2014 IL App (1st) 131456-U

FIRST DIVISION
JULY 14, 2014

No. 1-13-1456

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARK DE SOUZA, individually and derivatively on behalf of the Partnership, Plaintiff-Appellant, v. TRADELINK, LLC, an Illinois Limited Liability Company, Defendant-Appellee.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 11 CH 23089 Honorable Mary L. Mikva, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justice Hoffman concurred in the judgment.
Presiding Justice Connors dissents.

ORDER

¶ 1 *Held*: The circuit court improperly entered summary judgment, where genuine issues of material fact existed as to whether the parties formed a business partnership.

¶ 2 This appeal arises from the April 4, 2013 order entered by the circuit court of Cook County, which granted summary judgment in favor of defendant Tradelink, LLC (Tradelink), and denied plaintiff Mark De Souza (De Souza)'s motion for leave to file an amended complaint. On appeal, De Souza argues that: (1) the circuit court erred in granting Tradelink's motion for

summary judgment; and (2) the circuit court erred in denying his motion for leave to file an amended complaint. For the foregoing reasons, we reverse the judgment of the circuit court of Cook County, and remand the matter for further proceedings.

¶ 3 BACKGROUND

¶ 4 Stuart Simonsen (Simonsen), a nonparty to this action, was the inventor, sole owner, and developer of a computer software designed for use in commodity futures trading (the trading software). The trading software consisted of four computerized trading models known as the "Black Box." In 2006, De Souza met Simonsen, and they agreed that De Souza would attempt to find interested third-party investors who would provide capital with which to make trades using Simonsen's trading software. In the fall of 2006, De Souza arranged a meeting between Simonsen and a representative from Tradelink, in order to explore the possibility of acquiring capital from Tradelink for this purpose. Subsequently, on October 20, 2006, De Souza, Tradelink, Simonsen and Arthur Bushonville (Bushonville), who is not a party to this action, executed a one-page "Term Sheet," which sets forth the basic parameters surrounding the parties' business dealings. The Term Sheet states that the parties would be entitled to the following ownership percentages of the revenue earned as a result of trading with Simonsen's trading software: 45% Simonsen; 45% Tradelink; 5% De Souza; and 5% Bushonville. The Term Sheet further notes that these relative ownership percentages would "apply to any business ventures going forward in relation to the use of the partnership's IP." The face of the Term Sheet uses words such as "partnership" and "partners" to describe the business ventures amongst the parties. The Term Sheet is signed by Montgomery Cornell (Cornell) as Chief Operating Officer (COO) of Tradelink, and is also signed by Simonsen, De Souza, and Bushonville.

¶ 5 On November 9, 2006, Tradelink and Simonsen entered into a written "Trader Agreement," which details Simonsen's employment terms as a trader for Tradelink. Under the Trader Agreement, Tradelink is granted "an exclusive, royalty free, perpetual license to utilize the Black Box." In exchange, Simonsen would receive 55% of the net trading profits, while Tradelink would retain the remaining 45%. The Trader Agreement states that, upon termination of the agreement by Tradelink for cause or by Simonsen voluntarily, Tradelink "shall retain its exclusive, royalty free, perpetual license to utilize the Black Box." The Trader Agreement is signed only by Simonsen and Walt Weissman (Weissman), as co-chair of Tradelink.

¶ 6 On that same day, November 9, 2006, all of the parties—Tradelink, Simonsen, De Souza and Bushonville—executed yet another document, the "Side Letter," which "recognizes" the Term Sheet and states that, "Tradelink has agreed to pay [Simonsen] 55% and [Simonsen] has in turn agreed to pay each [De Souza] and [Bushonville] their respective 5%." The Side Letter further states that the same fee-sharing method would be implemented with regard to any future software models developed by Simonsen, whether independently or collaboratively with Tradelink, for which Simonsen receives compensation from Tradelink. Specifically, it states that "[t]o the extent that [Simonsen] develops either independently or collaboratively with Tradelink models that are not included in the Black Box and for which [Simonsen] receives compensation from Tradelink, [Bushonville and De Souza] will each be allocated a 5/55 share of [Simonsen's] compensation." The Side Letter further states that, in furtherance of the Term Sheet, the parties were "in the process of implementing an agreement with [Simonsen] which will define his obligations as a Tradelink trader and the parties' respective rights to the intellectual property relating to the 'Black Box' ***." Attached to the Side Letter is a rider, which states that, "[i]n the event of any conflict between the Term Sheet and this [r]ider, this [r]ider shall govern."

¶ 7 Beginning in November or December 2006, Tradelink commenced commodity futures trading using Simonsen's trading software. According to De Souza, as a result of the revenue generated by the use of the trading software, he received his first 5% share in the amount of approximately $70,000 from Simonsen in December 2006 and March 2007. In his deposition, De Souza testified that, following the execution of the November 9, 2006 Trader Agreement and Side Letter, it was his understanding that "Tradelink had no obligation to make direct payments" to him. Starting in 2006, Tradelink provided De Souza with daily statements of Simonsen's trading activity for Tradelink. However, in July 2007, Tradelink ceased to provide the daily trading statements to De Souza when it became concerned that De Souza was sharing this information with others. In an email dated July 11, 2007, a representative of Tradelink informed De Souza that it had provided the daily trading statements to him as a courtesy, but that Tradelink would no longer distribute them to him.

¶ 8 In September 2007, Tradelink terminated the Trader Agreement with Simonsen for cause, on the bases that Simonsen had allegedly marketed and licensed the trading software to others in violation of the Trader Agreement, that he had allegedly divulged confidential information to others, and that he had allegedly misrepresented his educational background to Tradelink. According to an affidavit by Tradelink's COO, Cornell, about one day after Tradelink notified Simonsen that it was terminating the Trader Agreement for cause, Simonsen refused to accept the termination and "purported to resign." Cornell averred in the affidavit that Tradelink "took no further action to clarify who initiated the termination" because, under the Trader Agreement, Tradelink retains an exclusive and perpetual license to utilize the Black Box regardless of whether the Trader Agreement is terminated for cause by Tradelink or voluntarily terminated by Simonsen. In his deposition, De Souza acknowledged that, during the time that Simonsen was in

a business relationship with Tradelink, Simonsen never failed to pay him his 5% share of the compensation that Simonsen received from Tradelink. It is alleged that, following September 2007, Tradelink continued to use the trading software and generated approximately $55 million in profits.

¶ 9 On June 28, 2011,[1] De Souza filed a three-count complaint against Tradelink, alleging that a partnership existed between Tradelink, Simonsen, Bushonville and him. He asserted, "individually and derivatively on behalf of the partnership," an accounting claim to determine what sums may be due him and the partnership (count I); a breach of contract claim to recover the approximately $55 million in profits that Tradelink made from using the trading software after it had terminated Simonsen (count II); and a breach of fiduciary duty claim, by alleging that Tradelink's use of the Black Box after Simonsen's termination constituted a theft of software from the partnership (count III).

¶ 10 On November 30, 2012, Tradelink filed a motion for summary judgment, arguing that all three counts in the complaint rested on whether a partnership actually existed, and that no partnership existed between the parties as a matter of law. On February 8, 2013, De Souza filed a response to the motion for summary judgment, arguing that a partnership existed between the parties as evidenced by the Term Sheet, but that, even if no such partnership existed, he was still entitled to 5% of Tradelink's profits pursuant to the Term Sheet. On February 20, 2013, Tradelink filed a reply in support of its motion for summary judgment.

¶ 11 On March 13, 2013, a hearing on the motion for summary judgment was held, during which counsel for the parties presented arguments. At the hearing, counsel for De Souza advised

[1] The date of filing for the complaint varies in the parties' briefs on appeal. However, we note that the date stamp on the complaint in the record bears the date of June 28, 2011.

the court that he intended to file a motion for leave to file an amended complaint to include claims that were not based on the existence of a partnership. The circuit court then reserved its ruling on the motion for summary judgment until it could review the proposed amended complaint.

¶ 12 On April 3, 2013, De Souza filed a motion for leave to file an amended complaint and a proposed amended complaint, which included a new claim for breach of contract (count IV) and a count for intentional interference with prospective economic advantage (intentional interference claim) (count V).

¶ 13 On April 4, 2013, the circuit court entered an order granting Tradelink's motion for summary judgment and denying De Souza's motion for leave to file an amended complaint.

¶ 14 On May 3, 2013, De Souza filed a notice of appeal.

¶ 15 ANALYSIS

¶ 16 We determine the following issues on appeal: (1) whether the circuit court erred in granting Tradelink's motion for summary judgment; and (2) whether the circuit court erred in denying De Souza's motion for leave to file an amended complaint.

¶ 17 We first determine whether the circuit court erred in granting Tradelink's motion for summary judgment, which we review *de novo*. See *Collins v. St. Paul Mercury Insurance Co.*, 381 Ill. App. 3d 41, 45 (2008).

¶ 18 De Souza argues that the circuit court erred in granting summary judgment in favor of Tradelink, by finding that no partnership existed as a matter of law. He contends that the evidence establishes that a partnership was created or, at a minimum, that a question of fact exists as to whether a partnership was formed. Specifically, he argues that the Term Sheet and Side Letter established his right to part ownership of the business and his right to a share of

profits, and that a partnership was created despite the fact that he did not share in any money losses with Tradelink. He further maintains that the evidence in the record shows that the parties intended to form a partnership. He argues that, even if no partnership existed, he was nonetheless entitled to 5% of the profits relating to the use of the Black Box, and that the circuit court erred in ending the litigation based upon the finding that no partnership existed.

¶ 19 Tradelink counters that the circuit court correctly found that no partnership existed and that no genuine issues of fact existed to preclude the circuit court's entry of summary judgment. Specifically, Tradelink argues that the claims in De Souza's complaint, whether asserted on behalf of the alleged partnership or individually, rested entirely on the existence of a partnership. Tradelink contends that the issue of whether a partnership exists under a given set of facts is a question of law, and that the circuit court properly ruled that no such partnership existed—where De Souza had no role in the development of Black Box, neither contributed capital to the relationship nor shared in the losses, had no right to control or participate in any aspect of the trading, and had no authority to bind "any of his so-called partners to anything nor could they bind him." Under the agreements, Tradelink argues, it had no obligation to make any payments to either De Souza or Bushonville. Tradelink further argues that De Souza had nothing more than a financial interest in a portion of the compensation paid to Simonsen, from which only Simonsen was obligated to pay De Souza, as a "finder's fee for putting Tradelink and Simonsen together," and that De Souza's interest ended when the Trader Agreement was terminated in 2007.

¶ 20 Summary judgment is proper where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West

2010). "In considering a motion for summary judgment, the court must view the record in the light most favorable to the nonmoving party." *Pielet v. Pielet*, 474 Ill. App. 3d 407, 419 (2010). "The purpose of summary judgment is not to try a question of fact, but to determine whether one exists" that would preclude the entry of judgment as a matter of law. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 421 (2002). "Summary judgment is 'a drastic means of disposing of litigation' and thus should only be awarded when the moving party's right to judgment as a matter of law is 'clear and free from doubt.' " *Seth v. Aqua at Lakeshore East, LLC*, 2012 IL App (1st) 120438, ¶ 13 (quoting *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008)).

¶ 21 Section 202(a) of the Uniform Partnership Act (the Act) provides that "the association of 2 or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." 805 ILCS 206/202(a) (West 2010); see also 805 ILCS 206/101(f) (West 2010) (definition of "partnership"). In determining whether a partnership is formed, the Act states that "[t]he sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived." 805 ILCS 206/202(c)(2) (West 2010); see 805 ILCS 206/101(k) (West 2010) (property is defined under the Act as "all property, real, personal, or mixed, tangible or intangible, or any interest therein"). However, section 202(c)(3) of the Act provides that a person "who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment *** (ii) for services as an independent contractor or of wages or other compensation to an employee." 805 ILCS 206/202(c)(3)(ii) (West 2010). A partnership exists if the parties join together to carry on a business or venture for their common benefit, each party contributes property or services to the

venture, and each has a community interest in the profits of the venture. *Maloney v. Pihera*, 215 Ill. App. 3d 30 (1991). Other factors that are relevant in determining the existence of a partnership include the manner in which partners deal with one another; the mode in which each alleged partner has, with the knowledge of the other partner, dealt with other persons in a partnership capacity; and advertising using a firm name. *Olson v. Olson*, 66 Ill. App. 2d 227, 233 (1965).

¶ 22 In granting Tradelink's motion for summary judgment, the circuit court found that no partnership was created among the parties. Specifically, the court found that De Souza did not participate in the development of the Black Box, did not provide any capital to the alleged partnership, did not share any losses, and had no obligation or role in the venture going forward—thus, the court characterized the 5% payments that De Souza had received from Simonsen as a "finder's fee." The circuit court further found that, despite evidence that the Term Sheet contains references to a "partnership," the parties' "intent does not create a partnership" under the Act and the parties' profit-sharing was a critical—though not determinative—component in finding the existence of a partnership.

¶ 23 In our view, there are facts in this case which are consistent with the existence of a partnership. On the other hand, there are facts which suggest that no partnership existed. Since the gravamen of DeSouza's complaint is based on the existence of a partnership, there is clearly a big question which is material to the resolution of the complaint. The materiality of such a question does not lend itself to resolution in the context of a summary judgment proceeding. It may be that the ultimate conclusion yields the answer that there is no partnership. However, our review of the record makes it clear that it is impossible for the trial court to have reached that conclusion based on the information that it had at the time it entered summary judgment. We

also note that the entry of summary judgment was accompanied by denial of leave to amend the complaint. Thus, no additional factual information was ever provided to the trial court before it entered its summary judgment order.

¶ 24 Viewing the record in the light most favorable to De Souza, we find that there is a genuine issue of material fact as to whether a partnership existed between Tradelink and De Souza. All three counts of De Souza's original complaint rested upon whether a partnership actually existed. In count I of the complaint, De Souza alleged an accounting claim to determine what sums, from 2006 to the time of the filing of the complaint, may be due him and the alleged partnership. In count II, he alleged a breach of contract claim to recover the approximately $55 million in profits that Tradelink had made from using the trading software after it had terminated Simonsen. In count III, De Souza alleged a breach of fiduciary duty claim against Tradelink, by alleging that Tradelink's use of the Black Box after Simonsen's termination constituted a theft of software from the partnership. Attached as exhibits to the complaint were the October 20, 2006 Term Sheet, the November 9, 2006 Trader Agreement, and the November 9, 2006 Side Letter.

¶ 25 The October 20, 2006 Term Sheet expressly states, under the heading label "Ownership," that De Souza has a 5% "[n]on [v]oting [s]hare" of "[e]quity/[n]et [r]evenue for all activities including proprietary trading and outside hedge fund activities." The Term Sheet states that the parties' relative ownership percentages would "apply to any business ventures going forward in relation to the use of the partnership's IP." The face of the Term Sheet repeatedly uses words such as "partnership" and "partners" to describe the business ventures amongst the parties.

¶ 26 The November 9, 2006 Side Letter, which "recognizes" the Term Sheet, specified a payment method by which De Souza would receive his 5% share of the income earned from the use of the trading software—through Simonsen, who would receive an extra 10% of the profits

from Tradelink and redistribute 5% of the profits to each De Souza and Bushonville. The Side Letter notes that the same "5/55" fee-sharing method would be used to allocate De Souza's and Bushonville's shares in connection with any future software model developments by Simonsen that are not included in the Black Box and "for which [Simonsen] receives compensation from Tradelink." Attached to the Side Letter is a rider, which states that, "[i]n the event of any conflict between the Term Sheet and this [r]ider, this [r]ider shall govern." The rider sets forth the definitions of "Black Box" and "Trader."

¶ 27 "The primary goal of contract interpretation is to give effect to the parties' intent by interpreting the contract as a whole and applying the plain and ordinary meaning to unambiguous terms." *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008). "As a general rule, the parties' intentions are determined from their final agreement." *Kehoe v. Commonwealth Edison Co.*, 296 Ill. App. 3d 584, 590 (1998). Illinois follows the "four corners" rule for contract interpretation, in that, " '[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used.' " *Air Safety Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999), quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291 (1962). "If the language of the contract is facially unambiguous, then the contract is interpreted by the trial court as a matter of law without the use of parol evidence." *Air Safety Inc.*, 185 Ill. 2d at 462. If, however, a contract is capable of being understood in more than one way, then the contract is ambiguous and only then may a court consider parol evidence to aid in resolving the ambiguity. *Id.* Whether a contract is ambiguous is a matter of law for the court to determine. *Guerrant v. Roth*, 334 Ill. App. 3d 259, 264 (2002).

¶ 28 First, based on our examination of the "four corners" of the Side Letter, we find that the document is ambiguous as to whether the parties intended it to supersede in part, amend in part, clarify, or supplement the terms of the Term Sheet. The Trader Agreement, which was executed by Tradelink and Simonsen on the same day as the Side Letter and to which De Souza was not a party, includes a provision stating that the agreement "supersedes all prior agreement and understanding between the undersigned." However, the Side Letter does not contain such a provision. Although the Side Letter "recognizes" the Term Sheet and its rider expressly states that the rider itself controls in the event that any conflict arises between the rider and the Term Sheet, it is unclear whether, to the extent that the Side Letter and Term Sheet are inconsistent, the terms of the Side Letter itself also controls. Further, while the plain language of the Side Letter specifies that De Souza would receive 5% of the profits earned from any future software models developed by Simonsen that are *not* included in the Black Box and *for which Simonsen receives compensation from Tradelink*, it is unclear whether the same restriction applies to profits earned in connection with the use of the Black Box. The Side Letter is capable of being understood in more than one way. For example, it could be understood to allow De Souza to receive his 5% share contingent upon compensation to Simonsen by Tradelink; or it could be understood as allowing De Souza to receive his 5% share regardless of Simonsen's compensation. As noted, the Term Sheet simply states that De Souza owns a 5% "non voting share" of equity or net revenue for the parties' business ventures relating to the use of the intellectual property, and makes no mention of whether De Souza's receipt of his 5% share is conditional on Simonsen receiving compensation from Tradelink. Thus, we find that the Side Letter is ambiguous and that parol evidence is needed to resolve what effect the parties intended the Side Letter to have on the Term Sheet and the parties' intention in executing the Side Letter, as well as to resolve the

ambiguities relating to the terms in the Side Letter. See *Gassner v. Raynor Manufacturing Co.*, 409 Ill. App. 3d 995, 1012 (2011) (where contract was ambiguous, summary judgment was inappropriate and cause remanded to allow for the introduction of parol evidence to determine the intent of the parties in entering into the contract).

¶ 29 Second, we find that, viewing the record in a light most favorable to De Souza, a genuine issue of material fact exists as to whether a partnership was formed between Tradelink and De Souza. The record contains evidence both tending to show that a partnership exists, as well as tending to show that no partnership was created, between the parties. The face of the Term Sheet repeatedly uses words such as "partnership" and "partners" to describe the business ventures amongst the parties, and sets forth De Souza's 5% non-voting "ownership" share of the equity and the net revenue generated by propriety trading, as well as "any business ventures going forward in relation to the use of the partnership's IP."

¶ 30 In an affidavit, De Souza averred that, in 2006, he held multiple meetings with various potential investors to provide capital for Simonsen's trading software, and that he repeatedly met with representatives of Tradelink to discuss a proposed relationship concerning Simonsen's intellectual property. De Souza averred that, during the meetings, Weissman, as co-chair of Tradelink, "insisted upon a partnership structure" and stated that the relationship between Tradelink, Simonsen, De Souza and Bushonville would be a "partnership." De Souza's affidavit further stated that other representatives of Tradelink also reiterated Weissman's statements that the parties would be "partners." However, in its amended responses to De Souza's first set of interrogatories, Tradelink stated that it did not intend to enter into a partnership with De Souza.

¶ 31 Further, in his affidavit, De Souza averred that, prior to and after the execution of the November 2006 agreements, he expended both money and time in meeting with and securing

capital from potential investors for the trading software, as his "ongoing role in the business" and, ultimately, secured a "$300 million commitment from Abraham Lincoln Capital and its client the Illinois Teachers Pension Fund." De Souza further averred that, after the parties executed the Term Sheet, Weissman and another Tradelink representative, Ruth Sotak (Sotak), informed him that because of a "regulatory issue," Tradelink would only make payment distributions to De Souza and Bushonville through Simonsen as a "conduit" so as to avoid having to register Bushonville and De Souza as proprietary traders. De Souza averred that Weissman and Sotak "repeatedly emphasized that the Side Letter that [subsequently] memorialized the agreement concerning flow of payment was just a logistical issue and did not change what [the parties] had agreed to in the Term Sheet." In his deposition testimony, De Souza acknowledged that, after the execution of the November 9, 2006 agreements, Tradelink had no obligation to make direct payments to him and Bushonville as a result of the revenue generated from the use of the trading software. The record also shows that, after the parties entered into the 2006 agreements, De Souza received his 5% shares from Simonsen in connection with the revenue generated by the use of the trading software, and that Tradelink provided De Souza with daily statements of Simonsen's trading activity for Tradelink until July 2007. It is undisputed that this array of facts and conflicting interpretations by the parties give rise to more than an inference of materiality.

¶ 32 We find that, based on the foregoing, there exists a genuine material issue as to whether a partnership was created between De Souza and the representatives of Tradelink under the facts and circumstances. See *Argianas v. Chestler*, 259 Ill. App. 3d 926, 942 (1994) (whether a partnership exists is a question to be determined by the fact finder from all the facts and circumstances presented). Specifically, viewing the record in the light most favorable to De

Souza, we cannot conclude as a matter of law whether the time and money that he expended in securing capital from potential investors for the trading software, prior to and after the execution of the Term Sheet and Side Letter, constituted a contribution of "property or services" to the business venture that may be indicative of the existence of a partnership. See *Maloney*, 215 Ill. App. 3d 30 (a partnership exists if the parties join together to carry on a business or venture for their common benefit, each party contributes *property or services* to the venture, and each has a community interest in the profits of the venture). Similarly, while the parties do not seem to dispute that De Souza received his 5% share of the revenue generated by Tradelink's use of the trading software from Simonsen, we cannot conclude as a matter of law that the payments received by De Souza could be categorized as payment "for services as an independent contractor or [] wages or other compensation to an employee," so as to preclude a determination that a partnership was formed. See 805 ILCS 206/202(c)(3)(ii) (West 2010) (a person "who receives a share of the profits of a business is *presumed* to be a partner in the business, unless the profits were received in payment *** (ii) for services as an independent contractor or of wages or other compensation to an employee"). Whether De Souza's relationship with Tradelink was either that of an independent contractor or an employee is a question of fact for the trier of fact. See *Dowe v. Birmingham Steel Corp.*, 2011 IL App (1st) 091997, ¶ 29. Although Tradelink characterizes De Souza's financial interest and payments earned as a "finder's fee for putting Tradelink and Simonsen together," we decline the invitation to usurp the role of the fact finder in making this determination. Nothing in the three documents which purport to outline the relationship among the parties uses the term "finder's fee." Further, as discussed, the evidence in the record is unclear as to the parties' intent in executing the agreements, and parol evidence is needed to resolve the ambiguities relating to the terms in the Side Letter. While De Souza

admitted in his deposition that Tradelink had no obligation to make *direct* payments to him and Bushonville after the execution of the November 9, 2006 agreements, a genuine issue of fact exists as to whether, under the Term Sheet or Side Letter, De Souza was still entitled to receive his 5% share *indirectly* from Tradelink through Simonsen as a "conduit," even after Simonsen's relationship with Tradelink terminated in September 2007.

¶ 33 Nonetheless, Tradelink argues that the parties' intent does not matter in determining whether a partnership was formed, and cites to section 202(a) of the Act, which provides that "the association of 2 or more persons to carry on as co-owners a business for profit forms a partnership, *whether or not the persons intend to form a partnership*" (Emphasis added.) See 805 ILCS 206/202(a) (West 2010). We disagree. While parties' intent is not a dispositive factor in determining whether a business partnership was created, it is nonetheless a factor used to determine partnership. See *In re Marriage of Kamp*, 199 Ill. App. 3d 1080, 1082-83 (1990) ("the existence of a partnership relation[ship] is a question of intention to be gathered from all the facts and circumstances"); *Pielet v. Hiffman*, 407 Ill. App. 3d 788, 795 (2011) ("[a] partnership is a contractual relationship and as such, contract law applies and a partnership is accordingly controlled by the terms of the agreement under which it is formed"); *Argianas*, 259 Ill. App. 3d at 942 ("[a] partnership between two or more persons is a contractual relationship and therefore there must be a meeting of minds of the parties to create partnership"). Further, we reject Tradelink's contention that whether a partnership exists is a question of law to be decided by the court. We observe that, in support, Tradelink relies heavily on an unpublished Third District case involving the determination, at the summary judgment stage, of whether the parties had a business partnership (*Carlson v. Ismail*, 2012 IL App (3d) 110566-U), in violation of Supreme Court Rule 23(e)(1) (eff. July 1, 2011). Rather, as discussed, a determination of whether a

partnership exists between two parties is a question of fact for the trier of fact to decide. See *Argianas*, 259 Ill. App. 3d at 942 (whether a partnership exists is a question to be determined by the fact finder from all the facts and circumstances presented); *Estes v. Maddrell*, 208 Ill. App. 3d 813, 818 (1991) (same). As such, because the record contains evidence that tends to both suggest that a partnership exists and does not exist between De Souza and Tradelink, we find that this question of fact is best resolved by the trier of fact. See generally, *Schuster v. East St. Louis Jockey Club, Inc.*, 37 Ill. App. 3d 483, 487 (1976) ("we do not know what other evidence plaintiff might produce at trial to buttress his own testimony" and "it is not the function of the trial court on a motion for summary judgment to resolve doubts about the credibility of one side's evidence in order to reach a decision on the motion"). Thus, because all three counts of De Souza's complaint, as discussed, were dependent upon the existence of a business partnership between the parties, we hold that the entry of summary judgment was inappropriate. At a minimum, should De Souza proceed with the claims on remand, the parties may conduct further discovery—including the deposition testimony of witnesses such as Weissman and Sotak, who may shed light on the intent of the parties. Discovery may also yield other pertinent information that may allow the trier of fact to determine whether, under the circumstances, the parties formed a partnership. See *Olson*, 66 Ill. App. 2d at 233 (other relevant factors in determining the existence of a partnership include the manner in which partners deal with one another; the mode in which each alleged partners has, with the knowledge of the other partner, dealt with other persons in a partnership capacity; and advertising using a firm name).[2] In light of our holding,

[2] It is undisputed by the parties that, at the time Tradelink filed the motion for summary judgment at issue, only the discovery deposition testimony of De Souza had been taken.

we need not address Tradelink's additional arguments that no partnership existed between the parties.

¶ 34 Moreover, because we reverse the circuit court's entry of summary judgment in favor of Tradelink, and remand this cause for further proceedings, the issue on appeal as to whether the circuit court erred in denying De Souza's motion for leave to file an amended complaint, based on its determination that no partnership was created, is moot. On remand, De Souza will have the opportunity to file an amended complaint, if he chooses, and the parties will otherwise continue with the discovery process.

¶ 35 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County, and remand the matter for further proceedings.

¶ 36 Reversed and remanded.

¶ 37 PRESIDING JUSTICE CONNORS, dissenting.

¶ 38 I respectfully dissent. The trial court was correct in granting the defendant's motion for summary judgment. Plaintiff's complaint relies on the assertion that a partnership existed as evidenced by the Term Sheet executed on October 20, 2006, and the Side Letter of November 9, 2006. The Term Sheet does iterate the term "partnership" a number of times in the document; this, in itself, is little proof of the existence of a partnership. The burden of proving the existence of a partnership rests on the party asserting it, and the allegations in this complaint are wholly insufficient.

¶ 39 A review of the Illinois Partnership Act discloses that pursuant to 805 ILCS 206/101(f), a partnership is defined as an "association of 2 or more persons to carry on as co-owners a business for profit ***." There is nothing to suggest in the case at bar that the four alleged partners carried on a business of any kind.

¶ 40 805 ILCS 206/201(a) states, "a partnership is an entity distinct from its partners." Nothing in the record of this case discloses the alleged entity that is in place here.

¶ 41 Under the heading of Partner's Rights and Duties, 805 ILCS 206/401(i) provides "A person may become a partner only with the consent of all of the partners." This flies in the face of defendant Tradelink's assertions and further, plaintiff supplies no affidavits from the other alleged partners as to their contentions.

¶ 42 Pursuant to Illinois case law, the Court considers various factors in determining whether a partnership exists including:

> "the manner in which the parties have dealt with each other; the mode in which each has, with the knowledge of the other, dealt with persons in a partnership capacity and whether the alleged partnership has advertised using the firm name. Furthermore, such factors as whether the parties have filed a partnership certificate with the county clerk, in the event the firm name does not include the true name of the persons transacting such partnership business and whether they have carried telephone listings using the firm name are also of import ***." *Snyder v. Dunn*, 265 Ill. App. 3d 891, 894 (1994).

¶ 43 In the case at bar, none of the factors enumerated by the appellate court in *Snyder* have been pled in the complaint nor have they been supplied by the plaintiff in an affidavit. This partnership does not even have a name. Further, as discussed in *Snyder*, these "partners" did not hold themselves out as partners, showed no evidence of filing partnership tax returns, nor evidence of having a joint checking account, nor joint business cards.

¶ 44 In response to the defendant's motion for summary judgment, plaintiff filed a response to which he attached a Declaration of Mark DeSouza, in which he "deposes and states" about facts to which he has personal knowledge. The Declaration is not sworn to, and contains no jurat. Moreover, this Declaration is self-serving, and it is well-settled that conclusory allegations of self-serving affidavits, without support in the record, do not create triable issues of fact, and will not preclude summary judgment. *Robinson v. Village of Oak Park*, 2013 IL App (1st) 121220 ¶ 21.

¶ 45 Thus, in this case, there are no indicia of a partnership beyond the use of the word in the Term Sheet dated October 20, 2006. This unsubstantiated assertion of partnership is not supported by the record. I would affirm the trial court as to its grant of summary judgment since all counts of the original complaint are based on the existence of a partnership, but would allow the plaintiff leave to file an Amended Complaint based on some other theory.