FIRST DIVISION
February 14, 2012

No. 1-10-2382

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

FRED C. BEGY III,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant, Cross-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CH 21835
	)	
LARRY S. KAPLAN, ROBERT C. VON OHLEN,	)	
and KAPLAN & VON OHLEN,	)	Honorable
	)	Dorothy K. Kinnaird,
Defendants-Appellees, Cross-Appellants.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 ***Held***: On plaintiff's appeal, we affirmed the judgment in favor of defendants on plaintiff's second-amended complaint for dissolution of the law firm partnership, an accounting and damages. On defendants' cross-appeal, we affirmed the judgment in favor of plaintiff on the breach of fiduciary duty count in his third-amended complaint. The respective judgments were affirmed as they were each supported by the evidence at trial.

¶ 2 On December 27, 2001, plaintiff Fred C. Begy III, was expelled from the law firm of Kaplan, Begy & von Ohlen. On June 29, 2004, plaintiff filed his second-amended complaint for dissolution, an accounting and damages, claiming his expulsion was improper and, in expelling him, defendants

Larry S. Kaplan and Robert C. von Ohlen breached their fiduciary duties, their duties of good faith and the partnership agreement. Following a bench trial, the circuit court ruled in favor of defendants on plaintiff's second-amended complaint. Plaintiff subsequently filed a third-amended complaint, which conformed the pleadings to the proof by adding a cause of action in count IV alleging defendants breached their fiduciary duty by delaying certain billings of clients in August 2001 so as to reduce the amount of income plaintiff was entitled to receive upon his expulsion. The circuit court ruled in favor of plaintiff on count IV of his third-amended complaint. Plaintiff appeals the judgment in defendants' favor on his second-amended complaint. Defendants cross-appeal the judgment in plaintiff's favor on count IV of his third-amended complaint. We affirm on the appeal and on the cross-appeal.

¶ 3 The relevant facts of this case, as set forth in the circuit court's 26-page memorandum opinion and order, are as follows.

¶ 4 Plaintiff is an attorney who has been licensed to practice law in Illinois since 1973. After practicing aviation litigation for14 years with Lord, Bissell & Brook, plaintiff founded the law firm of Adler, Kaplan & Begy in January 1988. At the end of 1994, Adler and other attorneys left the law firm, and the new law firm of Kaplan & Begy was created. In 1997, the law firm changed its name to Kaplan, Begy & von Ohlen (hereinafter referred to as the Firm). The Firm was a partnership with its principal place of business in Chicago, Illinois, and it specialized in aviation insurance defense. FedEx was one of its primary clients.

¶ 5 By the end of 1998, plaintiff and defendants Kaplan and von Ohlen were the only general partners of the Firm and they were still operating under a 1993 partnership agreement. On February

5, 1999, they executed a new partnership agreement, which provided plaintiff was entitled to 40% of the Firm's net profits and defendants were each entitled to 30%. Any amendments to the percentages could be made only by unanimous vote of plaintiff and defendants.

¶ 6 Section IX of the 1999 partnership agreement, titled "Involuntary Withdrawal," stated:

> "The following shall be grounds upon which the Firm may cause the involuntary withdrawal of a Partner.
>
> A. Disbarment or suspension by action of the Supreme Court of Illinois ***.
>
> B. Conviction of a felony, or of any criminal offense involving fraud.
>
> C. The filing of a voluntary petition in bankruptcy ***.
>
> D. Knowingly permitting a final judgment in excess of $10,000 or final judgments aggregating in excess of $30,000 to remain undischarged for more than thirty (30) days ***.
>
> E. Violation of this Agreement which is uncorrected within thirty (30) days after notice thereof from the Managing Partner to the Partner concerned; provided however, that such Partner shall have the right to appeal such action of the Managing Partner to the Partnership ***.
>
> F. A decision by a 2/3rds vote of the General Partners is required for involuntary withdrawal of a Partner who is disabled, mentally or physically, or both and unable to practice law at the level of competence which they expect of a Partner of the Firm.
>
> G. A decision by a 2/3rds vote of the General Partners is required for

involuntary withdrawal when the best interests of the Firm require such Partner to withdraw."

¶ 7 In June 1999, Mr. von Ohlen spoke with plaintiff regarding his concern that the Firm had not yet responded to the so-called Examen/C-21 audit report that was sent to the Firm the previous year. The Firm had served as counsel to the British Aviation Insurance Group (BAIG) in representing Simuflite in the matter of a crash of an Air Force C-21 resulting in multiple deaths. A jury returned a multi-million dollar verdict against Simuflite and other defendants involved therein. Following this adverse verdict, BAIG hired an auditing firm, Examen, to analyze and evaluate the Firm's legal fees and billing practices and procedures with respect to its representation of Simuflite in the C-21 matter. On June 4, 1998, Paul Travers, a broker for Aon, Simuflite's insurance broker, sent a letter to plaintiff asking him to review the audit report and provide his comments. As of June 1999, plaintiff had not yet responded to Mr. Travers. On multiple occasions, defendants offered to assist plaintiff in preparing a response. He refused their assistance.

¶ 8 On May 16, 2000, the Firm's local counsel in the C-21 matter, Cowles & Thompson, sent a letter to plaintiff stating that unless they were paid for their outstanding attorney's fees, or obtained a definite commitment to pay by June 15, 2000, they would pursue legal action against the Firm and Simuflite's insurers. Plaintiff responded that because of his schedule, he was unable to pursue payment from the insurers or to respond to their audit report. Plaintiff was aware that Cowles & Thompson would not be paid until plaintiff had responded to the audit report.

¶ 9 On November 1, 2000, Cowles & Thompson sued both the Firm and Simuflite's insurers. On November 2, 2000, plaintiff received notice of the action. He did not inform defendants, nor,

allegedly, did he inform Colin Campbell, a claims manager for one of Simuflite's insurers, of the suit. Plaintiff responded to the Examen/C-21 audit report on November 2, 2000, which was 29 months after the audit report was sent. On December 18, 2000, Mr. Campbell sent plaintiff a fax expressing his disappointment that plaintiff had not notified him of the lawsuit. Ultimately, Cowles & Thompson settled their action.

¶ 10 Meanwhile, Phoenix Aviation Managers, Inc., the claims manager for Old Republic Insurance Company, retained the Firm to defend the City of Joliet Park District in the case of *Greenwald v. City of Joliet Park District.* Plaintiff was the supervising attorney as to this matter. In December 1999, an associate of the Firm missed an arbitration hearing in the case, which resulted in a default judgment being entered against the City of Joliet Park District. The judgment was vacated, but as a condition of vacating the judgment, the City of Joliet Park District was ordered to pay the opposing side's attorney's fees.

¶ 11 In March 2000, Michael Barrett, head of claims for Phoenix Aviation Managers, Inc., removed the Firm from the *Greenwald* matter because he was dissatisfied with plaintiff's performance. In a March 11, 2000, letter, plaintiff instructed an associate with the Firm to tell the City of Joliet Park District: "due to a dispute we have with their insurers in another unrelated matter–that new counsel will represent them and will be in contact. Say nothing else."

¶ 12 Also, in March 2000, plaintiff reassigned a secretary, Linda Ginensky, who had been working for both Mr. Kaplan, and for an associate of the firm, Telly Andrews. Ms. Ginensky became so upset after the reassignment, she called Mr. Kaplan, who was on trial in North Dakota, and she quit. This was the first time plaintiff had involved himself in secretarial assignments.

¶ 13 The Firm, at that time, was located at 225 West Washington Boulevard. John Dempsey, a real estate broker, approached plaintiff and offered to buy the Firm out of its lease. Plaintiff allegedly threw the real estate broker out of his office. In early 2000, plaintiff told Mr. von Ohlen about the offer and his response. Mr. von Ohlen was surprised by plaintiff's response and suggested he speak to the real estate broker about the buyout. The Firm was ultimately bought out of its lease for $900,000. The Firm left the 225 West Washington Boulevard space in the summer of 2000.

¶ 14 On May 11, 2000, plaintiff accepted a new client, Southern Pine, for the Firm. Southern Pine was seeking to file a bad-faith claim against Old Republic Insurance Company and Phoenix Aviation Managers, Inc. Defendants individually and together told plaintiff the Firm should withdraw from the matter because a bad-faith action against an aviation insurer would jeopardize the Firm's reputation. Defendants also expressed concern that the Firm's reputation would suffer if it became involved in a case against Phoenix Aviation Managers, Inc., so soon after it had withdrawn several matters from the Firm. Plaintiff purportedly agreed to withdraw the Firm from the Southern Pine matter. However, the Firm continued to work on the matter through January 2001. The Firm's name appeared as counsel for Southern Pine on the complaint that was filed and served on Phoenix Aviation Managers, Inc. on October 31, 2000.

¶ 15 In the summer of 2000, the Firm moved to a new space at 120 North La Salle Street. Plaintiff and Mr. von Ohlen argued over who was entitled to a corner office. The argument was extremely combative, with each of them accusing the other of not contributing to the Firm and not supporting each other or the partnership. Ultimately, plaintiff obtained the disputed corner office.

¶ 16 On February 23, 2001, plaintiff placed a notice in the Firm's daily bulletin regarding Telly

Andrews. The daily bulletin was given to all attorneys and employees at the Firm. The notice read as follows:

"**NOTICE!**

Per Fred Begy's instructions, if Telly Andrews comes into anyone's office to talk, kibitz or in general to 'shoot the [expletive],' that person is hereby directed to tell him to *get out* because they have work to do." (Emphasis in the original.)

¶ 17 Mr. Andrews felt humiliated when he saw the notice and wanted to quit, but defendants convinced him to stay.

¶ 18 On July 20, 2001, a meeting was held to address billing and collection issues at the Firm. During the meeting, defendants became aware of the extent and magnitude of plaintiff's problem with unbilled time and outstanding accounts receivable. Fifty-one of plaintiff's matters that had been open for at least 180 days, had never been billed as of the July 20, 2001, meeting. Eighty-five of plaintiff's matters had been billed at least once since having been opened, but had not been billed in more than one year as of the July 20, 2001, meeting. Thirty-two of plaintiff's matters had been billed at least once since having been open but had not been billed, between 180 days and one year, as of the July 20, 2001, meeting. Defendants also learned plaintiff had not provided status reports to the clients on 69 of his matters.

¶ 19 During and after the July 20, 2001, meeting, plaintiff authorized some write-offs of unbilled fees and expenses. Plaintiff's fees and expenses unbilled for more than 120 days had dropped by more than 50% to 18% of the Firm's total unbilled fees and expenses. Over the next couple of months, plaintiff spent some time sending out some outstanding bills. Plaintiff collected $451,000

in outstanding fees and expenses out of the $858,000 on the books.

¶ 20 In August 2001, Mr. von Ohlen sent out bills on two major FedEx aircraft crash cases, one involving the crash of a DC-10, and the other involving a crash of an MD-11. The DC-10 bills were sent for fees and expenses from October 2, 2000, through April 30, 2001. The MD-11 bills were sent for fees and expenses from November 1, 2000, through April 30, 2001.

¶ 21 On August 20, 2001, Cameron Brown, a claims manager for the insurer ACE USA, called and asked to speak with Mr. von Ohlen, the person at the Firm with whom he regularly dealt. Mr. Brown wanted to open a new matter with the Firm. Mr. von Ohlen was on vacation, and the call was transferred to plaintiff. Plaintiff opened a new matter with a client form listing himself as the originating attorney. Plaintiff did not discuss the matter with Mr. von Ohlen. Mr. Brown signed an engagement letter indicating plaintiff would be one of the attorneys working on the matter. Mr. von Ohlen's name was not listed in the letter. On September 20, 2001, Mr. Brown sent plaintiff an e-mail expressing surprise and disappointment that Mr. von Ohlen was not apprised and involved in the matter. By the end of September 2001, Mr. Brown no longer had tasks or assignments for plaintiff. Starting in October 2001, Mr. von Ohlen worked on the matter and received assignments from Mr. Brown.

¶ 22 In the fall of 2001, Steve Lake with Global Aerospace, an insurer of Polar Air Cargo, called Mr. Kaplan and complained plaintiff had settled a matter for Polar Air Cargo and agreed to waive a potential claim for attorney's fees without getting approval from the client first. Mr. Kaplan gave Mr. Lake the option of pursuing the attorney's fees, but Mr. Lake decided not to do so.

¶ 23 Mr. Kaplan assisted plaintiff in sending out the outstanding bills for collections during the

fall of 2001. In reviewing and billing plaintiff's matters, Mr. Kaplan realized there was a more serious problem than what was originally understood at the July 20, 2001, meeting. The state of plaintiff's files showed there was a high level of inactivity. There was also confusion surrounding the status of many of plaintiff's matters. Mr. Kaplan discovered atypical fee arrangements for some of the matters where there were no special instructions indicated on the new matter forms. Mr. Kaplan also discovered plaintiff may have worked on matters without client authorization and without billing the client for several years. Status reports also had not been sent out in years. When Mr. Kaplan asked plaintiff for guidance as to whether a matter needed to be billed and how it should be billed, plaintiff did not offer any assistance or respond to his questions.

¶ 24 Meanwhile, defendants had approached plaintiff and discussed each partner's contributions to the Firm. Defendants proposed to plaintiff that the income allocation percentages be amended. Instead of a 40% allocation to plaintiff, a 30% allocation to Mr. von Ohlen, and a 30% allocation for Mr. Kaplan, all three partners would receive equal income allocations of 33.33%. In October 2001, plaintiff offered a counterproposal to defendants' proposed equalization of income allocation percentages, whereby plaintiff would take declining percentages over the next several years and then would retire, at which time he would receive an enhanced retirement package. Defendants rejected plaintiff's counterproposal. These discussions continued through early November 2001.

¶ 25 On December 27, 2001, a meeting was held where defendants voted to expel plaintiff from the Firm. Plaintiff voted against his own expulsion. On December 28, 2001, Mr. Kaplan sent plaintiff a memorandum regarding his expulsion. The memorandum stated plaintiff had been expelled pursuant to section IX(G) of the 1999 partnership agreement, which permits expulsion "by

a 2/3rds vote of the General Partners *** when the best interests of the Firm require such Partner to withdraw." The memorandum identified the following reasons why plaintiff's partnership status was no longer in the best interests of the law firm:

"1. A pattern of failure by [plaintiff] to timely bill client matters.

2. Business maintenance and generation by [plaintiff] which has not been commensurate with [plaintiff's] share of the partnership income.

3. The number of billable hours worked by [plaintiff] which have not been commensurate with [plaintiff's] share of partnership income.

4. Client relationships, which have suffered as a result of [plaintiff's] conduct.

5. Decisions by [plaintiff] to accept business which is not in the firm's best interests.

6. Other conduct which has caused a lack of confidence in [plaintiff's] judgment to make decisions on behalf of the firm."

¶ 26 Pursuant to the applicable-payout provision for an expelled partner under the 1999 partnership agreement, defendants paid plaintiff $684,771, which was 24% of the Firm's accounts receivable and unbilled time on the books as of December 31, 2001.

¶ 27 Plaintiff subsequently filed his second-amended complaint, alleging he and defendants had agreed, by the summer of 2001, that it was no longer practicable for them to practice in the Firm together, and they had agreed a dissolution of the Firm under the Illinois Uniform Partnership Act, then in effect (805 ILCS 205/32 (West 2000)) (hereinafter referred to as the Act), was appropriate. Plaintiff alleged that pursuant to such a dissolution, he would have been entitled to a 40% share of the Firm's assets, including its receivables and revenue generated by cases in progress. Instead of

so dissolving the Firm, though, defendants decided without prior consultation with plaintiff, to expel him because, according to plaintiff, the Firm's partnership agreement provided that a partner who was so expelled was entitled to "substantially less than he would have received in a dissolution." Plaintiff alleged defendants expelled him "in plain violation of their fiduciary duties and contractual obligations" in order to appropriate for themselves his interest in the Firm and to avoid paying him the amounts to which he would have been entitled upon a dissolution of the Firm. Plaintiff alleged that as a pretext to justify their expulsion of him, and to avoid paying him as required in the event of a dissolution, defendants falsely claimed the "best interests" of the Firm required his expulsion. Plaintiff asked the circuit court to: (1) find and declare defendants' expulsion of him was ineffective and to restore the rights he had in the Firm before his expulsion; (2) order the Firm be treated as dissolved effective as of December 31, 2001, with the three partners being treated as they would have been in a dissolution under the Act; (3) order an accounting and impose a constructive trust in favor of plaintiff with respect to amounts due him; and (4) award plaintiff compensatory and punitive damages.

¶ 28 Following the bench trial, the circuit court entered a memorandum opinion and order on July 14, 2009, in favor of defendants on plaintiff's second-amended complaint. The circuit court stated, therein, it initially found plaintiff to be "credible and precise during his testimony" but, as the trial continued, it found plaintiff "to be increasingly less credible." The circuit court also found Mr. von Ohlen "was not credible in all respects" but Mr. Kaplan *was* "credible in all respects." The court further stated:

"There is no doubt in this Court's mind that after all is said and done, Plaintiff Begy

appeared to have a history of having difficulty managing cases, handling clients, and interacting with personnel at the Firm. After the 1999 Partnership Agreement was signed, the working relationship between Plaintiff Begy and Defendant von Ohlen that had been simmering with underlying tensions developed into an untenable working relationship. There is no such evidence of animosity, however, between Plaintiff Begy and Defendant Kaplan. The events from February 5, 1999, through December 27, 2001, evidenced that Plaintiff Begy continued to have problems maintaining client relationships, handling cases, working with others in the Firm, and promptly billing and collecting. The July 20, 2001, meeting exposed the depth and magnitude of problems with respect to Plaintiff Begy's billings and collections. In the fall of 2001, Plaintiff Begy was apparently unwilling to acknowledge and fix his problems.

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[T]here is no evidence as to any significant contributions that Plaintiff Begy made to the Firm between February 5, 1999, and December 27, 2001.

***

Given the testimony and the evidence regarding the history of the Firm and the events at the Firm, focusing primarily upon the time period after the 1999 Partnership Agreement was executed, the Court does not believe that Defendants Kaplan's and von Ohlen's reasons for expulsion were pretextual. Defendants Kaplan's and von Ohlen's decision to expel Plaintiff Begy was not arbitrary, capricious, or done in bad faith. It is in the best interests of the Firm to remove a partner who has a proven a [sic] history of not contributing, harming client

relations, and not collecting outstanding bills, rather than maintain that partner. This pattern of behavior could not continue for viability of the Firm. Defendants provided sufficient evidence at trial to prove that Defendants Kaplan and von Ohlen were convinced that Plaintiff Begy's expulsion was in the partnership's best interests. Accordingly, the Court finds that Defendants Kaplan and von Ohlen did not breach their fiduciary duties and that Plaintiff Begy's expulsion was proper within Section IX(G), Involuntary Withdrawal, of the 1999 Partnership Agreement.

The Court does find, however, that in making the decision to expel Plaintiff Begy, Defendant von Ohlen acted in a way to maximize his and Defendant Kaplan's economic gain to the detriment of Plaintiff Begy by delaying the DC-10 and MD-11 billings in August of 2001. The August 2001 DC-10 bill covered the seven-month period from October 2, 2000, through April 30, 2001. The August 2001 MD-11 bill covered a six-month [period] from November 1, 2000, through April 30, 2001. Normally, Defendant von Ohlen would bill all the time incurred through the end of the month prior to the date of the bill. In this instance, Defendant von Ohlen excluded the months of May, June, and July from the August 2001 DC-10 bill and August 2001 MD-11 bill.

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Contrary to Plaintiff Begy's assertion, the Court does not believe Defendant von Ohlen's actions in delaying the billing require dissolution under the Illinois Uniform Partnership Act. Defendant von Ohlen's actions in delaying the DC-10 and MD-11 billings does not outweigh the other evidence that Defendants Kaplan and von Ohlen were convinced

> that expelling Plaintiff Begy was in the best interests of the Firm. Accordingly, the Court finds that although Defendant von Ohlen delayed the DC-10 and MD-11 billings, Defendants Kaplan and von Ohlen properly expelled Plaintiff Begy under the 'best interests of the firm' clause, Section IX(G) of the 1999 Partnership Agreement."

¶ 29 The circuit court entered judgment in favor of defendants but granted plaintiff 14 days to file a third-amended complaint "to conform the pleadings to the proof adding a cause of action, if one exists, regarding the delayed DC-10 and MD-11 billings."

¶ 30 Plaintiff subsequently filed his third-amended complaint on July 28, 2009, alleging, in count IV, that Mr. von Ohlen excluded the months of May, June, and July from the August 2001 DC-10 and MD-11 bills, thereby decreasing his departing income by $62,855.74, which was his share of those bills. Plaintiff alleged that as a result, "defendants breached the fiduciary duties they owed to [plaintiff], breached the Partnership Agreement, and engaged in conduct warranting a judicial dissolution of the firm."

¶ 31 On July 23, 2010, the circuit court entered judgment in favor of plaintiff on count IV of his third-amended complaint and awarded him $62,855.74 plus prejudgment interest for a total award of $96,661.67.

¶ 32 Plaintiff appeals the circuit court's July 14, 2009, judgment in favor of defendants on his second-amended complaint.[1] Defendants cross-appeal the circuit court's July 23, 2010, judgment

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[1]Defendants filed a motion to dismiss plaintiff's appeal for lack of jurisdiction on January 5, 2011, which we denied on January 19, 2011. Defendants renew their motion for dismissal but offer no new arguments in support thereof. See *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1014 n.2 (2010) (appellate court can dismiss for lack of jurisdiction despite motion panel's earlier denial of motion to dismiss). Defendants' renewed motion to dismiss for

in favor of plaintiff on count IV of his third-amended complaint.

¶ 33 I. Plaintiff's Appeal

¶ 34 First, we address plaintiff's appeal of the July 14, 2009, judgment in favor of defendants on his second-amended complaint. The judgment was entered following a bench trial. In a bench trial, the circuit court weighs the evidence and makes findings of fact. *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 128 (2008). We will not reverse the circuit court's factual findings unless they are against the manifest weight of the evidence. *Id.* We review the circuit court's conclusions of law *de novo*. *Id.*

¶ 35 At the outset, we note plaintiff does not argue that any of the circuit court's factual findings are against the manifest weight of the evidence; rather, he "challenges the trial court's application of the law to the facts it found."

¶ 36 Plaintiff first contends the circuit court should have invalidated Mr. von Ohlen's vote to expel him from the Firm once the court found Mr. von Ohlen's expulsion vote was improperly motivated by the desire to deprive plaintiff of his share of the DC-10 and MD-11 billings, and to correspondingly increase Mr. von Ohlen's share in violation of his fiduciary duties. Without Mr. von Ohlen's vote, there would not have been the two-thirds vote to expel as required by the 1999 Partnership Agreement. In the absence of a valid two-thirds vote to expel, plaintiff contends the circuit court should have ordered dissolution of the Firm under the Act, pursuant to which he argues he would have been entitled to an additional $2,276,115.

¶ 37 In support of his argument, plaintiff cites *Pielet v. Hiffman*, 407 Ill. App. 3d 788 (2011);

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lack of jurisdiction is denied.

Winston & Strawn v. Nosal, 279 Ill. App. 3d 231 (1996); and *Saballus v. Timke*, 122 Ill. App. 3d 109 (1983). Plaintiff contends *Pielet*, *Winston & Strawn*, and *Saballus* hold that a partner who expels another partner, must comply with his fiduciary duties in making the decision, otherwise the expulsion must be set aside.

¶ 38 We need not delve into an analysis of *Pielet*, *Winston & Strawn*, and *Saballus* for purposes of considering this argument because, contrary to plaintiff's contention, the circuit court made no finding that Mr. von Ohlen's expulsion vote was motivated by his desire to secure a financial benefit for himself in violation of his fiduciary duties. As discussed above, the circuit court stated in its July 14, 2009, memorandum opinion and order, that there was "no doubt" plaintiff "appeared to have a history of having difficulty managing cases, handling clients, and interacting with personnel at the Firm," and "[t]he events from February 5, 1999, through December 27, 2001, evidenced that [plaintiff] continued to have problems maintaining client relationships, handling cases, working with others in the Firm, and promptly billing and collecting." The court further found "[t]he July 20, 2001, meeting exposed the depth and magnitude" of plaintiff's billing problems and there was "no evidence as to any significant contributions that [plaintiff] made to the Firm between February 5, 1999, and December 27, 2001." The court also found defendants' reasons for expulsion were not pretextual or arbitrary, capricious or done in bad faith, and it was in the "best interests of the Firm to remove a partner who has a proven history of not contributing, harming client relations, and not collecting outstanding bills, rather than maintain that partner." The court concluded defendants "did *not* breach their fiduciary duties" and plaintiff's expulsion was proper under section IX(G) of the 1999 partnership agreement. (Emphasis added.)

¶ 39 Plaintiff, though, points to the next sentence in the memorandum opinion and order, which states:

> "The Court does find, however, that in making the decision to expel [plaintiff], Defendant von Ohlen acted in a way to maximize his and Defendant Kaplan's economic gain to the detriment of [plaintiff] by delaying the DC-10 and MD-11 billings in August of 2001."

Plaintiff argues this sentence indicates the circuit court found Mr. von Ohlen's decision to vote for plaintiff's expulsion was predicated on the desire to deprive plaintiff of his share of the DC-10 and MD-11 billings, and to increase Mr. von Ohlen's share of those billings, in violation of Mr. von Ohlen's fiduciary duties. We disagree. Plaintiff's construction of this sentence runs counter to the circuit court's express finding, in the immediately preceding sentence, that defendants did *not* breach their fiduciary duties in voting for plaintiff's expulsion. Since the discussion of Mr. von Ohlen's delayed DC-10 and MD-11 billings comes immediately after the finding that defendants' reasons for expulsion were not pretextual and not in violation of their fiduciary duties, we interpret the court's memorandum opinion and order as meaning the delay in billing for the DC-10 and MD-11 matters was done to take advantage of the expulsion vote, but *not* that it was the motivation underlying the expulsion vote. As the circuit court found the delayed DC-10 and MD-11 billings were not the motivation underlying the expulsion vote but, rather, defendants were convinced plaintiffs' expulsion was in the Firm's best interests, the court did not err in rejecting plaintiff's claim that Mr. von Ohlen violated his fiduciary duties when voting to expel him.

¶ 40 Our construction of the July 14, 2009, memorandum opinion and order is supported by the circuit court's subsequent findings in the July 23, 2010, judgment order in favor of plaintiff on count

IV of his third-amended complaint. Count IV alleged Mr. von Ohlen breached his fiduciary duties by delaying the DC-10 and MD-11 billings for May, June, and July 2001 until after plaintiff's expulsion, thereby decreasing his departing income. In finding in favor of plaintiff on count IV, the circuit court reiterated its finding in the July 14, 2009, order:

> "Defendants Kaplan and von Ohlen did not breach their fiduciary duties in the expulsion [of] Plaintiff Begy" but that Mr. von Ohlen breached his fiduciary duties when he "acted in a way that maximized his and Defendant Kaplan's economic gain to the detriment of Plaintiff Begy by delaying the DC-10 and MD-11 billings in August of 2001."

Thus, the circuit court drew an express distinction between the vote to expel plaintiff from the Firm, and the decision to delay the DC-10 and MD-11 billings. Pertinent to this appeal, the circuit court expressly found Mr. von Ohlen did *not* violate any fiduciary duties in the decision to vote for plaintiff's expulsion. Plaintiff makes no argument that the court's finding was against the manifest weight of the evidence, and, therefore, no basis exists for setting aside Mr. von Ohlen's vote to expel plaintiff from the Firm.

¶ 41 Next, plaintiff contends the circuit court erred when it refused to order dissolution because it concluded "[d]efendant von Ohlen's actions in delaying the DC-10 and MD-11 billings does not outweigh the other evidence that Defendants Kaplan and von Ohlen were convinced that expelling Plaintiff Begy was in the best interests of the Firm." Plaintiff argues the circuit court erred in balancing the equities and weighing Mr. von Ohlen's intentional misconduct in delaying the DC-10 and MD-11 billings against plaintiff's "unintentional" conduct in failing to maintain good client relations and not collecting outstanding bills. Plaintiff contends "[t]he analysis should have ended"

once the court concluded Mr. von Ohlen breached his fiduciary duties toward plaintiff and by instead weighing Mr. von Ohlen's intentional misconduct against plaintiff's unintentional conduct in order to determine who was more at fault for the breakdown in relations between them, the circuit court undermined the fiduciary duty of undivided loyalty that Mr. von Ohlen owed plaintiff.

¶ 42 Plaintiff's argument is without merit. Review of the July 14, 2009, memorandum opinion and order indicates the circuit court was not weighing whether plaintiff's conduct was worse than Mr. von Ohlen's conduct. Rather, the weighing went to whether defendants were being truthful as to the reasons they voted to expel plaintiff, or whether Mr. von Ohlen's decision to delay the DC-10 and MD-11 billings actually drove the expulsion decision. We agree with defendants that "[i]n performing its limited weighing analysis, the trial court acted precisely in accordance with the process that trial courts must engage in whenever an expulsion vote is challenged as being pretextual. Unless the trial court compares the reasons given for the expulsion vote with the claimed bad faith reason(s) advanced by the terminated partner, it [can] not determine what truly motivated the vote."

¶ 43 Next, plaintiff contends the circuit court should have invalidated Mr. von Ohlen's expulsion vote and ordered dissolution of the partnership pursuant to the "disloyal servant doctrine" as articulated in *Graham v. Mimms*, 111 Ill. App. 3d 751 (1982) and *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill. App. 3d 817 (1980). *Graham* stated in pertinent part:

> "As a matter of public policy in the corporate context, courts have been 'inveterate and uncompromising' in applying the constructive trust remedy to fiduciaries who have misappropriated corporate property or usurped corporate opportunities. [Citation.] This 'inveterate and uncompromising' application of the constructive trust remedy 'does not rest

upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation. [Citation.]' " *Graham,* 111 Ill. App. 3d at 762-63.

¶ 44 *ABC Trans National* stated in pertinent part:

" 'It makes no difference whether the result of the agent's conduct is injurious to the principal or not, as the misconduct of the agent affects the contract from considerations of public policy rather than of injury to the principal.' *** As a matter of public policy as expressed in the above cases, however, one who breaches fiduciary duties has no entitlement to compensation during a wilful or deliberate course of conduct adverse to the principal's interests." *ABC Trans National Transport, Inc.*, 90 Ill. App. 3d at 837-38 (quoting *Steinmetz v. Kern*, 375 Ill. 616, 621 (1941)).

¶ 45 Plaintiff here argues Mr. von Ohlen "intentionally misappropriated" plaintiff's share of the Firm's income by delaying the DC-10 and MD-11 billings until after his expulsion, and that just as a fiduciary who intentionally breaches his fiduciary duties forfeits his right to receive compensation (*id*. at 837-38) or profits (*Graham,* 111 Ill. App. 3d at 762-63) flowing from that breach, Mr. von Ohlen forfeited his right to vote on plaintiff's expulsion.

¶ 46 Plaintiff's argument is without merit. As discussed above, there was no finding by the circuit court that Mr. von Ohlen breached his fiduciary duties in voting to expel plaintiff from the Firm. Rather, the circuit court found Mr. von Ohlen's breach of fiduciary duties related to the delay in the

DC-10 and MD-11 billings, which was separate and apart from the expulsion vote, and which resulted in a total loss to plaintiff of $62,855.74. Plaintiff makes no argument that the court's findings of fact are against the manifest weight of the evidence, and, accordingly, we accept them as true for purposes of this appeal. On these facts, the only "profit" or "compensation" which Mr. von Ohlen should forfeit is the $62,855.74, plus interest resulting from the delayed billings, which is exactly what the circuit court ordered. There was no error here.

¶ 47 Next, plaintiff contends the circuit court should have invalidated Mr. von Ohlen's expulsion vote and ordered dissolution of the Firm pursuant to the "unclean hands doctrine." In support, plaintiff cites *Mascenic v. Anderson*, 53 Ill. App. 3d 971 (1977), which held that under the unclean-hands doctrine, a court of equity will not permit a party to benefit from a transaction when that party engaged in misconduct, fraud or bad faith in connection with that same transaction. *Id*. at 972. Plaintiff here argues the circuit court found Mr. von Ohlen breached his fiduciary duties in connection with his vote to expel plaintiff from the Firm, thereby triggering the unclean-hands doctrine and requiring the invalidation of Mr. von Ohlen's expulsion vote. We disagree. As discussed above, the circuit court expressly found Mr. von Ohlen did *not* breach any fiduciary duties when voting to expel plaintiff from the Firm. Thus, the unclean-hands doctrine does not apply to nullify his expulsion vote. Rather, the circuit court found Mr. von Ohlen breached his fiduciary duties in delaying the DC-10 and MD-11 billings, separate and apart from the expulsion vote. The circuit court awarded plaintiff the full amount of the damages from the delayed billings, $62,855.74, plus prejudgment interest, which was the appropriate remedy for Mr. von Ohlen's breach of fiduciary duties. There was no error here.

¶ 48 Next, plaintiff contends the circuit court made inconsistent "general" and "specific" findings necessitating reversal of its judgment in favor of defendants. According to plaintiff, the court's general finding consists of the following two sentences in the July 14, 2009, memorandum opinion and order:

> "Defendants Kaplan's and von Ohlen's decision to expel Plaintiff Begy was not arbitrary, capricious, or done in bad faith. It is in the best interests of the Firm to remove a partner who has a proven *** history of not contributing, harming client relations, and not collecting outstanding bills, rather than maintain that partner."

The "specific" finding is the court's statement that "in making the decision to expel Plaintiff Begy," Mr. von Ohlen effectively misappropriated plaintiff's share of Firm profits by delaying the DC-10 and MD-11 billings until after plaintiff's expulsion.

¶ 49 Plaintiff argues that the two findings are inconsistent with each other, and the more specific finding should be controlling here, pursuant to which Mr. von Ohlen's expulsion vote should be invalidated, and the Firm should be dissolved in accordance with the Act.

¶ 50 Plaintiff's contention is without merit, as there was no inconsistency in the circuit court's findings. The circuit court found that with regard to the expulsion vote, defendants acted in good faith and in the best interests of the Firm in voting to expel plaintiff. With regard to Mr. von Ohlen's decision to delay the DC-10 and MD-11 billings, which was an event separate and apart from the expulsion vote, the court found Mr. von Ohlen tried to take advantage of that good-faith expulsion by improperly seeking to obtain a financial advantage through the delayed billings. As the findings concerned two separate events, there was no inconsistency in finding Mr. von Ohlen acted in good

faith with regard to the expulsion vote, but in bad faith with regard to the delayed billings. Also, the circuit court's ultimate rulings were consistent with these two separate findings. Consistent with its finding that defendants acted in good faith in voting to expel plaintiff, the circuit court upheld the expulsion. Consistent with its finding that Mr. von Ohlen acted in bad faith in connection with the delayed DC-10 and MD-11 billings, the circuit court awarded plaintiff the full amount of his damages resulting therefrom.

¶ 51 Next, plaintiff contends the circuit court erred when it found that section IX(G) of the 1999 partnership agreement, which permits expulsion when two-thirds of the general partners vote that it is in the best interests of the firm, does not require the expelled partner's offending conduct be of similar severity to the other six grounds for expulsion set forth in section IX. As discussed above, the other six grounds for expulsion listed in section IX (A) through (F) included: disbarment; conviction of a felony or of any criminal offense involving fraud; filing of a voluntary petition in bankruptcy; knowingly permitting a final judgment in excess of $10,000, or final judgments aggregating in excess of $30,000 to remain undischarged for more than 30 days; violation of the 1999 partnership agreement which is not corrected within 30 days; and a two-thirds vote to expel a partner whose mental or physical disability renders him unable to practice law at the level of competence expected of a partner of the Firm.

¶ 52 Plaintiff argues that the six grounds for expulsion set forth in sections IX (A) through (F), describe specific, serious conduct, and pursuant to the doctrine of *ejusdem generis*, the circuit court should have interpreted section IX(G)'s non-specific, "best interests" ground for expulsion to apply only in similarly serious circumstances. Plaintiff contends none of his actions rise to the level of

severity or seriousness set forth in section IX (A) through (F) of the 1999 partnership agreement, and, therefore, the circuit court erred in upholding his expulsion under section IX(G).

¶ 53 *Ejusdem generis* is a common-law rule employed in the construction of statutes, wills, contracts and other written instruments, and which provides that when general words or phrases follow a set of enumerated things, the general words are limited in meaning to the same kind or class as those previously enumerated. *Hugh v. Amalgamated Trust & Savings Bank*, 235 Ill. App. 3d 268, 275 (1992). Here, the six separate grounds for expulsion listed in sections (A) through (F) are not of a like kind or class, but, instead, provide a wide range of dissimilar conduct. For example, the felonious conduct in section (B) cannot be equated to filing for bankruptcy in section (C) or to becoming so mentally ill as to be unable to competently practice law in section (F). As the grounds listed in sections (A) through (F) are not of a like kind or class, the doctrine of *ejusdem generis* does not apply.

¶ 54 Next, plaintiff argues that notwithstanding section IX(G) of the 1999 partnership agreement that authorizes expulsion of a partner when two-thirds of the general partners vote that expulsion is in the best interests of the Firm, the circuit court was "required" to apply the dissolution provision of section 32 of the Act. Section 32 of the Act provides in pertinent part:

> "On application by or for a partner the court shall order a dissolution whenever:
>
> ***
>
> (c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,
>
> (d) A partner willfully *** commits a breach of the partnership or agreement, or

> otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,
>
> ***
>
> (f) Other circumstances render a dissolution equitable." 805 ILCS 205/32 (West 2000).

¶ 55 Plaintiff argues four events require dissolution under section 32 of the Act: (1) the parties' deadlock over how to amend the 1999 Partnership Agreement to alter the income percentage allocations; (2) Mr. von Ohlen's delay in billing on the DC-10 and MD-11 matters; (3) the untenable working relationship between plaintiff and Mr. von Ohlen; and (4) defendants' alleged wrongful expulsion of plaintiff.

¶ 56 Contrary to plaintiff's argument, the circuit court committed no error in upholding plaintiff's expulsion under the 1999 partnership agreement instead of ordering dissolution under section 32 of the Act. "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." *Pielet*, 407 Ill. App. 3d at 795. The Act itself acknowledges the rights and duties of partners set forth therein are "subject to any agreement between them." 805 ILCS 205/18 (West 2000).

¶ 57 Section IX(G) of the 1999 partnership agreement unambiguously provides for expulsion of a partner when two-thirds of the general partners vote that such expulsion is in the best interests of the Firm. The circuit court found defendants complied with section IX(G) when they voted to expel plaintiff, and plaintiff points to no facts indicating the circuit court's finding was against the manifest weight of the evidence. Instead, plaintiff cites case law holding a partnership agreement may not abrogate a partner's fiduciary duties to his other partners, and a wrongful exclusion or "freeze out"

of one partner from participation in the business will be grounds for judicial dissolution of the partnership under the Act. See *e.g., Winston & Strawn*, 279 Ill. App. 3d at 231; *Saballus*, 122 Ill. App. 3d at 109. Here, there was no evidence defendants wrongfully excluded or froze out plaintiff from participation in the business prior to his expulsion. The only wrongful conduct as to defendants that the circuit court found, related to Mr. von Ohlen's delay in billing on the DC-10 and MD-11 matters. As discussed above, the delayed billings were unrelated to the expulsion vote and was remedied when the circuit court awarded plaintiff his full damages plus the maximum interest arising therefrom. On these facts, the circuit court committed no error in upholding plaintiff's expulsion under section IX(G) of the 1999 partnership agreement, and in refusing to dissolve the Firm.

¶ 58 Plaintiff cites various cases upholding dissolution orders, but none of those cases involved a partner who was found to have been properly expelled from the partnership under the terms of the applicable partnership agreement. See *Tembrina v. Simos*, 208 Ill. App. 3d 652 (1991); *Susman v. Cypress Venture*, 114 Ill. App. 3d 668 (1982); *Mandell v. Centrum Frontier Corp*., 86 Ill. App. 3d 437 (1980); and *Tilberry v. Body*, 1987 WL 8128 (Ohio App. 1987). Accordingly, the cited cases are inapposite.

¶ 59 For all the foregoing reasons, we affirm the judgment in favor of defendants on plaintiff's second-amended complaint.

¶ 60 II. Defendants' Cross-Appeal

¶ 61 In its July 14, 2009, memorandum opinion and order, the circuit court found that in August 2001, Mr. von Ohlen delayed billing FedEx for the months of May, June, and July on the DC-10 and MD-11 matters. The August 2001 DC-10 bill covered the seven-month period from October 2,

2000, through April 30, 2001. The August 2001 MD-11 bill covered the six-month period from November 1, 2000, through April 30, 2001. The circuit court found Mr. von Ohlen would "normally" bill all the time incurred through the end of the month prior to the date of the bill, but he had purposely excluded the months of May, June and July from the August DC-10 and MD-11 bills in order to reduce plaintiff's departing income upon his expulsion from the Firm. The circuit court granted plaintiff leave to file a third-amended complaint to conform the pleadings to the proof by adding a cause of action regarding the delayed DC-10 and MD-11 billings to FedEx.

¶ 62 Plaintiff subsequently filed his third-amended complaint on July 28, 2009, alleging in count IV that Mr. von Ohlen breached his fiduciary duties to plaintiff by excluding the months of May, June, and July from the August 2001 DC-10 and MD-11 billings, thereby decreasing plaintiff's departing income by $62,855.74, which was his share of those bills. On July 23, 2010, the circuit court entered a judgment in favor of plaintiff on count IV of his third-amended complaint and awarded him $62,855.74, plus prejudgment interest, for a total award of $96,661.67.

¶ 63 Defendants cross-appeal the judgment in favor of plaintiff on count IV of his third- amended complaint. The parties agree that the standard of review is whether the circuit court's finding of a breach of fiduciary duty is against the manifest weight of the evidence. See *1515 North Wells, L.P. v. 1513 North Wells, L.L.C.*, 392 Ill. App. 3d 863, 874 (2009). A finding is against the manifest weight of the evidence "if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best v. Best*, 223 Ill. 2d 342, 350 (2006).

¶ 64 Defendants argue that one of the two foundations for the circuit court's judgment was its

finding that "Normally, Defendant von Ohlen would bill all the time incurred through the end of the month prior to the date of the bill." Defendants contend this finding was against the manifest weight of the evidence. In support, defendants cite four DC-10 bills from April 1999 through December 2000, not one of which included time for the prior month. Defendants also cite the last DC-10 bill (mailed June 6, 1997) for which plaintiff was responsible before FedEx took him off all of its cases. That bill, too, did not include time for the prior month. Defendants note, "the first time [Mr.] von Ohlen billed the DC-10 case *after* [plaintiff's] expulsion was on February 20, 2002. Although no one argues that [Mr.] von Ohlen had any reason to delay billing *after* expulsion, that bill was consistent with the challenged bill as it, too, did not include the preceding three months." (Emphasis in the original.) Defendants also cite the 1999 through 2001 billing history for the MD-11 case. Starting in 1999, two out of the four MD-11 bills sent out by Mr. von Ohlen before his August 2001 bill, did not bill the prior month.

¶ 65 Defendants further argue plaintiff bore the burden of proving Mr. von Ohlen improperly delayed the DC-10 and MD-11 billings for May, June and July 2001. Defendants argue plaintiff "produced *no* evidence that the substantial data needed for the bills – including the attorney time records for the attorneys working on these matters, local counsel data, third-party vendor invoices, expert/consulting invoices and other necessary information – was even available to [Mr.] von Ohlen at the time." (Emphasis in the original.)

¶ 66 Defendants also argue that the other foundation for the circuit court's judgment, was its finding that Mr. von Ohlen's purpose in delaying the DC-10 and MD-11 billings for May, June, and July 2001, was to economically gain from the good-faith decision to expel plaintiff. Defendants

contend this finding, too, was against the manifest weight of the evidence. In support, defendants note the finding assumes Mr. von Ohlen knew by August 2001, that plaintiff was going to be expelled from the Firm, when "all evidence was to the contrary." Defendants cite the evidence that even after sending the disputed August 2001 billings that excluded the months of May, June, and July, defendants were talking to plaintiff about agreeing to reduce his profit share from 40% to 33.3% ,and about committing to changing the conduct that was harming the Firm. Defendants argue, "[c]learly, no decision about expulsion had yet been made" at the time the August 2001 billings were sent.

¶ 67 Defendants further argue, "any idea that an expulsion decision had been reached by early August is also defeated by the fact that the expulsion did not actually occur until December 27 – and, then, Kaplan and von Ohlen voluntarily made it effective four days *later*." (Emphasis in the original.)

¶ 68 Plaintiff responds that to determine whether Mr. von Ohlen had improperly changed his normal billing practices in August 2001 in order to harm plaintiff, one must look to what Mr. von Ohlen had done in August the year before under similar circumstances. In 2000, Mr. von Ohlen billed the MD-11 matter in August, and included in that bill all unbilled time through July 31, 2000. Yet in 2001, when he billed the matters in August, he only billed time through April 30, 2001, excluding more than $400,000 of time from May, June and July.

¶ 69 Plaintiff further argues Mr. von Ohlen's explanation at trial for why he delayed the May, June, and July billings for the DC-10 and MD-11 matters, was not credible. Mr. von Ohlen testified that in August 2001, he wanted to get the DC-10 and MD-11 billings out as quickly as possible in order

to generate income for the Firm, and he decided to only bill through April 30, 2001, because that was the only time period for which he had all the necessary information to calculate the amounts owed. Mr. von Ohlen testified it was a "difficult process" to get all the information necessary to calculate the amounts owed for the months of May, June, and July 2001, and, therefore, he did not believe he had the option of including those months in the August 2001 bills. Plaintiff argues Mr. von Ohlen's testimony, that he did not have the option to include those three prior months in the August 2001 bills, was "plainly false." In support, plaintiff notes, of 13 DC-10 and MD-11 bills sent before the August 2001 bills, only one excluded three months of unbilled fees. As for the MD-11 matter, none of the bills Mr. von Ohlen sent before August 2001 had excluded more than one month. Yet, in August 2001, he excluded three months of unbilled fees. Plaintiff argues Mr. von Ohlen "clearly had the option to include the May, June, and July fees in the August 2001 bills, but chose not to. The trial court's findings are well supported by the evidence."

¶ 70 The circuit court here heard all the evidence, observed Mr. von Ohlen, listened to his explanations for the delayed billings, and found "Defendant von Ohlen was not credible in all respects. Often times, Defendant von Ohlen did not answer questions directly. He would look away from the Court when answering questions. He was arrogant and dismissive of certain questions asked of him." The court obviously disbelieved Mr. von Ohlen's explanations for failing to include the May, June, and July fees in the August 2001 bills, and gave more credence to the evidence cited by plaintiff indicating Mr. von Ohlen had changed his normal billing practice in order to reduce plaintiff's share of those fees. " 'We will not substitute our judgment for the [circuit court's] regarding the credibility' " of the determinations. *Thompson v. Buncik*, 2011 Ill. App. (2d) 100589

¶ 26 (quoting *Best*, 358 Ill. App. 3d at 1055). The circuit court's judgment in favor of plaintiff was not against the manifest weight of the evidence, as the opposite conclusion was not clearly evident, nor was the judgment unreasonable, arbitrary, or not based on the evidence presented. *Best*, 223 Ill. 2d at 350. Accordingly, on defendants' cross-appeal, we affirm the circuit court's judgment in favor of plaintiff on count IV of his third-amended complaint.

¶ 71 For the foregoing reasons, we affirm on the appeal and the cross-appeal and deny defendants' renewed motion for dismissal of plaintiff's appeal for lack of jurisdiction. As a result of our disposition of this cause, we need not address defendants' waiver and *laches* arguments.

¶ 72 Affirmed.