2015 IL App (2d) 141062-U
No. 2-14-1062
Order filed October 7, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GERALD KARLEN and LANKFORD CONSTRUCTION COMPANY, INC.,	)	Appeal from the Circuit Court of Lake County.
Plaintiffs-Appellees,	)	
v.	)	No. 11-L-107
DONALD FITZGIBBONS,	)	
Defendant	)	
(JL3 Industries, LLC, d/b/a Dock's Bar and Grill, Defendant-Appellant).	)	Honorable Christopher C. Starck Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Schostok and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted summary judgment in favor of Karlen on count I of his first amended complaint. Therefore, we affirmed.

¶ 2 Plaintiffs, Gerald Karlen and Lankford Construction Company, filed a four-count complaint against defendants, Donald Fitzgibbons and JL3 Industries, LLC (JL3), d/b/a Dock's Bar and Grill (Dock's). The only count relevant to this appeal is count I, in which Karlen alleged default of a promissory note of $1,824,503 against JL3. Karlen moved for summary judgment,

and the trial court granted summary judgment in his favor. JL3 appeals, arguing that the promissory note was not enforceable because it lacked consideration and because it was procured by fraud. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Pleadings

¶ 5 On July 6, 2011, Karlen filed a first amended verified complaint against JL3. In count I, Karlen alleged that JL3 had defaulted on a promissory note, based on the following. JL3 was a company doing business as Dock's in Wauconda, Illinois. From December 2008 to January 2010, Karlen made a series of cash loans and/or cash infusions to JL3 totaling $976,000. In addition, Karlen, through his construction company, provided labor and construction services for a large outdoor deck at Dock's, which was valued at $848,503.

¶ 6 Karlen further alleged in his complaint that on January 6, 2010, Fitzgibbons, as member and manager of JL3, executed a "Secured, Junior, Demand Promissory Note" (promissory note) in the amount of $1,824.503. The promissory note listed Karlen as payee and was in exchange for his cash loans/infusions and construction services for the deck ($976,000 + $848,503 = $1,824,503). JL3, however, failed to make any payments on the promissory note. On January 10, 2011, Karlen served JL3 with a notice of demand for all principal and interest due on the promissory note. Because JL3 was in default under the terms of the promissory note, Karlen was entitled to a judgment in the amount of $1,824,503.

¶ 7 The promissory note was attached to Karlen's complaint and stated that "for value received," JL3 "absolutely unconditionally and irrevocably promises to pay on demand" to Karlen "the total, aggregate principal sum" of $1,824,503 with interest. The promissory note further stated that it "contains the entire agreement of the parties hereto with respect to the terms,

conditions and provisions hereof, and supersedes [*sic*] controls and prevails over any and/or all prior negotiations of the parties with respect to the terms, conditions and provisions hereof, all of which are hereby merged herein."

¶ 8 On March 21, 2014, Karlen moved for summary judgment as to count I of his amended complaint. In his motion, Karlen argued that in January 2010, the parties could not complete an agreement making him an equity partner. After JL3 requested additional money from Karlen, he agreed to infuse additional money into JL3 only if JL3 signed a promissory note for his previous payments. As a result, Karlen presented Fitzgibbons, as member and manager of JL3, a promissory note in the amount of $1,824,503. Fitzgibbons read the promissory note and signed it. However, JL3 failed to make any payments on the promissory note.

¶ 9 Karlen attached a statement of facts in support of his motion for summary judgment, which stated as follows. Fitzgibbons was a Class A investor of JL3, which was formed for the sole purpose of owning and operating Dock's. Unlike Class B investors, Class A investors had voting rights and the right to run Dock's day-to-day business.

¶ 10 Between December 2008 and January 2010, Karlen infused cash into JL3 so that it could pay Dock's expenses, and he constructed a deck. Originally, Karlen's infusion of cash and his construction of a deck were designed to be investments in JL3, and Karlen was to receive an appropriate equity interest in exchange for these investments. Fitzgibbons acknowledged in his deposition that in the beginning, Karlen was to become an equity investor of JL3 without specificity as to whether he was to be a Class A or Class B investor.

¶ 11 In 2009, Fitzgibbons offered Karlen a Class B investor membership (non-voting interest) for the money already infused and for future cash infusions. Karlen was not interested in becoming a Class B investor of JL3, however, and insisted on becoming a Class A investor.

Fitzgibbons advised Karlen that in order for him to become a Class A investor, Fitzgibbons' partner, Jefferey Lencioni, would have to give up his Class A investor membership. Fitzgibbons told Karlen that he would arrange to remove Lencioni as a Class A investor, and then he and Karlen would become partners, and Karlen would have a Class A investor membership. Based upon Fitzgibbons' representations, Karlen continued to infuse large sums of money in JL3.

¶ 12 On January 6, 2010, Lencioni was still a Class A investor of JL3, and Fitzgibbons was requesting more cash infusions from Karlen. In response, Karlen told Fitzgibbons that he would infuse additional money in JL3 only if Fitzgibbons agreed to convert all of Karlen's prior cash investments and deck construction costs into a loan and sign a promissory note on behalf of JL3 and in favor of Karlen for $1,824,503. As evidenced in Fitzgibbons' deposition, he read and signed the promissory note on January 6, 2010. The promissory note stated that "the parties" acknowledged that "if, and *only* if, (1) Jefferey Lencioni resigns as a Manager and as a Class A voting Member *** *and* (2) [Karlen] in his *** discretion opts and elects to become, and actually becomes a Manager and a Class A voting Member," then "the indebtedness under this Note shall automatically *** convert from the character of a loan" and be construed as Karlen's "Capital Investment." (Emphases in original.)

¶ 13 As a result of Fitzgibbons signing the promissory note on behalf of JL3, Karlen infused an additional $420,000 in JL3 from January to October 2010. Lencioni, however, had still not resigned as a Class A investor of JL3. On January 10, 2011, Karlen directed his attorney, Donald Morrison, to serve JL3 with a notice of demand regarding the promissory note. Though Fitzgibbons acknowledged receipt of the notice of demand, JL3 had not made any payment toward the indebtedness of $1,824,503.

¶ 14 In JL3's response to Karlen's motion for summary judgment, it argued that the promissory note was voidable for lack of consideration and because it was procured by fraud. JL3 included a "Factual Background" in its response, but Karlen argued that it did not comply with local rules. JL3 then sought leave to file an amended response to Karlen's statement of facts, and the court denied JL3's motion.

¶ 15 B. Depositions

¶ 16 1. Fitzgibbons

¶ 17 Fitzgibbons' deposition, taken in December 2013, is part of the record. Fitzgibbons averred as follows in his deposition. Fitzgibbons had received a BS-BA in business administration and had worked with different businesses over the past 35 years. When JL3 was formed in 2006, there were three Class A investors, which included Fitzgibbons and Lencioni. Fitzgibbons and Lencioni then bought out the third individual. JL3 had several Class B investors; one share was valued at approximately $50,000.

¶ 18 According to Fitzgibbons, JL3 was in "financial straits" in October 2009. Mike Curcios, Dock's manager, approached Karlen, who was a patron, about becoming an investor. After Karlen made several cash infusions in JL3, Karlen met with Fitzgibbons in February 2009. At this meeting, Fitzgibbons provided Karlen with the Class B investor subscription agreement, which Karlen subsequently gave to his attorney, Jeanne Miller, to review. In addition to the cash infusions, Karlen, through his construction company, offered to build a deck for Dock's, which would translate into additional equity interest. Karlen and Fitzgibbons did not discuss "any particular dollar amount" for the deck; the day-to-day conversations occurred between Karlen and Curcios. Karlen never completed the Class B investor subscription agreement; he wanted to wait until the deck was done to finalize the cost.

¶ 19 In July 2009, Fitzgibbons met with Karlen to review the cost of the deck. Miller was at this meeting; it was the first time that Fitzgibbons had met her. Miller had reviewed the Class B investor paperwork and created a memo for Karlen listing her concerns. Given the amount of Karlen's cash infusions and the cost of the deck, Miller did not think it was a good idea for Karlen to become a Class B investor. Karlen said he wanted to become a Class A investor of JL3.

¶ 20 At this point, Fitzgibbons told Karlen that he thought Lencioni would be willing to be bought out. Fitzgibbons agreed to talk to Lencioni about being bought out, which would result in Fitzgibbons and Karlen being Class A investors. When Fitzgibbons talked to Lencioni about moving from a Class A investor to a Class B investor, Lencioni said he would have his own "legal review done." Fitzgibbons testified that he, too, wanted to decrease his investment in JL3 (from $2.1 million to $1.5 or 1.6 million). Fitzgibbons was willing to be "bought down."

¶ 21 In January 2010, Fitzgibbons received the promissory note from Miller, and he asked her what it meant. Miller explained that because Lencioni had not resigned his position, and because Lencioni's buyout had not been finalized, she wanted to know if Fitzgibbons would sign the promissory note as an act of "good faith" until "all of this" was documented appropriately. Miller said that signing the promissory note was an "interim step"; the process would move forward to the mutual conclusion of Lencioni being bought out, Fitzgibbons being bought down, and Karlen becoming a Class A investor. Miller told Fitzgibbons that after signing the promissory note, they could continue to figure out the buyout and the partnership agreement, and the promissory note would "never be enforced."

¶ 22 Fitzgibbons admitted reading and signing the promissory note. He also admitted that in order for Karlen to become his partner, Lencioni "had to be off as a Class A" investor. However,

Lencioni was still a Class A investor at the time Fitzgibbons signed the promissory note. Though the promissory note did not state that it would not be enforced, Miller told him that it would not be enforced. Miller told Fitzgibbons not to worry because all the parties had the same interest, meaning the deal would come to fruition. Karlen wanted in, Lencioni wanted out, and the promissory note would not be enforced.

¶ 23 Once Fitzgibbons signed the promissory note, Karlen continued making payments to JL3. In the end, however, the parties did not agree to pay the amount that Lencioni was demanding in order to be bought out as a Class A investor. Fitzgibbons admitted that he had received a notice of demand on the promissory note but that no money had been paid.

¶ 24 Finally, with respect to Miller, Fitzgibbons was aware that she had represented JL3 in litigation involving an easement with a neighboring landowner. Karlen paid those legal fees on behalf of JL3.

¶ 25 2. Miller

¶ 26 The record also contains Miller's deposition, in which she averred as follows. Miller had represented Karlen and his construction company since 2004. Miller first met Fitzgibbons at the end of July 2009. At that time, she was not engaged to do anything for JL3 or Fitzgibbons. In August 2009, Karlen advised Miller about a problem with a neighboring property (SNS) of Dock's that was claiming an easement over the property. Karlen asked Miller to investigate the issue, and she ended up filing a lawsuit against SNS. Miller had no written agreement with JL3 to handle the case, but Fitzgibbons signed the complaint against SNS. The easement litigation also ended up involving another neighboring landowner of Dock's, and Miller handled that aspect of the case as well.

¶ 27 Miller did not represent Fitzgibbons personally in the easement litigation; JL3 was the only party. Fitzgibbons told Miller that he was the "go-to person," and she kept him informed about the progress of the easement litigation. Fitzgibbons told Miller that Lencioni was not engaged in the business and wanted to get out of it. In addition, Fitzgibbons took it upon himself to inform Lencioni about the easement litigation. Regarding payment for the easement litigation, Karlen and Fitzgibbons agreed that Karlen would pay Miller. Miller billed Karlen for her fees on a monthly basis, and Karlen paid her.

¶ 28 Miller's representation of Karlen included reviewing JL3's Class B investor subscription agreement. She reviewed it prior to meeting with Karlen and Fitzgibbons in July 2009. Lencioni's resignation was a condition of Karlen becoming a Class A investor of JL3. Also, Karlen was never going to buy out Lencioni; it was Fitzgibbons who was going to buy him out. Because Fitzgibbons continued to communicate that Lencioni wanted to resign and be bought out, Miller and Karlen anticipated that the deal would come to fruition.

¶ 29 In November or December 2009, Fitzgibbons needed money, not just for JL3 but also for himself, and he asked Karlen for more cash. Karlen refused to turn over additional money without security since no deal had been struck. Miller then sent a promissory note to Fitzgibbons to sign. Although Miller represented JL3 for the easement litigation, Fitzgibbons was not her client with respect to the deal between Karlen and Fitzgibbons, the capitalization of Karlen's infusions, or "anything having to do with the [promissory] note." Miller never represented Fitzgibbons personally, and she never represented JL3 outside of the easement litigation.

¶ 30 Fitzgibbons had his own attorney, Bill Fitzpatrick, whom Miller communicated with during the easement litigation. At the time Fitzgibbons signed the promissory note, however, Fitzgibbons was representing himself. Miller did not think it was her responsibility to request

Fitzgibbons to retain an attorney. Nevertheless, she told Fitzgibbons that he should "run" the promissory note "by an attorney." Fitzgibbons told Miller that he was dealing with it, and she was not sure what this meant. After she sent Fitzgibbons the promissory note, he said that even though he was aware that Miller represented Karlen and not him, he wanted to ask her a question. Miller responded by saying she was not his attorney, and she recommended that Fitzgibbons review the document with an attorney. It was not Miller's role to advise Fitzgibbons; she never represented him "and he was told so and he acknowledged that on numerous occasions." Miller "made it clear" that she represented only Karlen.

¶ 31 The promissory note stated that it was "secured by a third mortgage on" Dock's property, and Miller sent Fitzgibbons that mortgage as well. This meant that if the promissory note was not paid, Karlen could institute proceedings to foreclose on Dock's. Miller testified that when Karlen was investigating the value of Dock's, Fitzgibbons provided her copies of the existing mortgages on the property. Because the mortgages provided that the recording of other liens or mortgages would be an act of default, Miller told Fitzgibbons that she would not record the mortgage. In addition, based on Fitzgibbons' representations, Miller and Karlen were still convinced at this point that the deal would come to fruition. Nevertheless, the promissory note was security that would be enforced if the deal did not go through or if the money was not paid back.

¶ 32 With respect to Lencioni, Miller never interacted with him or sent him the promissory note. She did not send Lencioni the promissory note because Fitzgibbons held himself out as the principal manager of JL3, with the authority to act on its behalf, and Fitzgibbons was the managing member with whom she had been dealing. In addition, Fitzgibbons "continually, consistently announced" that he, alone, dealt with Lencioni. Miller left it up to Fitzgibbons to

channel the promissory note "through his internal people, processes, whatever." Then, in December 2010, while Miller was still handling the easement litigation, Lencioni advised Miller to cease and desist from any representation of JL3.

¶ 33 C. Trial Court's Ruling

¶ 34 On September 9, 2014, the trial court granted Karlen's motion for summary judgment as to count I against JL3.[1] In a final order entered on September 23, 2014, the court entered judgment in favor of Karlen and against JL3 for $2,512,484.12, which included the principal amount of the promissory note ($1,824,503) plus 8% interest from November 10, 2010, to September 16, 2014 ($687,981.12). The court's order also reflected Karlen's voluntarily dismissal of counts III and IV of his amended complaint.

¶ 35 JL3 timely appealed.

¶ 36 II. ANALYSIS

¶ 37 JL3 appeals the grant of summary judgment in favor of Karlen as to count I of his complaint. "Summary judgment is appropriate 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 a judgment as a matter of law.' " *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002), quoting *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 517-18 (1993). While it is true that summary judgment aids in the expeditious deposition of a lawsuit, it is also a drastic means of disposing of litigation and should be allowed only when the right of the moving party is clear and free from doubt. *Evans v.*

[1] The court also granted summary judgment in favor of Karlen as to count II, which alleged default of another promissory note against Fitzgibbons individually. Count II is not at issue on appeal.

Brown, 399 Ill. App. 3d 238, 243 (2010). The purpose of summary judgment is not to try a question of fact; rather, it is to determine whether a genuine issue of material fact exists. *Robidoux*, 201 Ill. 2d at 335. "A triable issue of fact precluding summary judgment exists where the material facts are disputed or where the material facts are undisputed, but reasonable persons might draw different inferences from those undisputed facts." *Simmons v. Reichardt*, 406 Ill. App. 3d 317, 321 (2010). The burden of proof in a motion for summary judgment lies with the movant. *Evans*, 399 Ill. App. 3d at 243. Finally, a trial court's grant of summary judgment is reviewed *de novo*. *Simmons*, 406 Ill. App. 3d at 322.

¶ 38 A. Consideration

¶ 39 JL3 first argues that the court erred by granting summary judgment because the promissory note lacks consideration. JL3 argues that at the time the promissory note was executed on January 6, 2010, Karlen gave no consideration and that Karlen's cash infusions and deck construction constituted *past* consideration that was transferred before January 6, 2010. JL3 relied on the language in the promissory note that states "for value received," which refers to the individual cash infusions and the value of the deck.

¶ 40 "Any act or promise which is of benefit to one party or disadvantage to the other party is sufficient consideration." *Johnson v. Johnson*, 244 Ill. App. 3d 518, 527-28 (1993). Although JL3 properly defines consideration, it improperly relies on contract principles for its argument regarding the lack of consideration. See *Johnson*, 244 Ill. App. 3d at 528 (under a contract theory, the plaintiffs carry the burden to prove all elements of a contract, including consideration, and the general rule dictates that if the alleged consideration for a promise has been conferred prior to the promise upon which the alleged agreement is based, there is no valid contract); see also *Gladstone v. McHenry Medical Group*, 197 Ill. App. 3d 194, 202 (1990) (same).

¶ 41 However, as Karlen points out, the promissory note at issue is not a contract but a validly executed negotiable instrument.[2] In an action on a validly executed negotiable instrument, consideration is presumed (*Rybak v. Dressler*, 178 Ill. App. 3d 569, 582 (1988)), and no further proof thereof is required other than the note itself (*Pedott v. Dorman*, 192 Ill. App. 3d 85, 93 (1989)). Indeed, in *Johnson*, 244 Ill. App. 3d at 527, cited by JL3, the court reasoned that because the note at issue was not a validly executed negotiable instrument, in which consideration was presumed, the principles of contract law governed, meaning the plaintiffs carried the burden of proving consideration.

¶ 42 Under section 3-104 of the Uniform Commercial Code (UCC), negotiable instrument "means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

> (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
>
> (2) is payable on demand or at a definite time; and
>
> (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money ***." 810 ILCS 5/3-104(a)(1),(2),(3) (West 2010).

¶ 43 Here, the promissory note contained an unconditional promise to pay a fixed amount of money ($1,824,503); it was payable to order, *i.e.*, to Karlen, at the time it was issued; and it was payable on demand without stating any other undertaking or instruction. Moreover, other than the general argument that contract principles apply to the promissory note, JL3 does not argue

[2] Although JL3 also argues that the promissory note was not validly executed because it was procured by fraud, we reject that argument in a subsequent portion of our decision.

that the requirements of section 3-104 are not satisfied. Accordingly, the promissory note is a validly executed negotiable instrument in which consideration is presumed. See *Rybak*, 178 Ill. App. 3d at 582.

¶ 44 In its reply brief, JL3 admits to receiving cash infusions of $976,000 but argues that the consideration for this amount is a "hotly disputed" fact. As stated above, consideration is presumed for a validly executed negotiable instrument, and no further proof is required other than the note itself. See *Pedott*, 192 Ill. App. 3d at 93. Again, the fundamental flaw in JL3's argument that the promissory note lacks consideration is that it is based on contract principles rather than negotiable instruments under the UCC. Therefore, there is no genuine issue of material fact regarding the existence of consideration for the promissory note.

¶ 45 Having reached this conclusion, we need not consider JL3's arguments regarding parol evidence or whether Karlen provided future consideration for the promissory note.

¶ 46 B. Issues of Fact

¶ 47 JL3 next argues that several genuine issues of material fact exist, thus precluding summary judgment. JL3 argues that the cash infusions of $976,000 were investments, not loans, and that Karlen "single handedly then decided to claim that his capital investments were something else." In addition, JL3 argues that the court "blindly awarded" Karlen over $800,000 for the deck without any supporting evidence or invoices. JL3 concludes that the following constitute genuine issues of material fact: (1) why the "deal" leading to Karlen's cash infusions fell apart; (2) the deck's worth; and (3) the agreement to pay for the deck.

¶ 48 As stated previously, JL3 did not file a proper response to Karlen's statement of facts, which was attached to his summary judgment motion, and the court denied JL3 leave to file an amended response. Thus, Karlen is correct that the factual allegations contained in his statement

of facts are deemed admitted by JL3. See 19th Judicial Cir. Ct. R. 2.04B.3.b. (eff. Dec. 1, 2006) ("All material facts set forth in the statement required of the moving party will be deemed admitted unless controverted by the statement of the opposing party.").

¶ 49 In his statement of facts, Karlen stated as follows. Originally, Karlen's cash infusions, as well as his construction of the deck, were designed to be investments in JL3, for which he was to receive an appropriate equity interest. After Fitzgibbons offered Karlen a Class B investor membership, Karlen insisted on becoming a Class A investor, with the attendant voting rights and ability to run Dock's day-to-day business. As a result, Fitzgibbons told Karlen that he would arrange to remove Lencioni as a Class A investor so that Karlen could become partners with Fitzgibbons and have a Class A investor membership. Based on Fitzgibbons' representations, Karlen continued to infuse large sums of money in JL3.

¶ 50 Six months later, in January 2010, Lencioni was still a Class A investor of JL3, and Fitzgibbons sought more cash infusions from Karlen. In response, Karlen told Fitzgibbons that he would infuse additional money in JL3 only if Fitzgibbons agreed to convert all of Karlen's prior cash investments ($976,000) and deck construction costs ($848,503) into a loan and sign a promissory note on behalf of JL3 and in favor of Karlen for $1,824,503. Fitzgibbons read and signed the promissory note on January 6, 2010. As a result of Fitzgibbons signing the promissory note, Karlen infused an additional $420,000 in JL3.

¶ 51 Because the above facts are deemed admitted by JL3, there are no genuine issues of material fact regarding why the "deal" fell apart or the payment for the deck. Karlen made cash investments and built the deck but never became a Class A investor. Fitzgibbons wanted more money, and Karlen wanted to secure his investment by converting his cash and deck costs into a loan. By signing the promissory note, Fitzgibbons agreed, on behalf of JL3, to convert Karlen's

cash investments into a loan, and he agreed to convert the cost of the deck into a loan. Likewise, at the time Fitzgibbons signed the promissory note, he did not dispute the cost of the deck or the payment schedule. Instead, he agreed to pay the amount Karlen charged for the deck, which was about half of the total amount reflected in the promissory note. Based on this evidence, we reject JL3's argument that genuine issues of material fact exist regarding the "deal" and the deck. See *Darrough v. Glendale Heights Community Hospital*, 234 Ill. App. 3d 1055, 1059 (1992) (to prevent entry of summary judgment, an opponent must present a *bona fide* factual issue and not merely general denials and conclusions of law).

¶ 52 C. Fraudulent Inducement

¶ 53 JL3's final argument is that the court erred by granting summary judgment as to count I because the promissory note was procured by fraud. Fraud in the inducement exists where the party fully understands what he is signing and is aware of the nature and character of the instrument he has executed, but where he is deceived by fraudulent representations as to the facts outside the instrument itself. *Belleville National Bank v. Rose*, 119 Ill. App. 3d 56, 59 (1983). The elements of fraud in the inducement are: a false representation of material fact, made with knowledge or belief of that representation's falsity, and made with the purpose of inducing another party to act or to refrain from acting, where the other party reasonably relies upon the representation to its detriment. *Enterprise Recovery Systems, Inc. v. Salmeron*, 401 Ill. App. 3d 65, 72 (2010). Fraud in the inducement vitiates the agreement and renders it voidable at the option of the injured party. *Grane v. Grane*, 130 Ill. App. 3d 332, 343 (1985).

¶ 54 JL3's defense of fraud in the inducement hinges on two allegations: that Miller improperly served a dual role as attorney for Karlen and JL3 and that she misrepresented that the note would not be recorded or enforced. Regarding Miller's role, JL3 argues as follows. Miller

was actively representing JL3 in the spring of 2009 and was actively representing JL3 at the time the promissory note was signed. Thus, Miller acted as dual counsel for Karlen and JL3 (*i.e.*, Lencioni and Fitzgibbons). However, Miller did not advise Fitzgibbons that Karlen's investment was being converted into a secured note; she never disclosed her conflict of interest in representing both the creditor and debtor in the same transaction; she failed to counsel Fitzgibbons and Lencioni that both should seek outside counsel to review the promissory note; and she "intentionally and deceitfully" did not contact Lencioni regarding the note. According to JL3, Fitzgibbons signed the note believing that Miller was acting as counsel for JL3 and advising him on the matter; thus, Miller violated her duties to JL3 by lulling Fitzgibbons into the misconception that she was an independent attorney representing JL3.

¶ 55 Turning to Miller's alleged misrepresentations, JL3 alleges that she told Fitzgibbons that by executing the note, he was merely acknowledging the investment that Karlen had already made in JL3. Miller also induced Fitzgibbons' signature on the promissory note by verbally promising him that Karlen would not record the promissory note or enforce it. JL3 argues that Fitzgibbons signed the note as a result of Miller's misrepresentations.

¶ 56 We reject JL3's argument in that its defense of fraud in the inducement is deficient as a matter of law. At the outset, there is no genuine issue of material fact regarding Miller's role. In Fitzgibbons' deposition, he testified that he first met Miller at the July 2009 meeting with Karlen; that Miller was Karlen's attorney; that Miller advised Karlen not to become a Class B investor; and that Miller represented JL3 in an unrelated case involving an easement with Dock's neighboring landowner. Significantly, there is nothing in Fitzgibbons' deposition indicating that he believed that Miller was representing JL3 in any capacity other than the easement litigation.

In other words, there is nothing in his deposition indicating that he believed that Miller was representing JL3 regarding Karlen's investment or the deal between JL3 and Karlen.

¶ 57 Miller provided similar testimony in her deposition. Although she represented JL3 for the easement litigation, she never represented JL3 outside of the easement litigation, and she never represented Fitzgibbons personally. On the other hand, Miller had represented Karlen and his construction company since 2004, which included reviewing JL3's Class B investor subscription agreement. Because she did not represent JL3 or Fitzgibbons with respect to the deal between Karlen and JL3, the capitalization of Karlen's infusions, or anything to do with the promissory note, it was not her role to advise Fitzgibbons on such matters. Moreover, Miller testified that she sent the promissory note to Fitzgibbons, not Lencioni, because Fitzgibbons held himself out to be a managing partner of JL3, with the authority to make decisions on its behalf.

¶ 58 In sum, there is nothing in the record to support JL3's allegations that Miller represented JL3 in any capacity other than the easement litigation; that she had a conflict of interest or duty to advise Fitzgibbons regarding the promissory note; or that Fitzgibbons operated under the misconception that Miller represented JL3 in any capacity other than the easement litigation. Again, the party opposing summary judgment must not present merely general denials and conclusions of law but a *bona fide* factual issue, and JL3 has failed to do so regarding Miller's role as attorney in this case. See *Darrough*, 234 Ill. App. 3d at 1059 (1992) (to prevent entry of summary judgment, an opponent must present a *bona fide* factual issue and not merely general denials and conclusions of law).

¶ 59 As for JL3's allegation that Miller induced Fitzgibbons to sign the promissory note by verbally promising him that Karlen would not record or enforce it, Karlen argues that the fact that Fitzgibbons read and signed the promissory note precludes him from challenging it on the

basis of fraud. Citing *Belleville National Bank*, 119 Ill. App. 3d at 58, Karlen argues that a party who signs a written agreement and has had the opportunity to review it, may not subsequently claim that he was fraudulently induced to enter into the agreement based on misrepresentations as to its terms. As Karlen points out, the promissory note stated that it was "the entire agreement of the parties"; that "the entire outstanding and unpaid principal balance" was due "on demand"; and that only if Lencioni resigned as a Class A investor and Karlen elected to become a Class A investor, then the indebtedness would convert from a loan into a capital investment. According to Karlen, this language in the promissory note contradicts Miller's alleged misrepresentation that the note would not be recorded or enforced.

¶ 60 Though Karlen's argument appears sound, a promise not to enforce a promissory note is arguably a fraudulent representation as to a fact *outside* the instrument itself. See *id*. at 59 (fraud in the inducement exists where the party fully understands what he is signing but is deceived by fraudulent representations as to the facts outside the instrument itself); see also *Shanahan v. Schindler*, 63 Ill. App. 3d 82, 92 (1978 (fraud shown where the party was induced to enter the transaction by the other party's promise that he would not be held liable on the note).

¶ 61 In addition, Karlen argues that Miller's alleged promise that she would not enforce the note is a promise to act in the future, which is insufficient to constitute fraud. Karlen is correct that the general rule is that a promise of future conduct made without intention to perform is not a misrepresentation. *Concord Industries, Inc. v. Harvel Industries Corp.*, 122 Ill. App. 3d 845, 849 (1984). Nevertheless, there exists a recognized exception where the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud. *Id*. "Where a party makes a promise of performance, not intending to keep the promise but intending for another party to rely on it, and where that other party relies upon it to his detriment,

the false promise will be considered an intended scheme to defraud the victim and will be actionable." *Id*. at 849-50. Thus, like Karlen's previous argument, this argument does not defeat JL3's defense of fraud in the inducement.

¶ 62 Rather than resolve this issue in the manner urged by Karlen, we determine that JL3's defense of fraud in the inducement is deficient as a matter of law. This is because Fitzgibbons cannot show that his reliance on Miller's alleged misrepresentation, even assuming it occurred, was reasonable. See *Siegel Development, LLC v. Peak Construction, LLC*, 2013 IL App (1st) 111973, ¶¶ 114, 118 (summary judgment proper because the plaintiffs' reliance on the defendants' statement was not reasonable as a matter of law).

¶ 63 In *Siegel*, the court stated that the plaintiff must show that its reliance on the misrepresentation was justified, which means that the reliance must be reasonable. *Id*. ¶ 114. "Generally, the question of whether a plaintiff's reliance was reasonable is a question of fact; however, where only one conclusion can be drawn from the undisputed facts, the question becomes one for the court to determine." *Id*.

¶ 64 As stated previously, the following facts are deemed admitted by JL3. After Karlen infused cash and built the deck, which occurred from December 2008 to January 2010, he insisted on becoming a Class A investor. Fitzgibbons told Karlen that he would arrange to remove Lencioni as a Class A investor, because Lencioni's resignation was the only way for Karlen to become a Class A member. Based upon Fitzgibbons' representations, Karlen continued to infuse large sums of money in JL3. Fitzgibbons continued to request money, however, and Lencioni had not resigned. In response, Karlen told Fitzgibbons that he would infuse additional money in JL3 *only if* Fitzgibbons agreed to convert all of Karlen's prior cash investments and deck construction costs into a loan and sign a promissory note on behalf of JL3.

After Fitzgibbons read and signed the promissory note, Karlen infused additional money in JL3, but Lencioni never resigned as a Class A investor.

¶ 65 Given JL3's admission that Fitzgibbons' agreed, by signing the promissory note, to convert Karlen's cash and deck construction investments into a loan, it is not reasonable for Fitzgibbons to claim that he relied on Miller's alleged misrepresentation that the promissory note would never be recorded or enforced. JL3 needed more money, but Karlen refused to infuse additional cash in JL3 without securing his prior investments. Simply put, there was no reason for Fitzgibbons to sign a promissory note securing Karlen's prior investments if the promissory note would never be recorded or enforced. See *Seefeldt v. Millikin National Bank of Decatur*, 154 Ill. App. 3d 715, 718 (1987) (in determining genuineness of a fact, a court should ignore personal conclusions, opinions, and self-serving statements and consider only facts admissible in evidence). Indeed, Fitzgibbons admitted that the promissory note, which he read, did not state that it would not be enforced. See *Seigel Development, LLC*, 2013 IL App (1st) 111973, ¶ 114 (if the party's reliance is unreasonable in light of the information open to him, the loss is considered his own responsibility).

¶ 66 Moreover, the context in which Miller's statement was made also renders Fitzgibbons' reliance unreasonable. Fitzgibbons claims that he relied on Miller's alleged misrepresentation that the promissory would never be recorded or enforced in the context of the deal coming to fruition. In his deposition, Fitzgibbons testified that Miller told him the promissory note would not be enforced because all the parties had the same interest: Karlen wanted in and Lencioni wanted out. Miller, too, testified that at the time she gave Fitzgibbons the promissory note in January 2010, she and Karlen believed that the deal would come to fruition. This means that if the parties could not agree, however, and the deal did not come to fruition, Fitzgibbons could not

justifiably rely on Miller's statement that the promissory note would not be enforced. This is exactly what occurred. One year later, in January 2011, Lencioni did not agree to resign, Karlen did not become a Class A investor, and the deal fell apart.

¶ 67 Finally, Fitzgibbons' claim of reasonable reliance is largely dependent on his claim that Miller violated her duties to JL3 by lulling him into the misconception that she was an independent attorney representing JL3, and we have rejected that claim. Because there is no genuine issue of material fact as to whether Fitzgibbons reasonably relied on Miller's statement, JL3's fraud-in-the-inducement defense fails as a matter of law and cannot defeat the entry of summary judgment in favor of Karlen.

¶ 68 III. CONCLUSION

¶ 69 For the foregoing reasons, the judgment of the Lake County circuit court granting summary judgment in favor of Karlen as to count I is affirmed.

¶ 70 Affirmed.