

No. 1-15-0260

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MAHMOUD FAISAL ELKHATIB,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County
)	
v.)	No. 12 L 3342
)	
KNIGHT HOLDINGS, LLC and AHMAD TAYSEER)	
SULAIMAN,)	Honorable
)	Raymond W. Mitchell
Defendants-Appellees.)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's entry of summary judgment for defendants vacated and cause remanded. Plaintiff's claim was not barred by either of two releases relied on by trial court. Genuine issues of material fact existed regarding validity of general release contained in deed-in-lieu-of-foreclosure based on plaintiff's claim that defendant breached fiduciary duty when negotiating release by failing to disclose material facts about property given in consideration for release, including multiple defects in title. Although trial court alternatively determined that plaintiff was collaterally estopped by summary judgment in plaintiff's case for fraud and unpaid wages (No. 12 L 1191), this court has now vacated that judgment because genuine issues of material fact existed as to validity of unexecuted settlement agreement produced by defendants that plaintiff claimed he did not sign.

¶ 2 This matter is one of two cases before this court involving plaintiff Mahmoud Elkhatab and defendant Ahmad Sulaiman. The first of the cases involved their relationship as employer-

employee (the employment case), in which plaintiff sued defendant, his employer at a law firm, for unpaid wages. In that case, the circuit court entered summary judgment in favor of defendant on the ground that plaintiff had signed a settlement agreement styled an "accord and satisfaction" that released all claims against defendant. We vacated the grant of summary judgment and remanded, finding a genuine issue of material fact as to whether plaintiff ever, in fact, signed that settlement agreement. See *Elkatib v. Sulaiman*, 2016 IL App (1st) 150259-U (unpublished order pursuant to Illinois Supreme Court Rule 23).

¶ 3 This second case, the one presently before us, is an action for breach of contract regarding a joint venture, in which defendant Sulaiman is one of the defendants, the second defendant being the limited liability corporation set up by Sulaiman, known as Knight Holdings, LLC (Knight Holdings). Once again, defendants argued below that plaintiff released his claims, but with regard to these contract claims, defendants pointed to two different releases. The first was a "deed in lieu of foreclosure," by which plaintiff purportedly released his contract claims in exchange for receiving a quitclaim deed on certain property held by the joint venture. The second was the same release on which defendant Sulaiman relied in the employment case—the "accord and satisfaction" by which plaintiff purportedly released all claims, both employment- and contract-related, in exchange for a nominal sum of money and a deed to that same property.

¶ 4 In this case, the circuit court agreed with both of these arguments in granting summary judgment in favor of defendants. The court ruled that plaintiff released his contract claims when he signed the "deed in lieu of foreclosure," rejecting plaintiff's attacks on the validity of that document. Alternatively, the court ruled that, because it had already found (in the employment case) that the "accord and satisfaction" constituted a release of all claims by plaintiff, plaintiff

was collaterally estopped from arguing otherwise in this action. Under either ground, the circuit court ruled, plaintiff had released the claims in this case.

¶ 5 We vacate the grant of summary judgment in this case and remand for further proceedings. We hold that genuine issues of material fact preclude a ruling that the release contained in the "deed in lieu of foreclosure" was valid and enforceable. As for the second basis for granting summary judgment, given our previous holding in the employment case that there was a genuine issue of material fact as to whether plaintiff ever actually signed the "accord and satisfaction" agreement, that purported release cannot be a basis for summary judgment in this case, either.

¶ 6 I. BACKGROUND

¶ 7 A. The Joint Venture

¶ 8 In January 2008, plaintiff entered into a written agreement with Knight Holdings, entitled "Knight Holdings, LLC: Elkhatib Joint Venture" (Joint Venture). By this Joint Venture, plaintiff agreed to invest \$130,000 with Knight Holdings to purchase property in Dolton, Illinois and develop a restaurant on that property. Knight Holdings, in turn, agreed to pay plaintiff investment profit payments, starting at \$2,000 per month and then escalating over time, plus additional payments after the initial \$130,000 was fully repaid. Defendant Sulaiman personally guaranteed the funds invested by plaintiff. The written contract embodying the Joint Venture refers to plaintiff and Knight Holdings continuously throughout as "partners."

¶ 9 If the intermingling relationships between the parties were not confusing enough already, it is important to understand that plaintiff was also a minority shareholder in Knight Holdings. Thus, insofar as the transaction at issue is concerned, plaintiff wore two hats: he was a minority

shareholder of Knight Holdings, and he also was a partner, or member of a joint venture, or some kind of investor, with Knight Holdings on the particular transaction that went sour here.

¶ 10 In any event, pursuant to the Joint Venture, plaintiff paid \$130,000 to Knight Holdings. Knight Holdings then purchased the Dolton property. Plaintiff claims that he never received any payment under this Joint Venture.

¶ 11 B. The Lawsuit

¶ 12 On March 28, 2012, plaintiff filed suit against defendants Knight Holdings and Sulaiman for breach of contract (against Knight Holdings) and breach of the personal guaranty (against Sulaiman). Defendants initially moved to dismiss the complaint based on the releases we have described above—the documents styled "accord and satisfaction" and "deed in lieu of foreclosure"—but the trial court found that questions of fact about the existence and validity of the releases precluded judgment in favor of defendants at the pleading stage.¹

¶ 13 Plaintiff later gave his deposition. He denied signing the "accord and satisfaction." He acknowledged, however, that he signed the "deed in lieu of foreclosure" and that he accepted the Dolton property as a settlement of his claims for the monies owed to him by Knight Holdings arising out of the joint venture agreement. He also testified that he chose to have his sister take title to the Dolton property.

¹ We are using the monikers "accord and satisfaction" and "deed in lieu of foreclosure" to keep these two purported settlement documents separate for clarity's sake, and because those are the titles the parties put on the documents. It is not clear to us that the latter document was, in fact, a deed in lieu of foreclosure as that term is traditionally understood, but the title is not important; by its terms, it was nevertheless a document in which the parties attempted to exchange a quitclaim deed to the Dolton property for plaintiff's release of claims against Knight Holdings.

¶ 14 C. The Motion for Summary Judgment at Issue

¶ 15 Defendants filed a motion for summary judgment based on plaintiff's acknowledgment that he signed the "deed in lieu of foreclosure" and his admission that he understood that it would settle all matters between himself and Knight Holdings. Defendants noted that the property was, in fact, quitclaimed to plaintiff's designee, Dena Elkhatab.

¶ 16 After the circuit court had ruled, in the employment case, that plaintiff has released his claims pursuant to the "accord and satisfaction," defendants in this action amended their motion for summary judgment and added that additional basis for judgment in their favor, arguing that collateral estoppel barred plaintiff from re-litigating the issue here. One way or the other, defendants argued, either based on the "deed in lieu of foreclosure" or the "accord and satisfaction," plaintiff had released his claims against Knight Holdings.

¶ 17 In response, while admitting that, on November 6, 2009, he signed the "deed in lieu of foreclosure" that conveyed the Dolton property to his sister (plaintiff's designee) in exchange for his release of claims, plaintiff argued that the release was voidable. Plaintiff claimed that defendants concealed material information about clouds on the title to that property—including unpaid taxes and other individuals' claims on that property—and that defendants owed him a fiduciary duty to disclose that information. As to the "accord and satisfaction" argument, plaintiff argued that the court's prior ruling in the employment case did not collaterally estop him from pursuing this contract action.

¶ 18 In reply, Defendants did not deny owing plaintiff a fiduciary duty but argued that they did not breach that duty. They argued that plaintiff's claim that he did not know about the clouds on the property's title was "untrue," that in fact plaintiff not only knew about the clouds on the title but had equal access to all the information about the Dolton property that defendants possessed.

In support of that contention, defendant attached a number of documents to their reply, including emails drafted by plaintiff and his sister and a lengthy affidavit from defendant Sulaiman.

¶ 19 Plaintiff sought to leave to file a sur-reply, arguing that defendants had raised a "host of new issues" in their reply. That motion was denied.

¶ 20 As we have noted, the circuit court agreed with both of defendant's arguments. The court entered summary judgment in favor of defendants on two bases: (1) that plaintiff released these claims when he signed the "deed in lieu of foreclosure" that contained a general release; and (2) that plaintiff was collaterally estopped by the summary judgment entered in the employment case, where the court had held that plaintiff released his claims in the "accord and satisfaction."

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 We first address the trial court's second basis for granting summary judgment, namely, that plaintiff's claim was barred by collateral estoppel as a result of the court's summary judgment entered in the employment case, where the trial court concluded that plaintiff was barred from bringing his action based on plaintiff's release of all claims against defendant in the "accord and satisfaction" he signed. As previously noted, we have now vacated that summary judgment, finding that a question of material fact existed as to whether plaintiff ever, in fact, signed that "accord and satisfaction." *Elkatib v. Sulaiman*, 2016 IL App (1st) 150259-U (unpublished order pursuant to Illinois Supreme Court Rule 23). Thus, regardless of whether the circuit court properly relied on that ruling as a basis for collateral estoppel, our vacatur of that ruling obviously negates that basis for affirming this judgment.

¶ 24 We now address the remaining basis for the trial court's grant of summary judgment, namely, whether plaintiff's signing of the "deed in lieu of foreclosure" constituted a valid release of his claims in this case.

¶ 25 A. Standard of Review

¶ 26 Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal 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.

Hall v. Henn, 208 Ill. 2d 325, 328 (2003). Our standard of review for the trial court's order granting summary judgment is *de novo*. *Passalino v. City of Zion*, 237 Ill. 2d 118, 124 (2010).

¶ 27 Although summary judgment is to be encouraged as an expeditious method of disposing of a lawsuit, it is a drastic measure and should be allowed only when the right of the moving party to judgment is free and clear from doubt. *Olson v. Etheridge*, 177 Ill. 2d 396, 404 (1997).

At the summary judgment stage, plaintiffs are not required to prove their cases. *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 423 (1998). The purpose of the summary judgment procedure is not to try a question of fact but simply to determine if one exists. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). A triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not disputed, reasonable minds could differ in drawing inferences from those facts. *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill. 2d 17, 31 (1999). Thus, in deciding a summary judgment motion, a court cannot make credibility determinations or weigh evidence. *Coole v. Central Area Recycling*, 384 Ill. App. 3d 390, 396 (2008).

¶ 28 B. Questions of Fact Remain Regarding Validity of Release

¶ 29 The trial court concluded that the "deed in lieu of foreclosure" was valid, and the general release language contained in that document precluded plaintiff from suing on any and all matters between the parties. As the trial court acknowledged, there is no dispute that plaintiff signed the "deed in lieu of foreclosure" or that the Dolton property was deeded by quitclaim to his sister at plaintiff's direction.

¶ 30 On appeal, plaintiff limits his arguments to the validity of the release. He contends that there is a genuine issue of material fact as to validity of the "deed in lieu of foreclosure," because he claims defendants owed him a fiduciary duty that included the obligation to inform him of clouds on the title to the Dolton property, which served as the sole consideration for the release. Those defects included:

- A few months before conveying the Dolton property to plaintiff's sister, Knight Holdings had conveyed the property to defendant Sulaiman's brother, Omar, by a quitclaim deed that, so far as we can tell, was never recorded;
- A few months before Knight Holdings conveyed the property to plaintiff's sister, the Dolton property was the subject of a tax sale for unpaid taxes, which would require redemption by the property owner of an amount plaintiff estimates at \$45,000;
- Just over 6 months before Knight Holdings conveyed the property to plaintiff's sister, defendant executed a settlement agreement with a man named Fouad Hallak, giving Hallak a lien on defendant Sulaiman's share in the Dolton property, a lien that *was* recorded; and
- Years earlier, the Environmental Protection Agency filed a letter with the Cook County Recorder of Deeds addressing a leaking underground storage tank on the

Dolton property (which was a former gas station) and placing some restrictions on the use of the property due to soil contamination on the property.

¶ 31 Plaintiff has claimed throughout this litigation that he was unaware of these encumbrances on the property at the time he executed the release in the "deed in lieu of foreclosure." In his deposition, he claimed that he was not intimately familiar with the goings-on at the Dolton property during his time with Knight Holdings and relied solely on what others told him about the property:

"Q: Okay. And you're familiar with the Dolton property, correct?

A: I am familiar with the Dolton property.

Q: That was one of Knight Holdings' properties?

A: Yep.

Q: Were you among the people who were involved in identifying that property for purchase?

A: No.

Q: Were you involved in planning for the development of that property?

A: Define involved. And I don't mean to be semantic about it but ...

Q: *Other than your being a member of Knight, did you have any involvement?*

A: *No. No. Everything was based on what they were relaying to me about it. I never even visited the property to this day.*" (Emphasis added.)

¶ 32 Plaintiff claims that defendants owed him a fiduciary duty that required defendants to disclose these defects at the time the "deed in lieu of foreclosure" was executed. Plaintiff is correct that, where a fiduciary relationship exists between the parties, the defendant has the burden to show that full and frank disclosure of all relevant information was made to the other

party. *Construction Systems, Inc. v. FagelHaber, LLC*, 2015 IL App (1st) 141700, ¶ 28. "If a petitioner shows that a fiduciary relationship exists, any transaction between parties in which the agent profits is typically presumed to be fraudulent and the agent has the burden of proving by clear and convincing evidence that the transaction was fair and equitable and did not result from the agent's undue influence over the principal." (Internal quotation marks omitted.) *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1005 (2010) (quoting *In re Estate of Miller*, 334 Ill. App. 3d 692, 698 (2002)); accord *Rizzo v. Rizzo*, 3 Ill. 2d 291, 305 (1954). Some of the significant factors to be considered in determining whether a defendant has met his burden of rebutting the presumption of fraud include "a showing that the fiduciary made a frank disclosure of the information he had, he paid adequate consideration, and the principal had competent and independent advice." *Matter of Estate of DeJarnette*, 286 Ill. App. 3d 1082, 1088 (1997).

¶ 33 Such transactions include the execution of a release. See, e.g., *ICD Publications, Inc. v. Gittlitz*, 2014 IL App (1st) 133277 (release between close corporation and former president); *Janowiak*, 402 Ill. App. 3d 997 (release between trustee and beneficiary); *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15 (2003) (release between partners). "The burden of the duty of full disclosure of material facts remains on the fiduciary seeking enforcement of the release." (Internal quotation marks omitted). *ICD Publications*, 2014 IL App (1st) 133277, ¶ 68.

¶ 34 In their brief before this court, defendants' arguments can be boiled down to the following: (1) the record evidence shows that plaintiff was heavily involved in the operations of Knight Holdings; he had equal access to the information defendants had concerning the problems with the Dolton property; and plaintiff's deposition testimony to the contrary is contradictory; (2) plaintiff ratified the "deed in lieu of foreclosure" transaction by accepting the fruits of the deal and not disavowing it until defendants raised the issue of the release in defending this lawsuit;

(3) consideration for the release was sufficient; (4) the so-called defects in the property were either not defects at all or did not overcome the fact that plaintiff received value in acquiring the land.

¶ 35 What is notable about defendants' response is that they do *not* deny that they owed plaintiff a fiduciary duty. They never denied it in the circuit court and they do not deny it before this court.

¶ 36 We would further note that the circuit court did not weigh in on plaintiff's claim of fiduciary duty, either. The court reasoned as follows:

"[Plaintiff] testified in his deposition that Sulaiman represented to him that the Dolton property was valuable and free and clear of any liens but that [plaintiff] later discovered the taxes had not been paid on the property, it was quitclaimed to another individual without his knowledge, and that environmental issues reduced the value of the property. Defendants counter these assertions with an affidavit from Sulaiman and emails that allegedly show [plaintiff] was fully aware of the property's present condition and any encumbrances.

Based on the evidence of record, it is clear that [plaintiff] had equal access to the documents pertaining to the Dolton Property. He was a member of the LLC, and he worked on the Dolton property project. Moreover, there was no disparity in bargaining power between Sulaiman and [plaintiff]. [Plaintiff] accepted the Dolton property because he knew it was his best chance to recover some measure of his original investment in a failed project. Thus, the Deed in Lieu of Foreclosure was valid, and the general release language precludes [plaintiff] for [*sic*] suing on any and all matters between the parties."

¶ 37 The circuit court did find that plaintiff had equal access to the information about the Dolton property and that there was "no disparity in bargaining power" between the two parties, but we do not interpret that as a comment, much less a ruling, on the existence, or lack thereof, of a fiduciary duty between the parties; the phrase never appears in the court's written ruling.

¶ 38 There is support in the record for the claim of a fiduciary duty by plaintiff, in whose favor we must construe the evidence at the summary judgment stage. Keeping in mind that plaintiff was both (i) a minority shareholder to defendant Sulaiman's majority shareholder in Knight Holdings and (ii) a partner/joint venture/investor with Knight Holdings (whose chief officer was defendant Sulaiman), the record could potentially support more than one possible source for a fiduciary duty.

¶ 39 For one, the contract on which plaintiff sued, the Joint Venture, could be read as a joint venture (by virtue of its title, at least) or as a partnership (based on how the contract language characterized the relationship), two forms of association that are similar and often indistinguishable from one another. See *Thompson v. Hiter*, 356 Ill. App. 3d 574, 582 (1st Dist. 2005) ("[G]enerally speaking, it may be said that practically the only distinction between the two [a joint venture and a partnership] is that the former relates to a single specific enterprise or transaction, while the latter relates to a general business of a particular kind.") (quoting *Harmon v. Martin*, 395 Ill. 595, 612 (1947)). But the nomenclature given by the parties is not dispositive; the question is whether the relationship of the parties, as a whole, gives rise to a fiduciary duty. *Yokel v. Hite*, 348 Ill. App. 3d 703, 706 (2004). The resolution of that question is often a question of fact. *Id.*; *Ransom v. A.B. Dick Co.*, 289 Ill. App. 3d 663, 673 (1997). If, in fact, the parties were involved in a joint venture, or a partnership, the relationship would give rise to a fiduciary

duty. See, *e.g.*, *In re Estate of Stahling*, 2013 IL App (4th) 120271, ¶ 18 (fiduciary relationship exists as a matter of law between partners and joint adventurers).

¶ 40 Another possible source of a fiduciary duty in this case is the LLC agreement by which Knight Holdings was formed. This is the principal basis on which plaintiff relies for his position. Citing *Katris v. Carroll*, 362 Ill. App. 3d 1140 (2005), and other cases, plaintiff argues that defendant Sulaiman, as a manager of the limited liability corporation, had a fiduciary relationship with the other members, including plaintiff. But it is not clear to us how the relationship between plaintiff and defendant Sulaiman as *shareholders* in Knight Holdings is relevant to Knight Holdings' relationship with plaintiff as *partners* in the Joint Venture, which after all is the contract on which this lawsuit is based.

¶ 41 The operative point is that this is all unclear to us. We are left with one party claiming a fiduciary duty when it is possible, but not altogether clear, that he is correct; the other party appearing to flatly concede the matter; and the trial court never having passed on the question. We could, of course, find the question forfeited by defendants for failing to contest it, but we are not bound to accede to a party's concession. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). And on a question so pivotal to the outcome of the case as this, we will not do so.

¶ 42 As we have noted, if in fact a fiduciary duty existed between the parties in this case, then the party relying on the release—defendants—must prove by clear and convincing evidence that they provided full and frank disclosure of all material facts to plaintiff. See, *e.g.*, *Construction Systems*, 2015 IL App (1st) 141700, ¶ 28; *ICD Publications*, 2014 IL App (1st) 133277, ¶ 68. The arguments that defendants raise here about equal access to information, plaintiff's heavy involvement in Knight Holding's business on the Dolton property, and the importance or lack thereof of the alleged defects on the property, are either questions of fact or facts that could be

immaterial if a fiduciary duty existed between the parties. And the preliminary question of fiduciary duty itself is one that is either a question of fact or, if it is a question of law, is a question of law on which we have received almost no guidance.

¶ 43 The proper remedy is to vacate the grant of summary judgment and remand to the circuit court to determine whether defendant owed plaintiff a fiduciary duty. See *Brown v. Brown*, 62 Ill. App. 3d 328, 333 (1978) (where trial court did not pass on question of fiduciary duty and appellate court found question dispositive, remand to circuit court for determination of issue was appropriate). The resolution of that question will then guide any further proceedings the circuit court may require in reconsidering the motion for summary judgment.

¶ 44 Finally, plaintiff filed a motion to strike portions of defendants' response brief. Defendants filed no objection. We took the motion for consideration with the case and now deny it.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we vacate the judgment of the circuit court of Cook County and remand the matter for further proceedings consistent with this order.

¶ 47 Plaintiff's motion to strike denied.

¶ 48 Vacated and remanded with instructions.