. *Backus v. Apishapa Land & Cattle Co.*, 44 Colo. App. 59, 61-62, 615 P.2d 42, 43 (1980). To plead a claim for unjust enrichment, a plaintiff must allege that she conferred a benefit that was known to or appreciated by the defendant, and which the defendant accepted or retained, making it inequitable for the defendant to retain the benefit without payment. *Dudding*, 11 P.3d at 445. Quantum meruit strikes the appropriate

balance by gauging the equities and ensuring that the party receiving the benefit of the bargain pays a reasonable sum for that benefit. *Id.*

B. Analysis

¶ 24 Applying these standards, we cannot agree that the district court properly dismissed the unjust enrichment claims. Because CSU had the authority to invoke the statute and close the campuses to void any contractual obligation to deliver in-person services, it does not necessarily follow that CSU had the right to retain the tuition and fees that plaintiff had paid pursuant to the contract, or that it was entitled to judgment as a matter of law.

¶ 25 Plaintiff's consolidated complaint alleges the elements of unjust enrichment claims. Whether it is inequitable for CSU to retain the tuition and fees that plaintiff paid for the spring 2020 semester remains to be determined, but the elements of an unjust enrichment claim are alleged here.

¶ 26 The district court recognized the general principles of unjust enrichment but, citing *Interbank*, relied on a corollary principle: When an express contract covers the same subject matter as the implied contract of the unjust enrichment claim, it precludes any

implied-in-law contract. 77 P.3d at 816. The district court found that the subject matter of plaintiff's unjust enrichment claims was covered by an enforceable implied-in-fact contract.

¶ 27 While the district court correctly cited the preclusion rule, it noted an exception, also recognized in *Interbank*, to the application of that rule: A party may recover on a claim for unjust enrichment when the party will have no right under the express contract, such as when the express contract failed. *Id.* The district court concluded that plaintiff and other similarly situated students "do not fall within this exception because they do have a remedy at law under the enforceable implied-in-fact contract with CSU." We disagree with this conclusion.

¶ 28 In *Interbank*, the plaintiff sued for breach of contract and unjust enrichment. The case proceeded to a bench trial on the contract claim, and the court found that plaintiff had failed to prove actual damages. But the court indicated that unjust enrichment "may apply," and after a remand it eventually awarded substantial damages for unjust enrichment. *Id.* at 815-16. A division of this court reversed the unjust enrichment award, concluding that the case did not come within the unjust enrichment exception that

applies when a plaintiff would have no right under an enforceable contract. *Id.* at 817. The division noted that an inability to recover more than nominal damages for breach of an enforceable contract because of a failure of proof is not the same as "the rationale of unjust enrichment cases discussing *un*enforceable contracts," such as in *Dudding*. *Interbank*, 77 P.3d at 818. As the division pointed out, the *Interbank* contract was enforceable; the plaintiff simply failed to prove its damages. *Id.*

¶ 29 Plaintiff in the present case is not in a comparable position. She has not failed to prove her contract case; rather, the contract obligations of CSU were obviated when it invoked the statute, leaving plaintiff with no contract rights to enforce.

¶ 30 If anything, this case is more like the *Backus* case, where the division held that the unjust enrichment claim could proceed. 44 Colo. App. at 61-62, 615 P.2d at 44. There the seller of real estate refused to pay the commission to the involved brokers — one from Texas and one from Colorado. *Id.* at 60-61, 615 P.2d at 43. Plaintiff, the real estate broker licensed in Texas, took an assignment of the claim for the commission from the Colorado-based broker and filed suit against the seller for breach of contract

and unjust enrichment. *Id.* at 61, 615 P.2d at 43. Because plaintiff was not a licensed real estate broker in Colorado, the trial court concluded that a Colorado statute prohibiting unlicensed brokers from entering into contracts for the sale of Colorado property barred the plaintiff from pursuing claims directly against the seller and entered summary judgment. *Id.*

¶ 31 A division of this court reversed. First, it held that the plaintiff, as assignee, stood in the shoes of the assignor (the Colorado broker) and could sue directly. *Id.* at 61, 615 P.2d at 43. Moreover, the division held that the unjust enrichment claim could go forward because it could be unjust for the seller to accept the benefit of the sale without paying the commission. *Id.* at 61-62, 615 P.2d at 44. Specifically, the division held that, if the plaintiff's assignment claim failed, he would have no right under an enforceable contract. *Id.* Under such circumstances, he "may be able to recover for unjust enrichment." *Id.*

¶ 32 We conclude that plaintiff in this case is in a position like that of the broker in *Backus*, except that plaintiff's claim under her contract theory fails due to CSU's invocation of the statute. Unlike the plaintiff in *Interbank*, plaintiff has not failed to prove her case or

failed to plead a viable contract theory. Rather, like the circumstance faced by the plaintiff in *Backus*, the invocation of a Colorado statute has made her contract claims unenforceable.[3] Plaintiff, like the plaintiff in *Backus*, is left with only the unjust enrichment claims to seek to enforce her rights. Under these circumstances, we cannot say the district court correctly entered judgment on the pleadings as a matter of law.

V. Disposition

¶ 33 The order dismissing plaintiff's breach of contract claims is affirmed. The order granting judgment on the unjust enrichment claims is reversed, and the case is remanded for further proceedings.

¶ 34 In entering this judgment, we do not opine in any way on whether it was unfair for CSU to retain all, or any, of the tuition or

---

[3] In *McCauliffe v. Vail Corp.*, Civ. A. No. 20-cv-01121, 2021 WL 4820542, at *13 (D. Colo. Oct. 15, 2021) (unpublished opinion), *aff'd in part and vacated in part*, ___ F.4th ___, 2023 WL 3829554 (10th Cir. June 6, 2023), a case cited in the district court's order dismissing plaintiff's unjust enrichment claims, the federal court described *Backus v. Apishapa Land & Cattle Co.*, 44 Colo. App. 59, 615 P.2d 42 (1980), as a case in which the defendants had used "legal technicalities" to avoid paying sums they clearly owed. The invocation by CSU of the statute could also be viewed as using a legal technicality.

fees plaintiff paid. As noted, that remains to be determined by the fact finder. We hold only that plaintiff has stated claims for unjust enrichment.

JUDGE VOGT concurs.

JUDGE TOW concurs in part and dissents in part.

JUDGE TOW, concurring in part and dissenting in part.

¶ 35 I agree that the contract in this case necessarily included the statutory term permitting defendant, the Board of Governors of the Colorado State University (CSU), to suspend the university under the circumstances presented by the COVID-19 pandemic. Consequently, I agree that plaintiff, Renee Alderman, has not stated a breach of contract claim.

¶ 36 But for the very same reason — that the contract between Alderman and CSU explicitly permitted the latter's actions — Alderman cannot pursue a claim for unjust enrichment. Accordingly, I dissent from the portion of the opinion that reinstates such claims.

¶ 37 Alderman alleges, and CSU admits, that the parties entered into a contract governing CSU's provision of educational services to Alderman. Alternatively, she seeks to impose an implied-in-law contract governing the exact same services. This she simply cannot do. "[A] party cannot recover for unjust enrichment by asserting a quasi-contract when an express contract covers the same subject matter because the express contract precludes any implied-in-law

contract." *Interbank Invs., LLC v. Eagle River Water & Sanitation Dist.*, 77 P.3d 814, 816 (Colo. App. 2003).

¶ 38 True, there are exceptions to this general rule. I do not agree, however, that this case implicates those exceptions. In particular, Alderman's unjust enrichment claims cannot find safe harbor in *Backus v. Apishapa Land & Cattle Co.*, 44 Colo. App. 59, 615 P.2d 42 (Colo. App. 1980). In *Backus*, the plaintiff — a real estate broker licensed in Texas but not Colorado — assisted a Colorado broker in finding a buyer for the defendant's property, but the defendant backed out of the deal. *Id.* at 60-61, 615 P.2d at 43. The agreement between the Colorado broker and the defendant provided for a commission in the event of such withdrawal, and the Colorado broker assigned his right to any such commission to the plaintiff. *Id.* at 61, 615 P.2d at 43. The plaintiff sued the defendant to recover the commission payment provided for in the contract under three theories: direct breach of contract, collection under the assignment, and a claim for unjust enrichment. *Id.*

¶ 39 The district court granted summary judgment on all claims. A division of this court partially reversed. The division affirmed the district court on the contract claim because "[the plaintiff] *had no*

contract with [the defendant]." *Id.* (emphasis added). The division permitted the assignment claim to proceed. *Id.* at 61, 615 P.2d at 44. The division recognized, however, that the assignment claim might fail because a statute in place at the time prohibited an unlicensed broker (such as the plaintiff) from entering into a contract for the sale of Colorado property. *Id.* at 61-62, 615 P.2d at 43-44. The division noted that "if [the plaintiff's] assignment claim fails, he will have no right under an enforceable contract. *Under such circumstances*, [the plaintiff] may be able to recover for unjust enrichment." *Id.* at 62, 615 P.2d at 44 (emphasis added).

¶ 40 In other words, *Backus* does not stand for the proposition that if a party *has a contract* but cannot recover under it (because the other party's actions did not breach that contract), the party may alternatively pursue an unjust enrichment claim. Instead, *Backus* holds merely that where a party may not be able to establish the existence of an enforceable contract at all, that party may recover for unjust enrichment.

¶ 41 Put another way, the exception to the general rule prohibiting pursuit of quasi-contractual recovery where an express contract covers the same subject matter applies "when an express contract

failed or was rescinded." *Interbank Invs.*, 77 P.3d at 816. But a contract does not "fail" merely because it does not provide all the services and protections to which one of the contracting parties claims entitlement. Indeed, if that were sufficient to permit parallel pursuit of contractual and quasi-contractual remedies, every breach of contract claim would be accompanied by an unjust enrichment claim. Rather, failure of a contract sufficient to open the door to pursuit of quasi-contractual recovery means that the contract was legally unenforceable, *see Backus*, 44 Colo. App. at 62, 615 P.2d at 44, or abrogated, *see Dudding v. Norton Frickey & Assocs.*, 11 P.3d 441, 444 (Colo. 2000).

¶ 42 Because the contract between Alderman and CSU was legally enforceable (albeit not in the manner Alderman sought), was not abrogated or rescinded, and related to the same subject matter as the allegations underpinning Alderman's unjust enrichment claim, she cannot pursue a quasi-contractual claim such as unjust enrichment.

¶ 43 I would, therefore, affirm the district court's judgment on those claims as well.