2015 IL App (1st) 133694-U

No. 1-13-3694

August 21, 2015

FIFTH DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

GERARD COLAGROSSI, Plaintiff-Appellant, v. UBS SECURITIES, LLC, and ABN AMRO, INC., Defendants-Appellees. and JOHN MURPHY and DAVID WULFFLEFF, Defendants.	)	Appeal from the Circuit Court of Cook County. No. 08 L 9672 The Honorable Sanjay Tailor and The Honorable Charles R. Winkler, Judges, presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

O R D E R

Held: The trial court's judgment is affirmed, as it did not err by (1) granting summary judgment in favor of one of the defendants on plaintiff's fraudulent inducement claim and (2) dismissing plaintiff's claims of fraudulent inducement against one of

the defendants, unjust enrichment against both defendants, and misappropriation of trade secrets against one of the defendants.

¶ 1 Plaintiff, Gerard Colagrossi, and defendants, ABN Amro, Inc. (AAI) and UBS Securities, LLC (UBS) are members of the "futures industry," an industry composed of futures commission merchants (FCMs) and brokers who accept orders for execution on futures exchanges. Defendants are plaintiff's former employers. In July 2009, plaintiff brought suit against them, setting forth claims of fraudulent inducement against both AAI and UBS as well as misappropriation of trade secrets against UBS.[1] In February 2010, the trial court dismissed plaintiff's misappropriation of trade secrets claim with prejudice pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). It also dismissed his fraudulent inducement claims without prejudice. Plaintiff then filed a second amended complaint, again alleging fraudulent inducement against both UBS and AAI and adding alternative claims of unjust enrichment against both defendants. In May 2010, the court dismissed all of plaintiff's claims against UBS as well as his unjust enrichment claim against AAI pursuant to section 2-615 of the Code. It allowed plaintiff to conduct discovery on his fraudulent inducement claim against AAI, but only on the allegation "related to the intent of [AAI] to sell the futures division." In September 2013, following discovery, the court granted summary judgment in favor of AAI on plaintiff's fraudulent inducement claim.

¶ 2 Plaintiff appeals, arguing the trial court erred by (1) granting summary judgment to AAI on his fraudulent inducement claim against AAI, (2) dismissing his fraudulent inducement claim against UBS, (3) dismissing his unjust enrichment claims against AAI and UBS, and (4)

[1] Plaintiff also brought claims of defamation *per se* and invasion of privacy—false light against two additional defendants, John Murphy and David Wulfleff. In addition, he alleged defamation *per se*, invasion of privacy—false light, and tortious interference with prospective economic advantage against UBS. Those claims are not at issue in this appeal.

dismissing his trade secret misappropriation claim against UBS. For the reasons that follow, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Facts Relevant to Plaintiff's Fraudulent Inducement Claim Against AAI

¶ 5 In or about 1990, plaintiff was the manager of a group of employees within Man Financial (Man) that operated a 24-Hour futures trading Desk (Desk). Plaintiff had spent over 20 years developing the group of employees to work on the Desk. Employees of the Desk were responsible for generating, clearing, and executing business for Desk clients. The customers plaintiff serviced at Man had a contractual relationship with Man, not plaintiff.

¶ 6 Plaintiff could have structured the Desk as a totally separate business. Instead, he operated the Desk as a profit center within the firm. FCM's generally had multiple profit centers. The Desk's members were Man employees who received paychecks and benefits from Man. However, plaintiff had the ability to hire and fire Desk employees, and they reported to him and followed his instructions. In addition, plaintiff determined how to divide the bonus pool the Desk received.

¶ 7 In early 2005, plaintiff and John Murphy, the then head of North American Futures at AAI, began discussing the possibility of plaintiff moving from Man to AAI. AAI intended to cut its existing 24-hour desk, which was not profitable, and Murphy was responsible for bringing the Desk to AAI. Plaintiff told Murphy he would not move his desk to AAI if its futures business was for sale, given that moving his business would require a great deal of effort and could result in the loss of valuable clients. During their second meeting, plaintiff asked Murphy whether AAI was for sale, and Murphy said no. Plaintiff testified that in June 2005, while he was considering

AAI's offer, Man's chief executive officer (CEO), Kevin Davis,[2] told him that AAI had offered to sell its futures division. When Davis was questioned in his deposition about whether he told plaintiff AAI was for sale, Davis stated he could not recall making such a statement.

¶ 8 During a final meeting with Murphy, which took place prior to July 29, 2005, plaintiff again asked if AAI was for sale. Murphy again told him, "No." In fact, Murphy believed AAI's futures group was expanding, as it was in negotiations to purchase the futures business of another firm, Prudential. Murphy had not asked his superiors if AAI was for sale, which plaintiff expected he would do if he did not know the answer. Plaintiff believed Murphy knew whether AAI was for sale because he was an executive in the firm and had a "very tight" relationship with Alan Zavarro, chief executive officer (CEO) of AAI.[3] Murphy also told plaintiff he had his "finger and pulse on everything that was going in" the company. Plaintiff acknowledged that he had no information, other than the fact that Murphy held an executive position, to support his allegation that during their discussions, Murphy knew AAI was for sale. E-mails exchanged between AAI employees at the end of July 2005 expressed that AAI was eager to hire the "team" and did not want to "lose" them.

¶ 9 Plaintiff decided in late July 2005 to leave Man and transfer to AAI. No written contract exists between plaintiff and AAI relating to plaintiff bringing his group, clients, and proprietary processes, procedures, and software to AAI. After making his decision, plaintiff instructed members of the Desk to leave Man and set up the Desk's operations at AAI. Plaintiff wanted the Desk to be fully operational at AAI before asking clients to transfer to AAI. The Desk members

[2] We have gleaned Davis's title from plaintiff's second amended complaint. The parties agree that Davis was the CEO of Man.

[3] The parties do not dispute that Zavarro was the CEO of AAI, although plaintiff has not directed us to a record citation providing Zavarro's title.

worked with AAI's information technology (IT) staff to install and recreate plaintiff's desk's processes, procedures, and software.

¶ 10 AAI presented plaintiff with an Employment Agreement (AAI Agreement) dated July 29, 2005. The AAI Agreement provided that plaintiff would receive a draw of $150,000 during his first year and that his group would receive a payout of 70% of net income for the group pool. The AAI Agreement specified that it contained "the entire understanding of the parties regarding the subject matter hereof" and that plaintiff acknowledged he had "not relied on any oral or written representations or understandings not explicitly contained herein in executing this agreement." The AAI Agreement further provided that it "suprecede[d] any and all oral or written understandings regarding [plaintiff's] employments with" AAI or any of its affiliates. Plaintiff believed he had a lawyer check the AAI Agreement before executing it, although he was not certain whether the lawyer checked his AAI Agreement or his later employment agreement with UBS. Each member of plaintiff's group (Group) that transferred to AAI signed a separate agreement with AAI, and each member could have decided to stay at Man.

¶ 11 Plaintiff signed the AAI Agreement on October 18, 2005. On either that day or the day before, he resigned at Man by handing his employer "a piece of paper that had everyone's signature on it at the [D]esk and informed him that we were resigning." Man offered plaintiff and the Desk employees certain incentives to remain at Man. For example, plaintiff was offered over $1 million.

¶ 12 At AAI, plaintiff became the Director of Futures Trading. According to plaintiff, his July 2005 decision to move his Desk to AAI was separate and apart from his later decision to enter into the Agreement with AAI. After he started at AAI, plaintiff personally contacted 15 to 20 of

the "[h]undreds" of clients that he serviced at Man about following him to AAI. About 12 of the clients did so. They executed new documents with AAI.

¶ 13 On December 5, 2005, Murphy received an email providing "Insider Notice" regarding "Project Pinetree." He testified that "Project Pinetree" was the code name for the valuation process of AAI and that such valuation was being done to facilitate a possible sale of AAI's futures divisions. Prior to that date, Murphy had no knowledge that AAI's futures division was for sale. In or around late April 2006, plaintiff learned from a public media source that AAI was selling its futures division to UBS. The Bloomberg news report, dated April 27, 2006, stated that ABN "may" sell its global futures business and that leading candidates included UBS.[4] Prior to the Bloomberg article, plaintiff had heard from an AAI employee and one of his desk employees that AAI was for sale. When questioned as to whether he asked Murphy to explain his statement that AII was not for sale, plaintiff responded, "I don't recall it, no." Plaintiff explained that at that point, Murphy could not have stopped the sale.

¶ 14 On or about May 19, 2006, ABN AMRO Global Futures issued its audited Consolidated Statement of Financial Condition, which disclosed that subsequent to December 31, 2005, ABN AMRO Bank N.V. began exploring the possibility of selling ABN AMRO Global Futures. According to the statement, no sale had been completed as of May 19, 2006. The record contains a certification of Hayward H. Smith, previously the secretary of AAI, who certified that the Consolidated Statement of Financial Condition was made in and kept in the regular course of business, in or about May 2006.

[4] In its motion for summary judgment, defendants asked the trial court to take judicial notice of the article under Illinois Rule of Evidence 201 (eff. Jan. 1, 2011). We have likewise taken judicial notice of the article, found at http://www.bloomberg.com/apps/news?pid=21070001&sid=atYT_XbzxQPU (last accessed August 3, 2015).

¶ 15 On May 25, 2006, UBS purchased AAI. After the sale was announced, plaintiff and his Desk continued conducting business like they "usually" did. Plaintiff was unable to immediately terminate his Desk's relationship with AAI and move to another company, as the process of transferring his business would be lengthy and disruptive to his Desk and clients' needs. Furthermore, moving companies again so soon after transitioning to AAI would likely have injured plaintiff's relationship with some of his clients. Plaintiff continued working at AAI through September 29, 2006. On September 21, 2006, he signed an employment agreement with UBS (UBS Agreement), dated September 7, 2006. Pursuant to the UBS Agreement, plaintiff would receive a retention bonus of $150,000. The UBS Agreement also extended the 70/30% commission split that plaintiff was receiving at AAI. Plaintiff continued to work at UBS until his termination in September 2007.

¶ 16 B. Facts Alleged In Plaintiff's Second Amended Complaint Relevant To His Fraudulent Inducement Claim Against UBS And Unjust Enrichment Claims Against UBS And AAI

¶ 17 Plaintiff alleged that after the AAI-UBS transaction became effective, he had to move from AAI to a new FCM. Murphy, who became Managing Director of UBS's Futures Division, and Murphy's superior, Clark Hutchinson, promised plaintiff that plaintiff and the Group would have substantially the same economic benefits and control at UBS that plaintiff enjoyed at AAI. In addition, they promised plaintiff that UBS would pay the amount owed by AAI that it had not paid as of the date of the sale, *i.e.*, the 50 % share of the revenue generated from exchange for physicals (EFP) payments. Murphy and Hutchinson also promised plaintiff that he would retain the same independent control over his Group at UBS as he had at Man and AAI. Plaintiff alleged that Murphy and Hutchinson knew he would move his Group to UBS only if they made the aforementioned promises, and those promises were part of a scheme to bring his Group, client

business, and proprietary processes to UBS and ultimately allow UBS to take over his Group and business.

¶ 18 Plaintiff alleged that he first decided in late summer 2006 to move his Group to UBS. No written contract was created relating to plaintiff bringing his Group, clients and proprietary processes, procedures, and software from AAI to UBS. In September 2006, he negotiated the UBS Agreement, which he alleged was separate and apart from his decision to move his Group and business to UBS. He accepted the September 7, 2006, UBS Agreement on September 21, 2006. The UBS Agreement provided that plaintiff's title would be Director, he would be an "at will" employee, and his base salary would be $150,000 a year. The UBS Agreement stated that it contained "the entire understanding and agreement between the parties concerning the subject matter hereof (including any compensation arrangements), and supersede[d] all prior agreements, understandings, discussions, negotiations, and undertakings, whether written or oral, between the parties with respect thereof." It also stated it superseded "all other agreements, arrangements or understandings" plaintiff may have had with AAI regarding his employment, and that any prior agreements would terminate and be of no force or effect immediately prior to, but subject to the occurrence of, closing. Furthermore, the UBS Agreement stated that plaintiff represented and warranted that "no representations were made to [plaintiff] concerning this offer or the terms or conditions of [his] anticipated employment except as expressly set out in this Agreement."

¶ 19 Plaintiff alleged that based on Murphy and Hutchinson's promises, he reasonably expected to have the same business relationship at UBS with his Group and clients that he had at Man and AAI. He expected that if and when he left UBS, his Group and clients would follow him as they did when he left AAI. He specifically renegotiated his UBS Agreement to reflect he would not solicit or interfere with UBS clients for only a period of one month after his

termination at UBS, and only if he was terminated for cause. Given that only plaintiff's Group members could read and use his proprietary processes, procedures, and software, and given that only his Group members knew with whom to communicate regarding client needs, plaintiff reasonably believed his clients would follow the Group in its moves so as not to disrupt their business.

¶ 20 Plaintiff alleged that shortly after UBS acquired AAI's futures business, UBS started (1) blocking plaintiff's participation in meetings, (2) conducting sales meetings without inviting plaintiff, (3) acting in an uncooperative manner with regard to how plaintiff ran his Group, (4) blocking completion of new business relationships, and (5) moving Group members to other groups. According to plaintiff, all of UBS's actions violated UBS's promises that plaintiff would continue to retain independent control over his Group. UBS also moved its employees into plaintiff's group and engaged in efforts to create dissension within plaintiff's Group by making various statements to the Group, such as that plaintiff was preventing Group members from receiving promotions. UBS knew that Colagrossi's Group members were the only individuals who could read and understand his processes and the unique aspects of his clients' needs; thus, by moving Group members, UBS took control of those employees away from plaintiff. Murphy also "spent weeks trying to renegotiate the terms" of plaintiff's employment, including his salary.

¶ 21 Plaintiff alleged that in or about September 2007, UBS terminated plaintiff from his position. UBS prevented him from taking anything relating to his clients, his Group, or his proprietary processes, procedures, and software. Plaintiff did not learn of UBS's fraud until after he was fired, when he discovered that UBS had solicited several members of his Group to stay, that members of his Group and UBS continued to use his trade secrets, and that UBS never intended to pay or honor its promises to him. He further learned of the fraud when UBS refused

to pay him the money it promised and owed him. According to plaintiff, UBS's intent from the beginning was to steal plaintiff's business and clients.

¶ 22 C. Facts Alleged In Plaintiff's First Amended Complaint Relevant to His Misappropriation of Trade Secrets Claim

¶ 23 Plaintiff alleged that while he was an employee at Man and with the consent and encouragement of Man, he developed the Group, which was responsible for generating clearing and execution for Man and managing its Desk for their joint benefit. The employees reported to plaintiff, followed his instructions, and serviced his clients (who were also Man clients, for clearing and other purposes). However, the Group members were Man employees. Plaintiff' could have structured his Group as a totally separate business; however, it was not customary to do so in the futures industry. Instead, his Group functioned semi-independently inside Man (and later, AAI and UBS). While at Man, Colagrossi caused the Group to develop new methods to manage client business, such as developing an "automated process" to manage an increased number of orders. The automated process automatically converted each client's order into a consistent language so that orders could be executed and allowed the Group to accurately and efficiently handle a significant volume of client orders. Plaintiff also caused the Group to develop other processes to manage client needs, such as an order tracker and an allocator, which were part of the Group's automated process.

¶ 24 Plaintiff alleged that only members of his Group were knowledgeable about his proprietary processes, procedures, and software. No other Man, AAI, or UBS employee knew how to use them. Group members were not permitted to discuss the processes, procedures and software with non-members of the Group. However, on occasion, some individuals who were not

members of the Group were informed of some of the processes. For example, when a computer problem arose, the IT department would be informed of the processes to correct the problem. Plaintiff further alleged that only he and his Group members had a direct relationship with the Group's clients, even though (1) each client was technically a client of Man, AAI, or UBS, (2) the back office of Man, AAI, or UBS would know some client information, and (3) a client might call the back office of Man, AAI, or UBS directly with problems relating to clearing a trade.

¶ 25 Plaintiff alleged that as part of his transition to AAI, he caused his Group to install its software and macros at AAI. After plaintiff and his Group left Man, Man was unable to use the processes, procedures, software and macros to process orders given the "uniqueness" of those processes, procedures, and software. At AAI, plaintiff "caused the Group to continue developing and enhancing its processes, procedures, programs and methods" to run a more efficient business. As at Man, the only people able to use the Group's processes, procedures, and software were Group members. No one else at AAI had access to these items, and plaintiff's Group took reasonable efforts to keep the processes confidential.

Plaintiff further alleged that he executed the UBS Agreement, effective September 30, 2006. In doing so, plaintiff renegotiated a paragraph of his UBS Agreement to reflect that he would not solicit or interfere with any UBS clients for a period of only one month after his termination, instead of six months. The UBS Agreement prohibited plaintiff from using for his own purposes or disclosing any confidential information, which included, among other things, "processes, computer programs," as well as customer names and requirements. When UBS terminated plaintiff's employment in September 2007, it prevented him from taking anything related to his clients, his Group, or his proprietary processes, procedures, and software.

¶ 26 D. Procedural History

¶ 27 1. *First Amended Complaint*

¶ 28 In July 2009, plaintiff filed an eight-count amended complaint. Relevant to this appeal, plaintiff set forth claims of fraud in the inducement against AAI and UBS. He also claimed that UBS violated the Illinois Trade Secrets Act (Act) by misappropriating his client list, computer processes, and computer software programs. In September 2009, defendants filed a motion to dismiss plaintiff's amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2008)). In February 2010, the trial court granted defendants' motion in part, dismissing with prejudice the counts relating to the misappropriation of trade secrets. The court found that plaintiff failed to establish a fundamental contractual right to any trade secret pursuant to the contract he signed. The court further found that if plaintiff had trade secrets when he went to work for UBS, those secrets no longer existed based on the parties' relationship. The court also dismissed plaintiff's fraudulent inducement claims but did so without prejudice.

¶ 29 2. *Second Amended Complaint*

¶ 30 In March 2010, plaintiff filed a second amended complaint against defendants. As to his fraudulent inducement claim against AAI, plaintiff alleged that Murphy told him AAI's futures business was not for sale, even though Murphy knew AAI was planning to sell its futures businesses. Plaintiff also alleged that Murphy promised him that he would have the same control over his Group as he had at Man and that his group would receive a 50% split of all EFP revenue that they introduced to AAI. Plaintiff also set forth an alternative claim of unjust enrichment against AAI, alleging that AAI reaped millions of dollars from the sale of its futures division that

it would not have received but for inducing plaintiff to bring his group to AAI by misrepresenting that AAI did not intend to sell its futures division.

¶ 31 Plaintiff's complaint also set forth claims of fraudulent inducement and unjust enrichment against UBS. As to the fraudulent inducement count, plaintiff alleged that after UBS and AAI entered into their purchase agreement, Murphy, acting on behalf of both UBS and AAI in a scheme to further defraud plaintiff, fraudulently induced plaintiff to move his Group by knowingly and intentionally misrepresenting the benefits plaintiff would receive. Plaintiff alleged that UBS knew it would not honor its promises at the time they were made and that UBS made its promises as part of a scheme to ultimately harm plaintiff's reputation and break up his Group by spreading lies to his Group and clients, then terminating him without cause and retaining his Group, clients, and trade secrets.

¶ 32 In his claim of unjust enrichment against UBS, plaintiff alleged that UBS reaped millions of dollars from the theft of his business that it otherwise would not have received but for inducing plaintiff to bring his group from AAI to UBS and then terminating plaintiff, and by inducing, through the use of false and defamatory statements regarding plaintiff's abilities and large sums of salary and benefits, plaintiff's Group employees to remain at UBS while continuing to provide services to plaintiff's clients by use of his trade secrets.

¶ 33 In May 2010, defendants filed a motion to dismiss plaintiff's claims pursuant to section 2-615 of the Code. In September 2010, the trial court entered an order striking plaintiff's fraudulent inducement claim against AAI in part. Specifically, the court struck plaintiff's allegations relating to AAI's purported misrepresentations regarding plaintiff's control of the Desk and his compensation at AAI. However, the court denied defendants' motion to dismiss as to plaintiff's allegations relating to AAI's intent to sell the futures division. In addition, the court struck

plaintiff's fraudulent inducement claim against UBS without leave to replead, reasoning that UBS's alleged misrepresentations related solely to plaintiff's duties and scope of authority at UBS, which were "non-verifiable promises that turned out to be incorrect." The court further found plaintiff's allegations of a scheme to defraud were lacking in particularity. Thus, the court found that to the extent plaintiff alleged UBS made a misstatement of fact, that statement did not constitute fraud without sufficient additional allegations concerning a "scheme to defraud." The court also found that plaintiff's attempts to separate the recruitment of his business from his employment were conclusory and, given that the processes were not separate, the non-reliance clauses in plaintiff's agreements with UBS and AAI were binding and defeated plaintiff's allegations that he reasonably relied on any pre-employment statements.

¶ 34 The trial court also struck plaintiff's unjust enrichment claims against UBS and AAI without leave to replead. The court found that plaintiff's relationships with AAI and UBS were governed by his employment contracts. The court further noted that plaintiff had not alleged he rendered services that were not paid for or that he was entitled to a stream of revenue that had been diverted by the defendants' actions. Rather, plaintiff had merely "speculate[d] that he would have done better to either strike out on his own as an independent actor or to have stayed put at Man Financial."

¶ 35 3. *Summary Judgment Motion*

¶ 36 Following discovery, AAI filed a motion for summary judgment on plaintiff's fraudulent inducement claim relating to Murphy's purported misrepresentations regarding the sale of its futures division (735 ILCS 5/2-1005 (West 2012)). Following a June 2013 hearing, the trial court granted AAI's motion for summary judgment. The court found that the non-reliance clause in the Agreement barred plaintiff's fraud claim, reasoning that the movement of plaintiff's futures

business was "hopelessly intertwined" with plaintiff's movement himself. The court also found that plaintiff waived his fraud claim by failing to object in a timely manner.

¶ 37 In July 2013, plaintiff filed a motion to reconsider the trial court's order. The court denied plaintiff's motion in October 2013. This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 On appeal, plaintiff asserts that the trial court erred by (1) granting summary judgment to AAI on his fraudulent inducement claim against AAI, (2) dismissing his fraudulent inducement claim against UBS, (3) dismissing his unjust enrichment claims against AAI and UBS, and (4) dismissing his trade secret misappropriation claim against UBS. We address plaintiff's assertions in turn.

¶ 40 A. Fraudulent Inducement Against AAI

¶ 41 Plaintiff first argues the trial court erred by granting summary judgment to AAI on his fraudulent inducement claim against AAI. Specifically, he contends the court erred when it found the non-reliance provision in his AAI employment agreement precluded a finding that he justifiably relied on AAI's alleged misrepresentations. Furthermore, he argues the court erred by finding he waived his claim. Finally, he maintains that Murphy made a knowingly false statement of material fact. For the following reasons, we conclude the court properly granted defendants' motion for summary judgment.

¶ 42 1. Standard of Review

¶ 43 Summary judgment may be granted 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." 735 ILCS 5/2-1005(c) (West 2012); *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino and*

Terpinas, 2015 IL 117096, ¶ 14. To survive a summary judgment motion, a plaintiff need not prove his case but must present a factual basis that would arguably entitle him to relief. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. We review a trial court's entry of summary judgment *de novo*. *Illinois State Bar Ass'n*, 2015 IL 117096, ¶ 14.

¶ 44 2. Non-Reliance Provision

¶ 45 Plaintiff first contends the trial court erred by finding the non-reliance provision in his AAI employment agreement barred his fraudulent inducement claim. He maintains that his claim was not based on AAI fraudulently inducing him to enter into the written employment agreement, but rather, on AAI fraudulently inducing him to move his separate business from Man to AAI, which occurred three months before he signed the agreement. He further contends that no evidence was presented reflecting that his execution of the agreement was part of the parties' negotiation relating to the movement of his business and trade secrets. Thus, he posits the non-reliance provision has no bearing on his fraud claim.

¶ 46 "Fraudulent inducement is a form of common-law fraud." (Internal quotations marks omitted.) *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15. To establish fraud, a plaintiff must show "(1) a false statement of material fact; (2) by one who knows or believes it to be false; (3) made with the intent to induce action by another in reliance on the statement; (4) action by the other in reliance on the statement; and (5) injury to the other resulting from that reliance." (Internal quotation marks omitted.) *Village of Palatine v. Palatine Associates, LLC*, 2012 IL App (1st) 102707, ¶ 80. Further, a plaintiff must show his reliance on the misrepresentation was justified. *Id.* ¶ 80. One factor our court has considered in analyzing whether a plaintiff's reliance was justified is the presence of a non-reliance clause in the contract between the parties. *Id.* ¶ 80; *Schrager v. Bailey*, 2012 IL App (1st) 111943, ¶ 20. As we have

explained, "it is hardly justifiable for someone to rely on something that they have agreed not to rely on, and without justifiable reliance there can be no fraud." *Greer v. Advanced Equities, Inc.*, 2012 IL App (1st) 112458, ¶ 9. Although generally the issue of whether a plaintiff's reliance was justifiable is a question of fact, the question becomes one for the court to decide where only one conclusion can be drawn from the undisputed facts. *Siegel Development, LLC v. Peak Construction LLC*, 2013 IL App (1st) 111973, ¶ 114.

¶ 47 In this case, plaintiff signed the AAI Agreement on October 18, 2005, which was dated July 29, 2005. It provided, among other things, that it contained "the entire understanding of the parties regarding the subject matter hereof" and that it "suprece[d] [*sic*] any and all oral or written understandings regarding [plaintiff's] employment with" AAI. Further, by signing the agreement, plaintiff acknowledged that he had "not relied on any oral or written representations or understandings not explicitly contained herein in executing this agreement." Based on these provisions, the trial court properly granted defendants' motion for summary judgment, as plaintiff could not establish he justifiably relied on Murphy's alleged misrepresentation. See *Schrager*, 2012 IL App (1st) 111943, ¶ 27 (where the settlement agreement stated that the plaintiff was relying solely on the information contained in the agreement and not on any prior representations, he could not establish justifiable reliance on the defendants' purported misrepresentations); see also *Village of Palatine*, 2012 IL App (1st) 102707, ¶¶ 79-80 (where the tenant signed leases containing integration and nonreliance clauses, the tenant could not establish justifiable reliance on any alleged statements made by the owner prior to entering into the leases).

¶ 48 In so concluding, we reject plaintiff's claim that the nonreliance clause in his employment agreement did not apply to the transfer of his "business." Plaintiff's attempt to draw a distinction

between his employment with AAI and the movement of his "business" to AAI is unpersuasive. Nothing in the pleadings or evidence suggests that plaintiff made two separate agreements with AAI—one relating to his business, and one relating to his own employment—or that any separate consideration was given to support his purported separate decision to bring his business to AAI. Plaintiff's attempt to distinguish his "business" from his employment with AAI overlooks that plaintiff's clients were, in fact, Man clients who had a contractual relationship with Man. Thus, plaintiff could not have entered into an agreement with AAI to bring those clients to AAI. Likewise, while AAI may have hoped the employees of plaintiff's Desk would follow him to AAI, it could not have entered into an agreement with plaintiff regarding such a transfer, as plaintiff lacked the ability to force the Desk members to leave Man. While plaintiff exercised control over the Desk members and had the ability to hire and fire them and determine their portion of the group pool, those Desk members were Man employees, who had contracts with Man, not plaintiff, and who executed separate employment agreements with AAI. In fact, plaintiff acknowledged that each of his employees could have decided to stay at Man, and each employee signed a separate employment agreement with AAI. In sum, plaintiff has failed to show that his employment and his "business" were not one in the same. He made one agreement with AAI—to provide services as an employee—and the employment agreement he signed with AAI and the nonreliance clause therein are dispositive of his fraudulent inducement claim. See *Village of Palatine*, 2012 IL App (1st) 102707, ¶ 80; *Schrager*, 2012 IL App (1st) 111943, ¶ 27.

The fact that plaintiff did not sign the AAI Agreement until October 2005 does not warrant a different outcome. Plaintiff argues that the terms of the agreement show it was "nothing more than an afterthought" and not intended to relate back to the date listed on the front of it, July 29, 2005. However, plaintiff has cited no authority suggesting that the nonreliance

clause had to be signed before the start of the parties' business relationship. In fact, a contract "generally speaks from the day of its date, regardless of when it was executed and delivered." (Internal quotation marks omitted.) *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 62; see also *In re Estate of Graff*, 117 Ill. App. 3d 900, 902 (1983) (a decedent's act of signing a note constituted *prima facie* evidence that the contents of the note were known to him; thus, when he signed the note, dated June 9, on June 16, he adopted and ratified June 9 as the effective date of the note). Furthermore, the express language of the AAI Agreement reflected that it "suprece[d] [*sic*] any and all oral or written understandings regarding [plaintiff's] employment with" AAI and that it contained the parties' "entire understanding" regarding plaintiff's employment. When plaintiff signed the agreement in October 2005, he could have modified it to reflect that it did not supersede Murphy's oral representations regarding the sale of AAI. In addition, plaintiff could have carved out the transfer of his "business" from the non-reliance provision in the agreement to make clear he had relied on Murphy's oral representations when he moved his "business." Plaintiff, however, elected not to do so. Instead, he signed the AAI Agreement, thereby expressing it was "the entire understanding of the parties regarding the subject matter hereof" and that it "suprece[d] [*sic*] any and all oral or written understandings regarding [plaintiff's] employment with" AAI. Accordingly, plaintiff cannot now claim that he relied on any statement made by Murphy. See *Colagrossi v. UBS Securities, LLC*, 2014 WL 2515131, * 4 (N.D. Ill. 2014) (noting that although plaintiff did not sign the AAI Agreement until two months after he started working, "[h]e chose to sign the agreement at that time rather than quitting or insisting that [AAI] put in writing" its alleged oral promises).[5]

[5] In *Colagrossi v. UBS Securities*, plaintiff brought claims against UBS for breach of contract and violation of the

¶ 49 3. Murphy's Purported Misrepresentation

¶ 50 The issue of justifiable reliance notwithstanding, plaintiff's fraud claim also fails in that he cannot show Murphy made a false statement of material fact that Murphy knew or believed to be false.[6] First, plaintiff has presented no evidence establishing that AAI was for sale at the time of Murphy and plaintiff's negotiations. To the contrary, the record shows that on December 5, 2005, Murphy was sent an insider notice regarding "Project Pinetree," which he explained was the code name for AAI's valuation process to facilitate a possible sale of AAI's futures divisions. Further, a Consolidated Statement of Financial Condition issued by ABN Amro Global Futures stated that ABN Amro Bank, N.V., started exploring the possibility of selling AAI after December 31, 2005. Thus, the evidence affirmatively demonstrates AAI was not for sale during plaintiff and Murphy's negotiations.

¶ 51 Plaintiff raises several arguments as to why the Insider Notice and the Consolidated Statement are insufficient to establish that AAI was not for sale until December 2005. First, he contends that the two documents are inconsistent, as Murphy received the notice on December 5 but the Consolidated Statement reflected AAI did not explore a possible sale until after December 31, 2005. However, we find the documents to be wholly consistent and reflect that AAI started a valuation process in December 2005 before it began exploring a possible sale at the end of that month. Plaintiff also contends that defendants "failed to produce any affidavit or other firsthand testimony from anyone from AAI as to when AAI actually first began contemplating a possible sale," thus creating an "inference adverse to AAI." He also notes that he

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Illinois Wage Payment and Collection Act (IWPCA) based on oral promises Murphy allegedly made regarding plaintiff's transfer to AAI and promises Murphy and Hutchinson allegedly made regarding plaintiff's transfer to UBS. *Colagrossi*, 2014 WL 215131, * 2. The court granted summary judgment to UBS, finding that the integration provisions in the AAI Agreement and UBS Agreement barred plaintiff's breach of contract claims. *Id.* at * 5-6. The court likewise rejected plaintiff's IWCPA claim. *Id.* at * 6.

[6] The trial court did not grant defendant's summary judgment motion on this basis; however, we may affirm the court's decision on any basis in the record. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10.

subpoenaed the accounting firm who created the Consolidated Statement to produce documents supporting the statement that AAI did not explore a sale until after December 31, but the firm failed to identify anybody involved in creating the report or any documents relating to the statement. Thus, he contends the statement that AAI did not consider a sale until December 31, 2005, was "nothing more than a foundationless, unsubstantiated statement by some unknown person." First, we note that defendants provided a certificate from the former secretary of AAI establishing that the Consolidated Statement was a business record. See Ill. R. Evid. 803(6) (eff. April 26, 2012) (a record made at or near the time of the event, by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity in the regular practice of that business, is not hearsay). Moreover, even if we ignored the Consolidated Statement, as plaintiff suggests, the sole admissible evidence remaining—the insider notice Murphy received—still affirmatively demonstrates that AAI was not for sale during plaintiff and Murphy's negotiations. In arguing that an issue of fact exists, plaintiff attempts to rely on his testimony that Davis, Man's CEO, told him AAI was for sale. However, Davis did not recall making such a statement, and plaintiff fails to explain how his own testimony as to what Davis told him would be admissible and not hearsay. See Ill. R. Evid. 803(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

¶ 52 In any event, even if we were to somehow conclude that an issue of fact existed as to whether AAI was for sale during plaintiff and Murphy's negotiations, plaintiff has failed to show a genuine issue of fact exists as to whether Murphy knew of the sale and lied to plaintiff about it. To the contrary, Murphy testified that the first time he learned that AAI was for sale was when he received the "Insider Notice" regarding a potential sale on December 5, 2005. Thus, the

evidence fails to show that Murphy knew AAI was for sale during his negotiations with plaintiff such that he made a knowingly false statement to plaintiff. See *Village of Palatine,* 2012 IL App (1st) 102707, ¶ 80 (setting forth the elements of fraud). Indeed, plaintiff acknowledged in his deposition that the only support he had for his allegation that Murphy knew about AAI's sale was Murphy's position as an executive.

¶ 53 Furthermore, while plaintiff points out that Murphy did not ask anybody above him whether or not AAI was for sale or indicate to plaintiff that he was unsure, there is no indication from the record that Murphy *was* unsure about whether AAI was for sale. According to his deposition testimony, Murphy believed AAI's futures division was expanding. In addition, mere carelessness is insufficient to sustain a fraud claim, as "it is well established that a misrepresentation is fraudulent either where a party makes the representation knowing it is false *or* where the misrepresentation was made with a reckless disregard for its truth or falsity." *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 193 (1989). Consequently, we conclude the trial court properly granted summary judgment, as plaintiff could not establish Murphy knowingly made a false representation of material fact.

¶ 54 4. Waiver

¶ 55 Finally, even if plaintiff could show Murphy made a false statement of material fact on which plaintiff justifiably relied, summary judgment is nevertheless appropriate, as plaintiff waived his fraudulent inducement claim by continuing to work at AAI and, later, UBS, after learning of the alleged fraud.

¶ 56 When a person has been misled by fraud or misrepresentation, he must " 'disaffirm or abandon the transaction with all reasonable diligence' " as soon as he learns the truth. *DeSantis v. Brauvin Realty Partners, Inc.*, 248 Ill. App. 3d 930, 937 (1993) (quoting *Eisenberg v. Goldstein,*

29 Ill. 2d 617, 622 (1963)). By failing to do so, a person waives relief from the misrepresentations. *DeSantis*, 248 Ill. App. 3d at 937. The purpose of the waiver rule has been described as follows: "One is not permitted to lie back and speculate as to whether avoidance or affirmance will ultimately prove more profitable." (Internal quotation marks omitted.) *Id.* at 938.

¶ 57 The record establishes that plaintiff read an April 27, 2006, Bloomberg article reflecting that AAI "may" have been selling its futures business. After reading the article, plaintiff did not confront Murphy. In late May 2006, UBS bought AAI. Nonetheless, plaintiff elected to continue working at AAI through September 29, 2006. Again, he did not confront Murphy or anybody else. Instead, he and his Group simply continued "doing business" like they "usually" did. Thus, for nearly six months after the Bloomberg article and five months after AAI's actual sale to UBS, plaintiff continued to work at AAI, without complaint, earning over $62,000 in salary and $270,000 in additional payments from May through September 2006.

¶ 58 Moreover, plaintiff then negotiated and executed his UBS Agreement, pursuant to which he earned a $150,000 retention bonus and extended the 70/30 split of EFP profits that he had been receiving at AAI. Although plaintiff contends the "similar contract" he negotiated at UBS does not show he continued to receive benefits from AAI, it is clear plaintiff was able to negotiate his contract with UBS at least in part due to his prior employment at AAI, as he testified he discussed with Murphy extending the 70/30 payout. Thus, for nearly 18 months, plaintiff continued to reap the benefits of his AAI Agreement, making approximately $1 million in salary and commission payments. As the trial court properly found, plaintiff has thus waived his fraud claim against AAI. See, *e.g.*, *Madison Associates v. Bass*, 158 Ill. App. 3d 526, 540 (1987) (the defendant, whose fraudulent inducement claim was based the plaintiff promising him that he would not have future roof leaks, waived his claim where he learned of the alleged fraud

four weeks after signing an agreement but nonetheless retained possession of the premises, made payments of bank rents, and did not allege fraudulent inducement until the counterclaim was filed after the case was on trial).

¶ 59 Plaintiff contends that since only a few months lapsed between the time AAI was sold and the time its sale was finalized, he could not have affirmed his relationship with AAI. Further, he posits that his decision to stay at AAI was reasonable under the circumstances, given that transferring his business would have been a lengthy process. He also claims that protesting to AAI would have exposed him to a risk of greater injury, as AAI would have fired him immediately and he would have faced the risk of temporary unemployment and also the loss of his business.

¶ 60 Despite plaintiff's arguments to the contrary, we conclude the evidence showed he intended to affirm his relationship with AAI and abandon his fraud claim. While plaintiff argues that protesting would have exposed him to the risk of losing his job and his business, we note that plaintiff did not even *ask* anyone about Murphy's purported misrepresentations, let alone protest them. Instead, he remained silent after learning of AAI's sale and continued conducting business as usual. Plaintiff's failure to call Murphy's alleged misrepresentation to anyone's attention shows he intended to waive his claim. See *Lillien v. Peak6 Investments*, 2004 WL 1445231, * 6 (N.D. Ill. 2004) (the plaintiff, who alleged he was promised stock options from a pending IPO, waived his fraudulent inducement claim by remaining at the company for nearly seven months after the IPO's initial delay and three months after the IPO's cancellation instead of "abandoning his relationship, commencing a job search, or even objecting to the delay after

learning of the alleged fraud.").[7] Furthermore, it is telling that plaintiff not only elected to continue working at AAI while its sale was finalized, but then also signed a contract with UBS without ever once asking anybody about Murphy's alleged misrepresentations—even though Murphy subsequently became an executive at UBS. Plaintiff then continued working at UBS for another year, eventually bringing his claim against AAI only after UBS terminated his employment. Thus, it is evident from all of plaintiff's actions that he chose to affirm his relationship with AAI, believing that doing so would be more profitable than pursuing a cause of action against AAI. See *Lee v. Heights Bank*, 112 Ill. App. 3d 987, 996 (1983) (a plaintiff's delay in bringing suit for the purpose of reaping a benefit and causing detriment to the defendant "would be indicative of an intent to abandon his right to sue and instead take whatever benefit there might be from continued performance."). Having made that decision, plaintiff cannot now pursue a fraud claim. See *DeSantis*, 248 Ill. App. 3d at 938 (the Illinois tort system is not "a commodity futures market" in which individuals may "hedge their investments, when possible, with a cause of action for fraud until such time that the investment sours, at which point they would be able to cash in on their preserved cause of action for fraud.").

¶ 61 We note that plaintiff also argues he did not learn that he was a victim of fraud at the time of AAI's sale, as he "did not have full knowledge of all material aspects of AAI's fraud" at that time. For example, he contends, he did not know that during his negotiations with Murphy, Murphy had lied about AAI's sale or the EFP profit sharing. The problem with plaintiff's argument is that he can point to no evidence in the record suggesting he *ever* learned that Murphy was lying. Furthermore, plaintiff's contention relating to the EFP profit sharing is irrelevant, as the trial court had already dismissed "[a]ny allegations of fraud related to the

[7] Lower federal court decisions are not binding on our court, but may be persuasive authority. *People ex rel. Ryan v. World Church of the Creator*, 198 Ill. 2d 115, 127 (2001).

Plaintiff's amount of control and compensation while employed by [AAI]" at an earlier proceeding, which plaintiff did not appeal. Thus, the court did not grant summary judgment on plaintiff's fraud claim relating to the EFP sharing, only on his claim relating to the purported misrepresentations regarding the sale of AAI.

¶ 62 In sum, for all of the reasons stated, the trial court properly granted summary judgment on plaintiff's fraudulent inducement claim against AAI.

¶ 63 B. Fraudulent Inducement Against UBS

¶ 64 Plaintiff next argues the trial court erred by dismissing his fraudulent inducement claim against UBS. Just like he did with AAI, plaintiff attempts to draw a distinction between his business and his employment, arguing that the non-reliance provision of his employment agreement with UBS did not preclude his fraudulent inducement claim because his claim was based on the movement of his business to UBS, not on his signing of the employment agreement. In addition, he argues the court erred by finding the misrepresentations at issue amounted to "non-verifiable promises that turned out to be incorrect."

¶ 65 A motion to dismiss under section 2-615 challenges the legal sufficiency of a complaint. 735 ILCS 5/2-615 (West 2012); *Turcios v. DeBruler Co.*, 2015 IL 117962, ¶ 15. A court must determine whether the allegations of the complaint are sufficient to state a cause of action upon which relief may be granted. *Turcios*, 2015 IL 117962, ¶ 15. In ruling on such a motion, we accept as true all well-pleaded facts in the complaint as well as any reasonable inferences that may be drawn. *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. Dismissal is appropriate only where "it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Wilson v. County of Cook*, 2012 IL 112026, ¶ 14. We review *de novo* a dismissal pursuant to section 2-615. *Id.*

¶ 66 To state a claim of fraud in the inducement, a plaintiff must allege "(1) a false statement of material fact; (2) by one who knows or believes it to be false; (3) made with the intent to induce action by another in reliance on the statement; (4) action by the other in reliance on the statement; and (5) injury to the other resulting from that reliance." (Internal quotation marks omitted.) *Village of Palatine*, 2012 IL App (1st) 102707, ¶ 80. He must also allege that his reliance was justified. *Id.*

¶ 67 Plaintiff alleged that UBS fraudulently induced him to transfer his Group, clients, procedures, and processes, where Murphy and Hutchinson promised him that "he and his Group would have substantially the same economic benefits and control at UBS" as he had at AAI and that it would pay him amounts due by AAI that had not yet been paid as of the date of the sale. However, plaintiff cannot allege he relied on any such statements because just like with AAI, plaintiff signed an employment agreement with UBS which, by its own terms, precluded such reliance. Specifically, the UBS Agreement contained the following language: "You represent and warrant that *** no representations were made to you concerning this offer or the terms or conditions of your anticipated employment except as expressly set out in this Agreement." It also provided that "[t]his Agreement contains the entire understanding and agreement between the parties concerning the subject matter hereof (including any compensation arrangements), and supersedes all prior agreements, understandings, discussions, negotiations, and undertakings, whether written or oral, between the parties with respect thereof." Based on the foregoing, the court properly dismissed plaintiff's fraudulent inducement claim, as the non-reliance provisions in the UBS Agreement precluded a finding that he justifiably relied on any purported misrepresentations by UBS. See *Village of Palatine*, 2012 IL App (1st) 102707, ¶¶ 80; *Schrager*, 2012 IL App (1st) 111943, ¶ 27.

¶ 68 We reject plaintiff's contention that he had a "business" that was separate from his employment and that the nonreliance clause in his employment agreement thus did not bar his claim. Plaintiff's allegations fall short of establishing that he had a separate business or that he made a separate agreement with UBS regarding that purported business. To the contrary, plaintiff alleged that he and the employees of his "business" were employees of the FCM in which they operated (first Man, then AAI, then UBS) for FICA, income tax withholdings, and other employee benefits. He further alleged that although he could have structured his Group's relationship with Man by having the Group function as a totally separate business, it was "not customary to do so in the futures industry" and his Group instead functioned "semi-independently" inside each FCM. Thus, plaintiff's factual allegations fail to support his claim that he had a separate "business" to move to UBS. Plaintiff made just one agreement with UBS, to be an employee. Further, Murphy's and Hutchinson's purported misrepresentations regarding plaintiff's control and compensation at UBS both clearly related to the terms and conditions of his employment. Thus, the integration and nonreliance clauses in his UBS employment agreement barred his claim.

¶ 69 Dismissal of plaintiff's claim was also appropriate given that Murphy's and Hutchinson's alleged misrepresentations were promises regarding their intent to perform future action. Misrepresentations of intent to perform future conduct, even if made without the present intention to perform, generally cannot sustain a fraud claim in Illinois. *HPI Health Care, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 168 (1989); see also *Abazari v. Rosalind Franklin University of Medicine and Science*, 2015 IL App (2d) 140952, ¶ 15 (generally, Illinois law does not recognize an action for promissory fraud). An exception exists where the false promises or representations are "alleged to be the scheme employed to accomplish the fraud.' " *HPI Health*

Care, 131 Ill. 2d at 168 (quoting *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 334 (1977)). "The totality of the circumstances must show a scheme or device to defraud, and the fraud must be pled with specificity." *International Meat Co., Inc. v. Bockos*, 157 Ill. App. 3d 810, 815 (1987).

¶ 70 Plaintiff argues that, like the plaintiff *HPI Health Care*, he has adequately alleged a scheme to defraud. In *HPI Health Care*, the supreme court found the plaintiff's allegations were sufficient to allege a scheme to defraud where the complaint set forth "a number of specific factual allegations" supporting its claims that the defendants employed a scheme of repeated and numerous false promises and representations. *HPI Health Care*, 131 Ill. 2d at 169. The complaint detailed 11 "knowingly false promises" that each of the defendants allegedly made to induce the plaintiff to continue providing certain goods and services, providing the approximate dates of those representations and factual details regarding the content of those representations. *Id.* at 165-67. The representations included promises regarding the payment of services, the obtaining of loans, and the implementation of a payment plan. *Id.* The supreme court concluded the false promises were "the scheme or device to accomplish" the purported fraud. *Id.* at 169.

¶ 71 Plaintiff's case is clearly distinguishable from *HPI Health Care*. The plaintiff in *HPI Health Care* alleged 11 different misrepresentations and provided facts regarding the specific content of those misrepresentations and the dates on which they were made. By contrast, the only misrepresentations that plaintiff alleges are two promises made by Murphy and Hutchinson, about which plaintiff provides no dates and very little detail. He alleged only that Murphy and Hutchinson promised that UBS would pay certain amounts due by AAI that had not yet been paid as of the date of the sale and "that [plaintiff] and his Group would have substantially the same economic benefits and control at UBS that [plaintiff] enjoyed at" AAI. He provides no

further details regarding what, specifically, Murphy and Hutchinson allegedly told him. He further alleged the promises "were part of a scheme to bring [plaintiff], his Group, his client business and his proprietary procedures and software to UBS, and ultimately to allow UBS to take over [plaintiff]'s Group and business." Thus, unlike the plaintiff's allegations in *HPI Health*, plaintiff's allegations concerning the purported misrepresentations are conclusory and lacking in factual detail, and they fail to set forth a claim that defendants engaged in any kind of overarching scheme or pattern to defraud him. See *International Meat Co.*, 157 Ill. App. 3d at 815 ("fraud must be pled with specificity"); see also *Bower v. Jones*, 978 F.2d 1004, 1012 (1992) (a plaintiff "must be able to point to specific, objective manifestations of fraudulent intent—a scheme or device. If he cannot, it is in effect presumed that he cannot prove facts at trial entitling him to relief. If the rule were otherwise, anyone with a breach of contract claim could open the door to tort damages by alleging that the promises broken were never intended to be performed.").

¶ 72 In sum, plaintiff's conclusory allegations are insufficient to establish UBS engaged in a scheme to defraud him. Consequently, we conclude the trial court properly dismissed plaintiff's fraudulent inducement claim against UBS.

¶ 73 C. Unjust Enrichment Against AAI and UBS

¶ 74 Next, plaintiff contends the trial court erred by dismissing his claims of unjust enrichment against AAI and UBS. We disagree.

¶ 75 As previously detailed, in ruling on a section 2-615 motion, the court accepts as true all well-pleaded facts and any reasonable inferences that may arise from the facts. *Kanerva*, 2014 IL 115811, ¶ 33. Dismissal is appropriate where, viewing the allegations in the light most favorable

to the plaintiff, it is clearly apparent that plaintiff can prove no set of facts that would entitle him to relief. *Id*.

¶ 76 "To state a claim for unjust enrichment, 'a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience.' " *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 25 (quoting *HPI Health Care*, 131 Ill. 2d at 160. A theory of unjust enrichment, however, is unavailable where a contract governs the parties' relationship. *Gagnon*, 2012 IL App (1st) 120654, ¶ 25.

¶ 77 Here, the trial court dismissed plaintiff's unjust enrichment claims after finding that his relationships with AAI and UBS were governed by his employment contracts. Further, the court found plaintiff had not alleged that he rendered services to AAI or UBS that were not paid for, nor had he alleged AAI or UBS diverted any other stream of revenue or money that was due to him.

¶ 78 We find no error in the trial court's decision. Plaintiff's relationships with both AAI and UBS were governed by employment agreements that, by their own terms, superseded and excluded all other agreements between the parties. Accordingly, the court properly dismissed plaintiff's claims. See *Gagnon*, 2012 IL App (1st) 120645, ¶ 25 (theory of unjust enrichment is unavailable where a contract governs the parties' relationship). Plaintiff again argues that his contracts with AAI and UBS related solely to his employment, whereas his unjust enrichment claims relate to AAI's and UBS's schemes to induce him to move his "business." However, for the reasons previously detailed, plaintiff's attempt to draw a line between his employment and his "business" fails. The court properly dismissed plaintiff's unjust enrichment claims.

¶ 79 D. Misappropriation of Trade Secrets Against UBS

¶ 80 Finally, plaintiff argues that the trial court erred by dismissing his claims against UBS for misappropriation of trade secrets. He contends that he owned the purported trade secrets and that he kept them sufficiently secret so as to qualify as trade secrets under the Act. We disagree.

¶ 81 The trial court dismissed plaintiff's claim pursuant to section 2-615 of the Code. Accordingly, we must determine whether plaintiff's allegations, construed in the light most favorable to him, are sufficient to state a cause of action upon which relief may be granted. *Kanerva*, 2014 IL 115811, ¶ 33. Our review is *de novo*. *Id.*

¶ 82 The Act allows a plaintiff to recover damages for the misappropriation of trade secrets. 765 ILCS 1065/4 (West 2008). A "trade secret" is defined as information, including a program, process, or list of actual or potential customers, that (1) is sufficiently secret to derive economic value from not being generally known to other persons who can obtain economic value from its disclosure and (2) is the subject of reasonable efforts to maintain its secrecy or confidentiality. 765 ILCS 1065/2 (West 2008). Thus, to qualify as a trade secret under the Act, the information must be sufficiently secret to give the plaintiff a competitive advantage and must be the subject of some affirmative measures to prevent others from using it. *System Development Services, Inc. v. Haarmann*, 389 Ill. App. 3d 561, 571 (2009).

¶ 83 1. Whether Plaintiff Owned The Alleged Trade Secrets

¶ 84 The trial court dismissed plaintiff's claim based on its finding that plaintiff could not establish a fundamental contractual right to any trade secret. The court found that even if plaintiff had trade secrets when he transferred to UBS, those secrets no longer existed based on the parties' subsequent relationship.

¶ 85 We find no error in the trial court's dismissal of plaintiff's claim. First, plaintiff's allegations fail to establish that he had any ownership of the processes, procedures, software, or

client list such that he could claim they were his trade secrets. He alleged that while he was an employee at Man and with Man's consent and encouragement, he formed the Group, which he then "caused" to develop various processes to manage client needs. Although plaintiff controlled the Group employees and had the ability to hire and fire them, they were, in fact, Man employees. Thus, plaintiff has merely alleged that while he was a Man employee, he caused other Man employees to create processes, procedures, and software. If anybody owned those processes, procedures, and software, it was Man, not plaintiff. See *Heath v. Zenkich*, 184 Ill. App. 3d 761, 767 (1989) (noting, in the context of a patent dispute, that generally "an employer who hires or engages someone for consideration to devote his time to developing a product becomes the owner of that property which is developed and of any invention incident to it."). Likewise, plaintiff alleges that all of his clients were "technically" clients of Man, AAI, or UBS. Given that any of plaintiff's clients were also clients of the FCM in which he worked, he cannot claim ownership over information relating to them.

¶ 86 Nonetheless, plaintiff maintains that UBS had no right to any of his alleged secrets, as they were created outside of the scope of his employment with UBS. He argues that even if Man had a "shop right" over his trade secrets, as Man was his employer when he developed them, UBS had no such right. In support of his claim, plaintiff relies on *E.J. McKernan Co. v. Gregory*, 252 Ill. App. 3d 514 (1993). There, the employee, Joseph, was hired "to run the Midwest sales accounts" of Edward's company, which manufactured, sold, and distributed aerosol products. *Id.* at 518. Joseph later became a Board member and registered agent of the company. *Id.* At some point, Joseph met a third party who was using a process to remove lithography from aerosol cans. *Id.* at 519. The third party assigned his rights in the process to Edward and Joseph. *Id.* Joseph then "worked to make the delitho process commercially feasible for the" company, with

the company paying for expenses involved in the development. *Id.* Both Joseph and Edward were designated as co-inventors of the patent when it was issued. *Id.* Joseph eventually incorporated his own business and began using the delitho process. *Id.* at 521. In subsequent litigation, the trial court determined that Edward and Joseph individually owned the patents and not for the benefit of the company. *Id.* at 522.

¶ 87 The appellate court held that the trial court did not abuse its discretion by finding that Edward and Joseph individually owned the patents. *Id.* at 546. The court noted that absent a specific agreement, "an employer's rights arise from the inventor's employment status." *Id.* at 545. Inventions made by an employee hired "to invent" are typically the property of an employer, whereas inventions made by general employees who are not hired to invent and use the employer's property to create the invention typically belong to the employee, subject to a nontransferable shop right in favor of the employer. *Id.* at 545. The court found that Joseph "was not hired to pursue his creative instincts," and the delitho process he created was not at the direction of Edward or the company. *Id.* at 546. Rather, Joseph's perfection of the delitho process "evolved from his own desire" to make the company more profitable. *Id.* at 546.

¶ 88 Plaintiff's case is readily distinguishable from *E.J. McKernan*. The employee in *E.J. McKernan* was hired to run sales accounts; thus, creating a process to remove lithography from aerosol cans was clearly outside the scope of his employment. By contrast, plaintiff was the head of Global Execution Services for Man, a role in which he was responsible for executing trades and managing the Desk "for the mutual benefit of his Group and Man." Plaintiff developed the Group, which consisted of Man employees, with Man's consent and encouragement, and he caused those employees to create the purported trade secrets to improve trading efficiency. We fail to see how the creation of the purported trade secrets fell outside the scope of plaintiff's

employment. Plaintiff also contends that a question of fact existed as to whether the Group members were acting within the scope of their Man employment when they created the purported trade secrets. He observes the pleadings contain no allegations as to when and how the trade secrets were created, such as whether they were created during work hours or with other Man resources. However, the question on a motion to dismiss is not whether a question of fact exists, but whether plaintiff's allegations are sufficient to state a cause of action. See *Turcios*, 2015 IL 117962, ¶ 15. Given that plaintiff has not sufficiently alleged that he created the trade secrets outside of his employment, the court correctly dismissed his trade secret claim.

¶ 89 Furthermore, even assuming Man did, in fact, have only a non-transferable "shop right" to plaintiff's processes and procedures, AAI likewise had a "shop right" to those processes and procedures, as plaintiff alleged he caused his Group to continue "developing and enhancing" those processes and procedures at AAI. See *Chicago Daily News v. Kohler*, 360 Ill. 351, 360-61 (1935) ("An employee who finds an improved method of, or instrument for, doing his work, using the property or labor of his employer to develop his invention into practical form, by assenting to the use of such improvement by his employer grants to him an irrevocable license to use the invention."). Furthermore, any shop rights AAI had would have passed to UBS through UBS's purchase of AAI. See *California Eastern Laboratories, Inc. v. Gould*, 896 F.2d 400, 402 (1990).

¶ 90 Plaintiff does not dispute defendants' claim that any shop rights AAI had would pass to UBS. However, he argues that the meaning of the words "developing and enhancing," as used in his complaint, are too unclear to establish that AAI had a "shop right" to his technology. We disagree, as "developing and enhancing" a process clearly constitutes finding "an improved method of, or instrument of, doing" work. *Chicago Daily News*, 360 Ill. at 360. Our conclusion is

in line with the idea behind the concept of a "shop right," *i.e.*, that an employer is entitled to some right in an invention where the employee uses the employer's property and labor to create the invention. *Chicago Daily News*, 360 Ill. at 360. In so concluding, we reject plaintiff's argument that his development of the alleged trade secrets was not part of his job responsibilities at AAI such that AAI could not have any right to his secrets. He was the Director of the Futures Division and he and his Group members were hired to clear and execute trades. Thus, creating a better process to execute trades clearly fell in line with their employment.

¶ 91 2. Whether The Secrets Were Sufficiently "Secret" And Whether Reasonable Efforts Made To Maintain Their Secrecy

¶ 92 In any event, plaintiff's misappropriation claim also fails given that he cannot establish that the alleged secrets were sufficiently secret or the subject of reasonable efforts to maintain their secrecy. See 765 ILCS 1065/2(d) (West 2008). As to the client list, plaintiff alleged that only he and members of his Group had a direct relationship with the Group's clients and that he "made reasonable efforts to maintain the secrecy of his client list, which enabled him to have pricing power over his business." Yet, he also alleged that "each client was technically a client" of Man, AAI, or UBS. Further, he alleged the back office of the FCM through which the client cleared trades "would know some client information" and might receive calls from a client "with problems relating to clearing a trade." Thus, plaintiff's allegations establish that UBS knew the identity of plaintiff's clients at UBS, who were, in fact, also UBS's clients. While plaintiff argues that only he and his Group had a direct relationship with the clients, knew the contact person at each client, and knew how to understand the clients' orders and effectuate their trading goals, UBS could easily duplicate such information given plaintiff's clients were UBS's clients. See *System Development Services, Inc.*, 389 Ill. App. 3d at 572 (information is not a trade secret where it "can be readily duplicated without considerable time, effort, or expense." (Internal

quotation marks omitted.)). Furthermore, plaintiff's conclusory allegation that he "made reasonable efforts to maintain the secrecy of his client list" is insufficient to support a claim that he did, in fact, make such efforts, particularly given that his clients were UBS's clients and he did not allege that he and UBS entered into any kind of agreement to keep the clients' names secret.

¶ 93 Plaintiff's allegations as to the processes, procedures, and software are similarly insufficient. Plaintiff merely alleges that only Group members were "knowledgeable about" the processes and software used to effectuate clients' trades and were "not permitted to discuss" those processes and procedures with non-members. However, he makes no allegation as to any other affirmative steps he took to maintain the secrets, such as requiring the Group employees to sign a non-disclosure agreement. Moreover, the members of plaintiff's Group were UBS employees, serving UBS clients. As employees, plaintiff and the Group members owed a duty of loyalty to UBS. See *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 62 Ill. App. 3d 671, 683 (1978) ("While acting as an agent or employee of another, one owes the duty of fidelity and loyalty; accordingly, a fiduciary cannot act inconsistently with his agency or trust; I.e., solicit his employer's customers for himself, entice coworkers away from his employer, or appropriate his employer's personal property."). Plaintiff fails to explain how, consistent with that duty, he and his Group could have maintained "secrets" from UBS regarding its clients and the technology used to serve them.

¶ 94 In short, the trial court properly dismissed plaintiff's claims where his allegations failed to establish the processes, procedures, software, or client list were trade secrets under the Act.

¶ 95 III. CONCLUSION

¶ 96 For the reasons stated, we affirm the trial court's judgment.

¶ 97 Affirmed.