No. 1-17-3044
APPELLATE COURT OF ILLINOIS FIRST DISTRICT Fifth Division

Arndt v. Nardulli

2018 Ill. App. 173044
Decided Dec 21, 2018

No. 1-17-3044

12-21-2018

SAMUEL F. ARNDT, III, Plaintiff-Appellant, v. NICHOLAS NARDULLI and DIANA JOHNSON, Defendants-Appellees.

JUSTICE LAMPKIN delivered the judgment of the court.

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1). Appeal from the Circuit Court of Cook County. No. 15 CH 12683 Honorable Peter Flynn, Judge, presiding. JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 HELD: The release provision and non-reliance clause in the parties' settlement agreement did not act as affirmative matters barring plaintiff's claims for breach of fiduciary duty and fraud. ¶ 2 Plaintiff, Samuel Arndt, appeals the circuit court's dismissal of his second amended complaint, which asserted claims of breach of a fiduciary duty and fraud. Plaintiff and defendants, Nicholas Nardulli and Diana Johnson, were the sole
2 shareholders in a corporation. *2 Following years of litigation, the parties entered into a settlement agreement and plaintiff transferred his shares of the corporation to Nardulli. The settlement agreement contained a release provision and a non-reliance clause. Plaintiff contends the circuit court erred in dismissing his claims in favor of defendants where they breached their fiduciary duty when negotiating the settlement agreement, thus rendering the release provision and non-reliance clause voidable. Based on the following, we reverse and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff and defendants were shareholders in Redhawk Financial Services, Inc. (Redhawk). Plaintiff owned 49 percent of Redhawk's shares; Nardulli was the controlling shareholder, a director, and the president of Redhawk; Johnson was a shareholder, a director, and the secretary of Redhawk.[1] ¶ 5 On December 4, 2012, Redhawk filed a complaint against plaintiff for breach of fiduciary duty. The complaint alleged plaintiff withdrew over $100,000 from Redhawk without an apparent business justification and diverted Redhawk's commissions into plaintiff's personal bank account. Plaintiff filed a counterclaim against Redhawk and a third-party complaint against defendants claiming, *inter alia*, breach of fiduciary duty and oppression of him as a minority shareholder, and requesting an accounting of Redhawk's books and records and the dissolution of the company. Plaintiff alleged defendants improperly removed him as an officer and director of Redhawk. Both

parties were represented by counsel in the 2012 litigation. *3 ¶ 6 During the pendency of the 2012 case, Redhawk filed a 2013 tax return reporting a loss. Plaintiff also received an IRS Schedule K-1 Form reflecting that Redhawk incurred a loss in 2013. ¶ 7 On January 20, 2015, defendants' attorney sent a letter to plaintiff's attorney proposing a settlement. The letter proposed that plaintiff relinquish his shares of Redhawk and release Redhawk and defendants from his claims against them. The letter further provided that "the affairs of Redhawk at this stage only involve debt, not profit. ***. In all, [defendants] have suffered over $250,000 in damages as a result of [plaintiff's] actions." ¶ 8 On February 18, 2015, plaintiff and defendants entered into a settlement agreement to dismiss the 2012 litigation. The settlement agreement included an assignment of plaintiff's shares of Redhawk to Nardulli, a release by plaintiff of his claims against defendants, and a non-reliance clause. The release provision provided:

> "Arndt and Federal,[2] individually and derivatively, on behalf of themselves and their successors, heirs, assigns, parents, subsidiaries and affiliates, and their respective officers, directors, stockholders, agents, employees, attorneys, servants, insurers, representatives, successors, heirs and assigns (the "Defendant Releasing Parties"), do hereby remise, release and forever discharge N&A[3], Redhawk, Nardulli and Johnson, individually and derivatively, and their successors, heirs, assigns, parents, subsidiaries and affiliates, and their respective officers, directors, stockholders, agents, employees, attorneys, servants, insurers, representatives, successors, heirs and assigns (the "Plaintiff Released Parties") from all claims, demands, rights and causes of action (inchoate or

*4

> otherwise), which the Defendant Releasing Parties ever had or now have against the Plaintiff Released Parties whether known or unknown, existing on or prior to the date of this Agreement, including but not limited to those which were or could have been asserted in relation to the Litigation, except that the obligations set forth in this Agreement are not released."

The non-reliance clause provided:

> "This Agreement constitutes the entire agreement between the parties and supersedes all agreements, representations, warranties, statements, promises, and understandings, whether oral or written, with respect to the subject matter of this Agreement. No party hereto has in any way relied, nor shall in any way rely, upon any oral or written agreements, representations, warranties, statements, promises or understandings made by any other party, any agent or attorney of any other party or any other person unless such agreement, representation, warranty, statement, promise or understanding is specifically set forth in this Agreement. No party hereto nor any of its attorneys shall be bound by or charged with any statements, promises, or understandings not specifically set forth in this Agreement."

¶ 9 According to plaintiff's second amended complaint, Redhawk realized a profit of $161, 593 as represented in its 2014 federal tax return. Approximately one week after the parties executed their settlement agreement, plaintiff received an IRS Schedule K-1 Form reporting his personal tax liability of $79,181 resulting from Redhawk's 2014 profits. ¶ 10 On June 4, 2015, plaintiff filed a demand pursuant to section 7.75 of the Business Corporation Act of 1983 (805 ILCS 5/7.75 (West 2014)) requesting access to Redhawk's books *5 and accounts. Redhawk and Nardulli refused to produce the requested records. On August 24, 2015, plaintiff filed a petition for mandamus against Redhawk, requesting a judgment to compel Redhawk and Nardulli to produce the requested financial records. In response, Redhawk and Nardulli filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)), arguing, *inter alia*, that plaintiff lacked standing to inspect Redhawk's books and records because plaintiff was no longer a shareholder. On November 15, 2015, following a hearing, the circuit court granted the motion, thus

dismissing plaintiff's petition for mandamus. Plaintiff was granted leave to file an amended complaint. ¶ 11 On December 29, 2015, plaintiff filed an amended complaint against Redhawk and defendants alleging that he was fraudulently induced into executing the settlement agreement. Plaintiff sought rescission of the settlement agreement. Redhawk and defendants responded by filing a section 2-615 motion to dismiss, arguing plaintiff's claim was barred by the non-reliance clause in the settlement agreement. At the subsequent hearing, when asked by the circuit court whether plaintiff actually wished to pursue a claim for rescission, plaintiff's attorney withdrew the amended complaint. Plaintiff was granted leave to file a second amended complaint. ¶ 12 On February 11, 2016, plaintiff filed his second amended complaint, which we consider in this appeal. In his second amended complaint, plaintiff asserted claims for fraud and breach of fiduciary duty against defendants. Plaintiff alleged defendants' attorney's false statement in the January 20, 2015, letter that "the affairs of Redhawk at this stage involve only debt, not profit" fraudulently induced him to relinquish his Redhawk shares for no compensation and to enter into the settlement agreement. Plaintiff further alleged defendants owed him
6 fiduciary duties while *6 negotiating the settlement, which they breached by authorizing their attorney to falsely represent Redhawk's financial status, thus rendering voidable the release in the settlement agreement. In response, defendants[4] filed a section 2-619 motion to dismiss, arguing the settlement agreement's release provision and non-reliance clause barred plaintiff's claims of fraudulent inducement and constructive fraud based on the breach of a fiduciary duty. Defendants additionally argued that they did not owe plaintiff a fiduciary duty during their negotiations to end their adversarial litigation and to dissolve their business relationship where they were represented by separate counsel. Defendants attached the settlement agreement as an exhibit to their motion. ¶ 13 On November 7, 2017, the circuit court dismissed plaintiff's second amended complaint. In so doing, the circuit court held that, because the parties were involved in adversarial litigation and were represented by separate attorneys while negotiating to end their relationship, they no longer owed fiduciary duties to each other at the time the settlement agreement negotiations took place. The court further held that the release provision and non-reliance clause barred plaintiff's claims. ¶ 14 This appeal followed.

1 Plaintiff's second amended complaint does not provide the express break down of defendants' percentages of ownership.

2 Federal refers to Redhawk Federal, Inc., an entity not involved in this appeal.

3 "N&A" refers to Nardulli & Associates, an entity not involved in this appeal.

4 Nardulli initially filed the dismissal motion and Johnson later joined.

¶ 15 II. ANALYSIS

¶ 16 Plaintiff contends the circuit court erred in finding defendants no longer owed fiduciary duties to him. Plaintiff maintains defendants continued to owe him the fiduciary duty to truthfully account for Redhawk's profits when they fraudulently induced him to enter into the settlement agreement. Plaintiff contends
7 defendants breached their fiduciary duty by falsely *7 representing *vis a vis* their attorney's January 20, 2015, letter that Redhawk had no profits. Plaintiff insists that defendants' breach rendered voidable the settlement agreement's release provision and non-reliance clause. Plaintiff, therefore, contends neither the release provision nor the non-reliance clause barred his breach of fiduciary duty and fraud claims in his second amended complaint. ¶ 17 A section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts an affirmative matter outside the complaint that defeats the claim. *Hoover v. Country Mutual Insurance Co.*, 2012 IL App (1st) 110939, ¶ 31. When a section 2-619 dismissal motion is under consideration, all well-pled facts in the complaint are admitted, as well as any reasonable inferences that may be drawn from those facts (*Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 23-24 (2004)), but a court will not accept as true mere

conclusions unsupported by specific facts (*Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009)). When ruling on a section 2-619 motion to dismiss, the circuit court must view all of the pleadings and any supporting documentation in a light most favorable to the nonmoving party. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. The motion should be granted only if the moving party proves there is no set of facts that would support a cause of action. *Id.* We review *de novo* a circuit court's decision granting a section 2-619 dismissal motion. *Id.* ¶ 18 We first address plaintiff's breach of fiduciary duty claim. In order to present a claim for breach of fiduciary duty, a plaintiff must demonstrate: (1) a fiduciary duty exists; (2) the fiduciary duty was breached; and (3) the breach proximately caused the plaintiff's injury. *Cwikla v. Sheir*, 345 Ill. App. 3d 23, 32 (2003). We acknowledge that defendants refer to plaintiff's cause of action as a constructive fraud claim based
8 on a breach of fiduciary duty. Constructive *8 fraud is "anything calculated to deceive, including acts, omissions and concealments involving a breach of legal or equitable duty, trust or confidence resulting in damage to another." (Internal quotations omitted.) *Duffy v. Orlan Brook Condominium Owners' Assoc.*, 2012 IL App (1st) 113577, ¶ 33. Constructive fraud has been described as "spring[ing]" from the breach of a fiduciary duty. *La Salle National Trust, N.A. v. Board of Directors of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d 449, 455 (1997). The elements for both claims, therefore, are the same. See *Duffy*, 2012 IL App (1st) 113577, ¶ 33. Contrary to defendants' argument, plaintiff was not required to prove justifiable reliance in order to establish a claim for breach of fiduciary duty or constructive fraud based on a breach of fiduciary duty.[5] ¶ 19 Plaintiff argues that defendants owed fiduciary duties to him at the time the parties negotiated and entered into the settlement agreement. In contrast, defendants posit that the parties no longer maintained a fiduciary relationship when the alleged breach occurred because they had been involved in extensive adversarial litigation, had entered into arm's length negotiations to settle the litigation and to dissolve their relationship, and were represented by separate counsel throughout the process. ¶ 20 The law is clear that "partners are fiduciaries to one another and each partner is bound to exercise the utmost good faith and honesty in all dealings and transactions relating to the partnership." *Hamilton v. Williams*, 214 Ill. App. 3d 230, 247 (1991). Moreover, an individual that controls a corporation owes a fiduciary duty to the corporation and its shareholders. *ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277, ¶ 66 (2014). Additionally, "
9 [d]irectors *9 and officers of a corporation have a duty to 'deal openly and honestly with each other, and to exercise the utmost good faith and honesty in all dealings and transactions.' (Internal citations and quotation marks removed.)" *Anest v. Audino*, 332 Ill. App. 3d 468, 476 (2002). ¶ 21 According to plaintiff's second amended complaint, Nardulli was the controlling shareholder of Redhawk, as well as its director and president, while Johnson was a shareholder, director, and secretary of the company. Plaintiff was a shareholder, owning 49% of the outstanding shares of Redhawk, but did not hold any officer positions. According to the record, Redhawk was a subchapter S corporation and, therefore, was not subject to the Close Corporation Act (805 ILCS 5/2A.05 (West 2012)). This court, however, has found that shareholders in a small corporation, like the one in this case, may trigger fiduciary duties to each other similar to those in a partnership by behaving like a close corporation. *Hagshenas v. Gaylord*, 199 Ill. App. 3d 60, 69-71 (1990). ¶ 22 In *Hagshenas*, the Second District applied common-law principles applicable to closely held corporations despite the fact that the company at issue was not subject to the Close Corporation Act. *Id.* at 69. The *Hagshenas* court relied on the definition of a close corporation as " 'one in which the stock is held in a few hands, or in a few families, and wherein it is not at all, or only rarely, dealt in buying or selling,' " and the shareholders act as directors and officers and participate in the day-to-day operations. *Id.* (quoting *Galler v. Galler*, 32 Ill. 2d 16, 27 (1964)); see also *Rockford Corp. v. Kulp*, 41 Ill. 2d 215 (1968). In finding the company acted as a closely-held corporation, the court stated "the mere fact that a business is run as a corporation rather than a partnership does not shield the business venturers from a fiduciary duty similar to that of true partners." *Id.* at 70. Similarly, based on the
10 foregoing, it appeared that Redhawk acted as a close *10 corporation despite its lack of formal registration as

such under the Close Corporation Act. We, therefore, regard Redhawk's obligations as that of a close corporation wherein the parties owed each other a duty to exercise the highest degree of honesty and good faith in all of their dealings and transactions. ¶ 23 Notwithstanding, defendants contend that, due to the status of their relationship, any fiduciary duties owed by them to plaintiff had ceased at the time the parties were negotiating the settlement agreement. Defendants cite *Hamilton* for support. In *Hamilton*, limited partners of a partnership resigned, and the parties disputed the value of the departing limited partners' share of the partnership interests. The dispute resulted in multiple, adversarial lawsuits. *Id*. at 233. The limited partners then agreed to sign a letter of intent with the remaining managing partner specifying terms for the dissolution of the partnership, which included an agreement to use approved appraisers to value the partnership interests. *Id*. The managing partner, however, used a non-approved, substitute appraiser to value the interests. The limited partners essentially argued, *inter alia*, that the managing partner breached his fiduciary duty to them by failing to disclose the use of the substitute appraiser. *Id*. at 247. The Second District ultimately concluded that the managing partner did not owe a fiduciary duty to the limited partners where the execution of the letter of intent, which had the admitted purpose of severing the partnership, involved an arm's length deal that was not fiduciary in nature. *Id*. at 248. In so concluding, the court referenced the rule that the dissolution of a partnership ends the fiduciary relationship. *Id*. at 247. Additionally, the court cited that "[t]he partnership relationship does not extend to all affairs and transactions between partners, *** [citation] and when the partners have entered into an arm's length transaction in order to [a]ffect dissolution, their relationship is not
11 fiduciary in nature." *Id*. at *11 247-48 (citing *Babray v. Carlino*, 2 Ill. App. 3d 241, 251 (1971) (where it was found that, when partners agreed to dissolve their partnership and signed a written agreement specifying the terms of the dissolution, they were dealing with each other at arm's length and did not owe each other fiduciary duties). ¶ 24 When considering whether a fiduciary duty remains within the business relationship, the critical determination is the nature of the relationship at the time the alleged breach occurs. In *Hagshenas*, the court considered whether a 50% shareholder owed a fiduciary duty to the other 50% shareholder after resigning as a director and officer of the corporation. The court recognized that a mere owner of stock generally does not owe a duty to the corporation. *Hagshenas*, 199 Ill. App 3d at 68. The court, however, likened the closely-held corporation to a partnership and determined that, despite the defendant's resignation as director and officer, his 50% ownership allowed him to retain "significant control" over the company. *Id*. at 72. In so doing, the court stated: "[w]e find it implicit that people who enter into a small business enterprise, as in this case, place their trust and confidence in each other." *Id*. (citing *Kulp*, 41 Ill. 2d at 215). The court dismissed the defendant's argument that no fiduciary duty existed because the parties had become "openly hostile" and because he had made "an attempt to sell his shares and filed for dissolution." *Id*. Instead, the court found there was no hostility or distrust when the parties entered the business relationship. *Id*. Furthermore, the court stated that the defendant owed a fiduciary duty to the company "[u]ntil the final sale or order of dissolution." *Id*.; see *Graham v. Mimms*, 111 Ill. App. 3d 751 (1982) (finding the majority shareholder's fiduciary duties did not cease upon his resignation as officer and director where he maintained his position as the majority shareholder and
12 installed his sister and brother-in-law in corporate positions, thus *12 retaining control over the company); see also *Dowell v. Bitner*, 273 Ill. App. 3d 681, 691-92 (1995) (finding that, although a corporate officer no longer owed the corporation a fiduciary duty after he resigned, the officer's resignation did not sever liability for transactions completed after termination of the party's relationship if the transactions began during the relationship or were founded on information acquired during the relationship); *Comedy Cottage, Inc. v. Berk*, 145 Ill. App. 3d 355, 360 (1986) (even assuming, *arguendo*, that a former officer did not begin competing for a lease until after his resignation, he remained bound by his fiduciary duty because the acquisition of the lease was based on knowledge he obtained during his employment). Accordingly, when determining whether a shareholder maintains a fiduciary duty to other shareholders, our court's operative concern is the shareholder's

ability to hinder, influence, or control the corporation. See *Dowell*, 273 Ill. App. 3d at 690. ¶ 25 In more relevant part, the existence, and later termination, of a fiduciary relationship was further discussed in *Golden v. McDermott, Will & Emery*, 299 Ill. App. 3d 982 (1998). In *Golden*, the plaintiff alleged that the defendant breached its fiduciary duty to him when the parties were negotiating a settlement agreement following the plaintiff's termination. The settlement agreement contained a release of all claims and established the plaintiff's separation from the defendant firm. *Id*. at 986. The plaintiff alleged that the defendant withheld and misrepresented facts during the negotiations of the settlement. *Id*. at 988. In response, the defendant argued that it did not breach a fiduciary duty during the negotiations because the partnership with the plaintiff had been dissolved at that time. *Id*. This court considered conflicting authority as to whether a fiduciary relationship among partners ceases upon dissolution of the partnership. Compare *Babray*, 2 Ill. App. 3d at 252, and *Burtell*
13 *v. First* *13 *Charter Service Corp.*, 76 Ill. 2d 427 (1979). This court concluded that "the better rule" is that partners stand in a fiduciary relationship to one another after dissolution, but only in connection with the winding up and accounting of the partnership's affairs. *Golden*, 299 Ill. App. 3d at 990. It is worth noting that *Hamilton*, as primarily relied upon by plaintiff here, cited *Burtell* for this legal premise as well. *Hamilton*, 214 Ill. App. 3d at 247. Ultimately, the *Golden* court held that the defendant owed fiduciary duties to the plaintiff at the time the severance agreement was negotiated. *Golden*, 299 Ill. App. 3d at 990. This court quoted the following from *Kurti v. Fox Valley Radiologists, Ltd*, 124 Ill. App. 3d 933, 938-39 (1984):

> "The existence of a confidential relationship is not precluded by the fact that plaintiff had been notified of his impending termination *** Indeed, the need to prevent a fiduciary from taking improper advantage of the dislocation attendant upon the ending of a confidential relationship requires that fiduciary principles be observed so long as the relationship continues." *Id*.

¶ 26 Based on the record before us, we hold that the parties maintained a fiduciary relationship at the time of defendants' attorney's alleged misrepresentation. It is undisputed that the parties' relationship was in the process of dissolving while negotiating the terms of their separation when the misrepresentation regarding Redhawk's profits occurred. However, unlike in *Hamilton* and *Babray*, the record does not reveal any mutual document demonstrating that the parties had agreed to dissolve their relationship until *after* the date of defendants' attorneys' letter. See *Hamilton*, 214 Ill. App. 3d 248 (where it was undisputed that the execution of the letter of intent had the purpose of severing the partnership); *Babray*, 2 Ill. App. 3d at 251 (where the parties' had signed
14 a written agreement specifying the terms of the dissolution). Accordingly, the record *14 does not clearly support a finding that the parties were engaged in arm's length negotiations when the misrepresentation occurred. The Uniform Partnership Act (805 ILCS 205/1 *et seq*. (West 2014)) provides guidance in defining when a partnership, which, as stated, a close corporation simulates in this context, dissolves. Dissolution is defined in the Uniform Partnership Act as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." 805 ILCS 205/29 (West 2014). Here, the pleadings do not clearly establish that plaintiff ceased to be associated with Redhawk. That said, the parties, at the very least, were in the process of winding up the business. Accordingly, based on the more recent decisions of *Hagshenas* and *Golden*, we disagree with the circuit court and find the status of the parties' relationship at the time in question resulted in the fiduciary duties of utmost good faith and honesty as they wound up their business dealings.[6] ¶ 27 Because we have found the parties' maintained a fiduciary relationship at the relevant time, we must consider how that relationship affected the application of the release in the settlement agreement. A release is a contract in which one party abandons a claim to the person against whom the claim exists. *Cwikla*, 345 Ill. App. 3d at 33. "Parties in a fiduciary relationship owe one another a duty of full disclosure of material facts when making a settlement and obtaining a release. [Citation.] Therefore, a severance agreement arising out of a fiduciary relationship is voidable if one party

withheld facts that were material to the agreement." *Id*. (citing *Golden*, 299 Ill. App. 3d at 988). A withheld fact is deemed material if the plaintiff would have acted differently had he known it. *Id*. The party seeking to
15 invalidate the release need not *15 provide justifiable reliance on the other party's failure to disclose. *Gittlitz*, 2014 IL App (1st) 133277, ¶ 68. Instead, the party seeking to enforce the release has the duty of full disclosure of material facts. *Id*. ¶ 28 In *Cwikla*, the plaintiffs alleged the defendant violated his fiduciary duty by using his position as the director of the company to divert corporate funds to his mother-in-law. *Cwilka*, 345 Ill. App. 3d at 26-27. The plaintiff and the defendant were equal, sole coshareholders of a trucking company. *Id*. at 26. The plaintiff and the company entered into a mutual release and termination agreement with the defendant in exchange for the purchase of the defendant's rights, titles, and interests in the company. Following entry of the termination agreement and release, the plaintiff discovered the defendant had issued a company check to his mother-in-law that had not been disclosed during the termination agreement negotiations. The plaintiff alleged that, had he known about the diverted check, he would not have entered into the mutual release and purchased the defendant's shares for the agreed amount. *Id*. at 33. This court ultimately found the parties' release did not bar the plaintiff's breach of fiduciary duty claim where the defendant had a duty of full disclosure during the settlement negotiations, and there was a question that his failure to disclose the issuance of the company check was material to the mutual release and termination agreement. *Id*. This court remanded the cause of action to determine whether the release was voidable. *Id*. ¶ 29 In *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15 (2003), the plaintiff sued the defendant law firm and his ex-business partner after he was shut out of a profitable deal. The plaintiff and his ex-partner had formed a partnership to develop the plaintiff's farm as a
16 residential community and golf course. *Id*. at 18. Initially, the ex-partner was unable to *16 successfully negotiate with the PGA and notified the plaintiff that the PGA's "involvement in the development project was not feasible." *Id*. at 19. The ex-partner, however, continued to negotiate a secret deal that would significantly increase the value of the partnership. *Id*. at 19-20. While covertly doing so, the capital that the plaintiff had provided to fund the ex-partner's development activities was dissipating without any indication of future success. As a result, the plaintiff expressed his desire to liquidate the partnership or sell his interest. The ex-partner agreed to purchase the plaintiff's interest without disclosing that the interest was likely to gain significant value in the near future due to the negotiations with the PGA. *Id*. The ex-partner then hired the defendant law firm to draft a settlement agreement to buy out the plaintiff and to assist in negotiating with other investors and the PGA. *Id*. at 20. The settlement agreement included releases of claims. Four years after signing the releases, the plaintiff discovered the ex-partner's actions and filed suit. *Id*. at 21-22. This court ultimately remanded the cause after finding that the plaintiff could state a claim against the defendant law firm for aiding and abetting its client's breach of fiduciary duty. The court focused on the fact that the plaintiff alleged the releases were voidable because they were obtained by fraud where the ex-partner failed to disclose his continued negotiations with the PGA. *Id*. at 26. The *Thornwood* court noted that, if fraud was found, the ex-partner's actions would invalidate the entire settlement agreement and related releases. *Id*. ¶ 30 Based on the foregoing, we find the circuit court erred in dismissing plaintiff's claim for breach of fiduciary duty. Plaintiff alleged in his second amended complaint that defendants' attorney's misrepresentation of Redhawk's financial
17 status was material to his decision to enter into the settlement agreement. This court has recognized: *17

> " 'A release between fiduciaries is to be evaluated in the context of the fiduciary relationship. [Citation.] In appraising the validity of a release in the context of a fiduciary relationship, the court must regard the defendant as having the burden of showing by clear and convincing evidence that the transaction embodied in the release was just and equitable. [Citation.] In addition, the defendant must show by competent proof that a full and frank disclosure of all relevant information was made to the other party.' " *Id*. (quoting *Peskin v. Deutsch*, 134 Ill. App. 3d 48, 55 (1985)).

Viewing the pleadings and supporting documentation in the light most favorable to plaintiff as we must, we conclude that at this stage defendants have not shown by clear and convincing evidence that the agreement embodied in the release was just and equitable. Defendants further have not proved that they provided full and frank disclosure of all material facts, namely, Redhawk's accurate financial position. Accordingly, plaintiff has raised genuine issues of material fact regarding the validity of the release. If fraud is ultimately found, the entire agreement is voidable. See *id*; *Cwilka*, 345 Ill. App. 3d at 33 ("the question of whether there was fraud in obtaining a release is generally one of fact"). As a result, we conclude that an affirmative matter, in this case the existence of the settlement agreement, did not defeat plaintiff's breach of fiduciary duty claim where the second amended complaint alleged defendants breached those duties in obtaining the release and non-reliance clauses. ¶ 31 We next address plaintiff's fraud claim. Fraudulent inducement is considered to be a form of common-law fraud. *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15. In order to establish a claim for fraud, a plaintiff must demonstrate: (1) a false statement of material fact; (2) by an individual who
18 knows or believes it to be false; (3) made with the intent *18 to induce action by another in reliance on the statement; (4) action by the other in reliance on the statement; and (5) injury to the other resulting from that reliance. *Village of Palatine v. Palatine Associates, LLC*, 2012 IL App (1st) 102707, ¶ 80. The plaintiff additionally must establish that his reliance on the misrepresentation was justified. *Id*. Generally, the issue of whether a plaintiff's reliance was justified is a question of fact; however, the issue becomes a matter for the court where only one conclusion can be drawn from the undisputed facts. *Siegel Development, LLC v. Peak Construction LLC*, 2013 IL App (1st) 111973, ¶ 114. When assessing whether the plaintiff's reliance was justified, a court considers "all of the facts that the party knew, as well as those facts that the party could have discovered through the exercise of ordinary prudence." *Adler v. William Blair & Co.*, 271 Ill. App. 3d 117, 125 (1995); see also *Tirapelli v. Advanced Equities, Inc.*, 351 Ill. App. 3d 450, 456 (2004). ¶ 32 Moreover, our courts examine the presence of a non-reliance clause in the parties' contract when considering whether the plaintiff was justified in relying on the misrepresentation at issue. *Schrager v. Bailey*, 2012 IL App (1st) 111943, ¶ 20. This court has held that a non-reliance clause bars a cause of action for fraud because "[h]aving agreed in writing that [the parties] did not rely on any representation found outside the subscription documents, [a] plaintiff cannot be allowed to argue fraud based on such representations." *Tirapelli*, 351 Ill. App. 3d at 457. In *Greer v. Advanced Equities, Inc.*, 2012 IL App (1st) 112458, this court held that a non-reliance clause stating that a purchaser of securities did not rely on any oral representation made in connection with its purchase barred the purchaser from bringing a fraud claim alleging that it relied on oral misrepresentations when purchasing the securities. *Id*. ¶ 1. After considering *Adler*, *Tirapelli*, and *Benson v. Stafford*, 407 Ill. App. 3d
19 902 (2010), this court explained that "if a *19 purchaser signs an agreement containing a nonreliance clause that disclaims any reliance on any oral representations by the seller, then the purchaser cannot hereafter maintain a cause of action for common-law fraudulent oral misrepresentation. This is a logical rule, given that it is hardly justifiable for someone to rely on something that they have agreed not to rely on, and without justifiable reliance there can be no fraud." *Id*. ¶ 9. ¶ 33 Although often appearing in the context of securities fraud matters, this court has found the reasoning equally applicable in nonsecurities cases. *Schrager*, 2012 IL App (1st) 111943, ¶ 26. The *Schrager* court explained: "[r]educing the possibility of faulty memories and fabrication are important considerations in the drafting of any contract and is not limited to contracts involving securities transactions." *Id*. ¶ 25 (rejecting the plaintiff's fraud claims against his former attorneys and their law firm where the settlement agreement stated that the plaintiff relied solely on the information contained in the agreement and not on any prior representations, thus he could not establish justifiable reliance); see also *Village of Palatine*, 2012 IL App (1st) 102707, ¶ 82 (applying the same reasoning in a lease dispute where the tenant signed leases containing integration and non-reliance clauses; therefore, he could not establish justifiable reliance on any alleged statement made by the owner prior to entering into the lease). ¶ 34 That said, none of

the non-reliance clause cases discussed above involved a fiduciary relationship. Accordingly, unlike the facts before us, the *Greer*, *Benson*, *Tirapelli*, and *Schrager* courts did not consider the burden of fiduciary duties or the affect of those duties and any violation thereof on non-reliance clauses. We are unaware of, and our research has not uncovered, a case wherein an Illinois court has reviewed whether an alleged fraud between
20 fiduciaries invalidated the resulting non-reliance clause. *20 ¶ 35 In *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564 (2011), the Fourth District applied New York law pursuant to the parties' contractual choice of law provision in deciding whether the defendants owed the plaintiff a fiduciary duty despite the existence of a contractual disclaimer preventing the formation of a fiduciary relationship. *Id*. at 581. In so deciding, the court stated that choice of law provisions should be given effect as long as the foreign law is not "dangerous, inconvenient, immoral, [or] contrary to the public policy of the local government." (Internal quotations omitted). *Id*. The court found, "[b]ecause we are unaware that any of those objections could be made against New York law, we will give effect to the contractual choice of New York law insomuch as this case requires us to interpret and apply exhibits ***. [Citation.] That is not to say that we otherwise will ignore New York law, such as when evaluating the parties' legal relationship that predated the execution of these contracts. Binding or not, New York case law provides useful guidance on the fiduciary duties of brokers and investment advisors." *Id*. Ultimately, the Fourth District found, after applying New York law, that "where parties in a preexisting fiduciary relationship make a contractual representation to one another that no representations have been made, the contract, including its no-representation clause, is voidable unless the fiduciary has made full disclosure of all material facts." *Id*. at 591. ¶ 36 Plaintiff has not cited, and our research has not uncovered, any Illinois cases favorably citing the holding in *Khan*. Moreover, there has been no analysis wherein the no-representation clause at issue in *Khan* was found to be the equivalent of a non-reliance clause under Illinois law. See *ADM Alliance Nutrition, Inc. v. SGA Pharm Lab, Inc.*, 877 F.3d 742, 750 (2017) (in applying Illinois law, the
21 Seventh Circuit United States Court of Appeals stated, "[w]hile an *21 integration clause alone may or may not have barred ADM's claims [citation], a nonreliance clause would"). *Khan*, therefore, is limited in its applicability. ¶ 37 Although there is no case law answering the precise question before us, we find we need not answer that question here. Because we have concluded that there is a question of material fact as to whether the release provision in the settlement agreement is voidable due to defendants' alleged breach of fiduciary duty in obtaining said release, the entire settlement agreement could be invalidated. See *Thornwood*, 344 Ill. App. 3d at 26. If the settlement agreement is found to be invalid, the non-reliance clause will be rendered voidable as well and cannot act as an affirmative matter to defeat plaintiff's fraud claim. We, therefore, find the circuit court erred in dismissing plaintiff's fraud claim.

5 The case cited by defendants does not support their argument where *Small v. Sussman*, 306 Ill. App. 3d 639, 647 (1999), stated that detrimental reliance, not justifiable reliance, was an element of constructive fraud.

6 At oral argument, the parties disputed whether plaintiff's allegation of fraud was within the continued fiduciary duty to account following dissolution. We are not persuaded by defendants' argument that defendants' attorney's misrepresentation of Redhawk's financial status was not within the purview of an accounting or winding up of the business dealings. --------

¶ 38 III. CONCLUSION

¶ 39 We reverse the circuit court's decision dismissing plaintiff's second amended complaint. We remand this cause for further proceedings consistent with this order. ¶ 40 Reversed and remanded.