FOURTH DIVISION
September 25, 2014

1-13-3776

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STERICYCLE, INC., a Delaware corporation,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 13 CH 02223
RQA, INC., an Illinois corporation, and LAWRENCE E. PLATT,	)	Honorable Neil H. Cohen,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Epstein and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's order is affirmed in part and reversed in part. The order granting defendants' motion to dismiss counts I through III of plaintiff's original complaint is reversed. The allegations in counts I through III of plaintiff's complaint state a claim for declaratory and injunctive relief as to contractual obligations purported to have been released by subsequent agreement of the parties; and plaintiff's amended complaint states a claim for

reformation or rescission based on fraud of the parties' subsequent agreement containing the purported release.

¶ 2 Plaintiff, Stericycle, Inc., filed a complaint against defendants, RQA, Inc., and Lawrence E. Platt (hereinafter individually and collectively "defendants"), seeking declaratory and injunctive relief with regard to certain ancillary agreements entered in connection with contracts for the purchase of RQA's business (hereinafter purchase agreements). The ancillary agreements to the purchase agreements included noncompetition agreements prohibiting RQA and Platt from engaging in the business Stericycle purchased, and an exclusive license to use certain computer software needed to run the business.

¶ 3 Stericycle sought to enforce a provision in one of the purchase agreements, the parties could not resolve their differences, and the matter entered arbitration. The parties settled their dispute and entered a written settlement agreement. The written settlement agreement contains a release of both parties' obligations under all of the documents that are part of the purchase agreements, which includes the noncompetition agreements and the exclusive software license. Stericycle contends the parties did not intend to release defendants' obligations under those two agreements. In these proceedings plaintiff sought a declaratory judgment that defendants are still obligated by those agreements and an injunction prohibiting defendants from violating those agreements. Alternatively, Stericycle sought to reform or rescind the written settlement agreement to remove the release of the noncompetition agreements and exclusive software license.

¶ 4 Plaintiff sought the declaratory and injunctive relief in counts I, II, and III of the original complaint. Defendants filed a motion to dismiss the complaint pursuant to section 2-

615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). The trial court granted defendants' motion to dismiss counts I through III of plaintiff's complaint with prejudice and the remaining claims for reformation or rescission of the written settlement agreement without prejudice. Plaintiff filed an amended complaint for reformation or rescission of the written settlement agreement. Defendants filed a motion to dismiss the amended complaint pursuant to section 2-615 of the Code. The trial court granted defendants' motion to dismiss the amended complaint with prejudice.

¶ 5 For the reasons that follow, we affirm in part and reverse in part.

¶ 6 BACKGROUND

¶ 7 At this stage of proceedings we are limited to a consideration of the pleadings and the exhibits attached thereto.[1] In October 2006 the parties entered into an "Asset Purchase Agreement" (2006 purchase agreement) under which plaintiff purchased a segment of RQA's North American business for approximately 8 million dollars. The assets plaintiff acquired under the 2006 purchase agreement included "an irrevocable, royalty-free, perpetual license to use in the United States and Canada" RQA's software. Plaintiff and defendants entered into a noncompetition agreement, plaintiff alleges, "to protect the goodwill that Stericycle acquired from RQA and to secure the full benefit of its bargain under the 2006 [purchase agreement]."

¶ 8 In December 2010 the parties entered a 2010 Asset Purchase Agreement (2010 purchase agreement). The 2010 purchase agreement was for the purchase of assets totaling approximately 18 million dollars, part of which was paid by a promissory note supported by

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[1] See *Beahringer v. Page*, 204 Ill. 2d 363, 365-69 (2003).

an irrevocable letter of credit. One of the assets included in the 2010 purchase agreement was RQA's recall and retrieval business services unit (the "RR Assets"). The 2010 purchase agreement included a provision (the "Revenue Guaranty" provision) that would permit Stericycle a refund of a portion of the purchase price attributable to the RR Assets if Stericycle did not achieve certain revenues. The 2010 purchase agreement defined the "RR Assets" as those RQA uses to service and support the "RR Business" which is described as RQA's "business in the United States and Canada of providing (i) consumer product recall and withdrawal services, (ii) brand integrity services ***." The "RR Purchase Price" was approximately 12 million dollars. Under the 2010 purchase agreement, Stericycle also purchased the "US FF Assets" for $337,843, the "US QA Assets" for approximately 5 million dollars, and the "RQA Software License." The parties entered similar agreements with regard to defendants' foreign operations.

¶ 9 The parties executed a separate "Amended and Restated Software License Agreement" on the same date as the 2010 purchase agreement that states that the amended agreement amends and restates the "2006 License Agreement." The 2010 document (hereinafter the "exclusive software license") states, in part, as follows:

> "(a) Subject to the terms and conditions of the Agreement, RQA hereby grants, and Stericycle hereby accepts, a limited exclusive, royalty-free, fully paid, perpetual, world-wide, nonterminable license (the 'Software License') (i) to use the Licensed Software and Documentation in any Licensed Field of

> Use and (ii) to create and use the Stericycle Improvements in any Licensed Field of Use.
>
> * * *
>
> (1) neither RQA nor any RQA Affiliate may use (or grant any third party a license or sublicense to use) the Licensed Software in a Core Field of Use in the Restricted Territory[.] "

¶ 10 The foregoing language does not appear in the 2010 purchase agreement. Separately, the parties entered agreements ("transition agreements") under which defendants were to collect remaining revenues from its businesses on behalf of and for the sole benefit of plaintiff.

¶ 11 In January 2012, plaintiff informed defendants that a downward adjustment of the 12 million dollar purchase price for the RR Assets was required pursuant to the revenue guarantee provision of the contract and that the purchase price of the RR Assets should be reduced to approximately 4 million dollars. Therefore, plaintiff was owed a refund of approximately 3 million dollars from defendants. Defendants disputed whether plaintiff was entitled to the price reduction and responded that even if it were, the amount of the price reduction was limited to the 5 million dollar promissory note, and, therefore, plaintiff was not entitled to the 8 million dollar reduction it requested.

¶ 12 Plaintiff offered to settle the parties' dispute. The parties could not reach an agreement and plaintiff initiated arbitration with the American Arbitration Association over the dispute as to the reduction in price for the RR Assets. At the same time the parties were involved in a dispute regarding payments by defendants to plaintiff under the transition agreements.

Plaintiff contended defendants owed it approximately $225,000 under the transition agreements.

¶ 13 After defendants deposed the president of one of plaintiff's divisions, defendants approached plaintiff to revive the prior settlement offer. Later that same day the parties reached an agreement on the terms of a settlement of all disputed matters involved in the arbitration (which included defendants' counterclaim against plaintiff), as well as a settlement of the dispute regarding the transition agreements. After their negotiations, the parties agreed that plaintiff would dismiss its claim for an approximately 8 million dollar reduction in the purchase price for the RR Assets and for a refund of approximately 3 million dollars it already overpaid as a result of that reduction, in exchange for defendants' dismissal of its breach of contract claim against plaintiff, cancellation of the 5 million dollar promissory note and irrevocable letter of credit, and the return of funds plaintiff placed into an escrow account pending resolution of the arbitration. The parties also agreed that defendants would pay plaintiff $200,000 to settle the transition agreements dispute.

¶ 14 Plaintiff alleges the parties never discussed the noncompetition agreements or exclusive software license. The parties exchanged draft written settlement agreements. The written settlement agreement the parties executed contained a mutual general release, but plaintiff "believed that the Noncompetition Agreements and the Software License would remain valid, binding, and enforceable after the settlement was finalized" and "neither of the parties discussed or intended" a contrary result. In December 2012, the parties notified the American Arbitration Association the matter settled. In January 2013, an attorney for defendants

contacted an attorney for plaintiff regarding the written settlement agreement. Defendants' attorney's correspondence reads, in pertinent part, as follows:

> "The mutual general releases provided by our clients are inclusive of all agreements that are exhibits to the 2010 [purchase agreement (including the noncompetition agreements and exclusive software license)]; therefore, all obligations/responsibilities of the parties to each other were terminated in full by the signing of the Settlement Agreement."

¶ 15 Plaintiff's attorney responded the next day, informing defendants' attorney that plaintiff did not agree with defendants' interpretation of the written settlement agreement, "and in particular [the] implication that the noncompetition agreements and/or the software license agreement were terminated." Plaintiff's attorney's correspondence reads, in part, as follows: "The Settlement Agreement does not have any impact on the enforceability of the [noncompetition agreements or exclusive software license.] They constitute assets purchased and paid for by Stericycle." Five days later, the arbitrator issued an order dismissing the arbitration between the parties. One day after that, defendants responded to plaintiff's correspondence disagreeing with plaintiff's statement that the written settlement agreement did not terminate the noncompetition agreements and exclusive software license.

¶ 16 Plaintiff alleges it did not intend to terminate the noncompetition agreements or exclusive software license, nor did defendants intend for the written settlement agreement to terminate the noncompetition agreements or exclusive software license. If defendants did so intend, then defendants also knew that plaintiff did not intend the written settlement

agreement to have that effect, and "intentionally withheld that material fact from Stericycle for the purpose of inducing Stericycle's consent to the final version of the Settlement Agreement, and Stericycle relied on that omission of material fact to its detriment."

¶ 17 The Original Complaint

¶ 18 Count I of the complaint sought a declaratory judgment as to the rights of the parties under the purchase agreements, noncompetition agreements, exclusive software license, and written settlement agreement. Plaintiff sought a declaration that both the noncompetition agreements and the exclusive software license are in full force and effect and were not terminated under the general mutual release in the written settlement agreement. Counts II and III sought an injunction against defendants to prevent them from violating, and from proceeding with business activities that would violate, the noncompetition agreements and exclusive software license, respectively. Count IV sought rescission of the written settlement agreement, and Count V sought reformation of the written settlement agreement.

¶ 19 In March 2013, defendants filed a motion to dismiss plaintiff's complaint pursuant to section 2-615 of the Code. As to counts I through III, defendants argued that those counts should be dismissed because, "under the unambiguous language of the Settlement Agreement, Stericycle released the Defendants from their obligations ***." In April 2013 the trial court dismissed counts I, II, and III with prejudice in a written memorandum and order. The trial court's order states that defendants' argument "is not a § 2-615 argument" but is properly raised under section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). The court's order states that because plaintiff responded to the merits of defendants' argument the court would

treat the motion to dismiss counts I through III as a motion to dismiss under section 2-619 of the Code.

¶ 20 The Amended Complaint

¶ 21 In August 2013, plaintiff filed an amended complaint for reformation of the written settlement agreement (count I) and, in the alternative, rescission of the written settlement agreement (count II). The amended complaint realleged the transaction between the parties and contains the following pertinent additional allegations of fact: The written settlement agreement differs from the parties' oral settlement agreement as to specific and limited disputes and does not reflect the parties' true intent and agreement as a result of one or both of the following: (1) mutual or unilateral mistake of fact on the part of Stericycle, or both; or (2) material omissions or other misconduct by defendants. When the parties attempted to negotiate a settlement of their dispute over an adjustment in the price of the RR Assets, plaintiff offered to relinquish its claim for an 8 million dollar price reduction in exchange for defendants' cancellation of the promissory note and irrevocable letter of credit. This offer did not include releasing defendants from their obligations under the noncompetition agreements or exclusive software license. During negotiations, the parties never addressed any issues "relating to the separately executed and independently enforceable Noncompetition Agreements and/or Software License."

¶ 22 Defendants' counsel approached plaintiff's counsel after deposing one of plaintiff's witnesses and stated that defendants "hoped that the parties could reach the 'same deal.' " The parties met "to confirm the core and material terms of the Settlement Agreement." Defendants did not request alteration of plaintiff's initial settlement offer. The parties reached

an oral settlement agreement regarding all of the issues in the arbitration as well as the transition agreements dispute.

¶ 23 The only material terms of the oral settlement agreement were that (1) plaintiff would dismiss its arbitration claim for an 8 million dollar price reduction, (2) defendants would cancel the 5 million dollar promissory note and irrevocable letter of credit, (3) defendants would return to plaintiff the funds placed in escrow pending resolution of the arbitration, (4) defendants would dismiss their breach of contract claim against plaintiff, (5) defendants would pay plaintiff $200,000 to resolve the transition agreements dispute, and (6) the parties would mutually release each other "from any other claims for amounts allegedly owed under any of the agreements related to the [purchase agreements]." The parties did not negotiate a release from the noncompetition agreements and exclusive software license and both parties intended the noncompetition agreements and exclusive software license to continue in full force and effect beyond the settlement.

¶ 24 The parties did not discuss the noncompetition agreements or exclusive software license while exchanging written documents to memorialize the oral settlement agreement. Defendants did not request to add any material terms to the settlement. Plaintiff alleges it became aware of a material mistake of fact in the written settlement agreement upon receipt of defendants' correspondence stating their disagreement with plaintiff's view that defendants' obligations under the noncompetition agreements and exclusive software license remained in force. Plaintiff reiterated that the "only material terms" of the parties' settlement agreement were those stated above and specifically that the oral settlement agreement did not include termination or cancellation of the noncompetition agreements or exclusive software license.

¶ 25 Plaintiff alleged that the "parties' written settlement agreement does not conform to the parties' oral Settlement Agreement, which was the parties' true agreement, in material and fundamental ways because the parties never agreed to release either party from their remaining performance obligations under the Noncompetition Agreements and Software License." Plaintiff alleged that a mutual mistake of fact existed at the time the parties executed the written settlement agreement in that:

> "(a) the parties mistakenly failed to exclude the Noncompetition Agreements and the Software License from the mutual general release provisions in the Settlement Agreement;
>
> (b) neither party, upon information and belief, intended for the written Settlement Agreement to extinguish Stericycle's exclusive rights as set forth in the Software License or to terminate, cancel, and declare of no further force and effect the parties' ongoing performance obligations (including Defendants') under the Noncompetition Agreements; and
>
> (c) upon information and belief, Defendants intended to remain bound by the performance obligations set forth in the Noncompetition Agreements and Software License."

¶ 26 Plaintiff alleged that as a result of these mutual mistakes of fact, the written settlement agreement does not reflect the parties' true agreement. Alternatively, plaintiff alleged that the nonconformity resulted from a unilateral mistake of fact by plaintiff in that defendants did intend for the written settlement agreement to release the parties from their mutual

obligations under the noncompetition agreements and exclusive software license and knew the written settlement agreement did not accurately reflect the parties' oral settlement agreement which did not include those material terms. Plaintiff also calls defendants' withholding of that information an intentional omission of material fact upon which plaintiff relied to its detriment.

¶ 27 In support of its claim to rescind the written settlement agreement, plaintiff alleged, in pertinent part, that multiple mistakes of fact occurred resulting in the nonconformity of the written settlement agreement and the oral settlement agreement "notwithstanding the exercise of reasonable and due care by Stericycle" including that plaintiff adhered to the core and material terms of the oral settlement offer, the parties conferred to confirm those core and material terms, and "[t]he parties exchanged draft documents to effectuate the settlement, and Defendants only made minor non-material modifications to the documents relating to release of the escrow funds; in other words, Defendants never sought to add any additional material terms to the Settlement Agreement." Plaintiff alleged that because of its due care, it "did not err in failing to include a more specific exclusion of the Noncompetition Agreements and/or Software License in the written memorialization of the Settlement Agreement."

¶ 28 Finally, plaintiff alleged that enforcement of the written settlement agreement would be unconscionable because defendants would unfairly benefit by retaining the amount plaintiff paid to defendants in exchange for defendants' performance under the noncompetition agreements and exclusive software license, but defendants would never complete their performance obligations. Further, defendants could be placed in *status quo* by rescinding the written settlement agreement.

¶ 29 In September 2013, defendants moved to dismiss plaintiff's amended complaint pursuant to section 2-615 of the Code on the grounds plaintiff failed to allege sufficient facts to state a claim for reformation or rescission and specifically because plaintiff failed to allege any actual mutual mistake. Defendants argued that the only allegation is that the parties never discussed whether or not the parties would be released from the noncompetition agreements and exclusive software license, and that allegation is not enough to reform or rescind the written settlement agreement.

¶ 30 In November 2013, the trial court granted defendants' motion to dismiss plaintiff's amended complaint with prejudice.

¶ 31 ANALYSIS

¶ 32 In this appeal plaintiff argues that the trial court erred when it dismissed counts I, II, and III of the original complaint seeking a declaratory judgment and injunctive relief because the court improperly converted a 2-615 motion to dismiss into a 2-619 motion. Plaintiff argues the trial court's orders granting defendants' motions to dismiss the amended complaint should be reversed because disputed questions of fact remain as to the scope of the written settlement agreement and the parties' intent with regard to its scope, such that the trial court erred in construing the agreement as a matter of law to dismiss the complaint; and the amended complaint contains allegations of specific fact which establish plaintiff's reformation and rescission claims.

> "A motion to dismiss under section 2–615 challenges the legal sufficiency of a complaint. [Citation.] In ruling on such a motion, a court must accept as true all well-pleaded facts in the

> complaint, as well as any reasonable inferences that may arise from them. [Citation.] The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. [Citation.] A cause of action should not be dismissed under section 2–615 unless it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recover. [Citation.] Our review of an order granting a section 2–615 motion to dismiss is *de novo* ***." *Kanerva v. Weems*, 2014 IL 115811, ¶ 33.

¶ 33 A. Declaratory and Injunctive Relief Claims of the Original Complaint

¶ 34 Plaintiff sought a declaratory judgment to construe the parties' written settlement agreement, and preliminary and permanent injunctive relief to secure compliance with the noncompetition agreements and exclusive software license under plaintiff's construction of the settlement agreement. A declaratory judgment action is proper to determine the parties' existing rights under a contract. *Karimi v. 401 N. Wabash Venture, LLC*, 2011 IL App (1st) 102670, ¶ 10; *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 309 Ill. App. 3d 730, 748 (1999). "The declaratory judgment process allows a court to address a controversy after a dispute arises but before steps are taken that give rise to a claim for damages or other relief. [Citation.]" *Id.* "A court may use a preliminary injunction to compel compliance with a contract." *Travelport, LP v. American Airlines, Inc.*, 2011 IL App (1st) 111761, ¶ 33. A

permanent injunction is a proper remedy to enforce a negative covenant in a contract. See *Petrzilka v. Gorscak*, 199 Ill. App. 3d 120, 124 (1990).

¶ 35 1. Propriety of Deciding Motion Under Section 2-619

¶ 36 The trial court found that defendants should have made their argument that the general release in the written settlement agreement defeats plaintiff's claim pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)) and that the court would construe defendants' motion to dismiss as having been brought under the appropriate section. Section 2-619 permits a defendant to file a motion for dismissal of the action on the grounds that the "claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2012). Plaintiff argues the trial court committed reversible error because the court's act prejudiced plaintiff. Plaintiff argues it was prejudiced because, had defendants filed their motion under the proper section, plaintiff would have responded with its own affirmative matter demonstrating the ambiguity in the written settlement agreement. Specifically, plaintiff argues on appeal that it would have submitted affidavits stating that termination of the noncompetition agreements and the exclusive software license were not within the parties' contemplation when they entered the written settlement agreement. "Meticulous practice dictates that a lawyer specifically designate whether her motion to dismiss is pursuant to section 2-615 or section 2-619. [Citations.] The failure to do so may not always be fatal, but reversal is required if prejudice results to the nonmovant." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994).

¶ 37 The trial court did not prejudice plaintiff when it construed defendants' motion as having been brought under section 2-619 of the Code because the trial court only considered

the pleading and the exhibits attached to the pleading. The "affirmative matter" allegedly defeating plaintiff's claim was the plain language of the parties' written settlement agreement. Plaintiff attached the written settlement agreement to its complaint as an exhibit. When ruling on a section 2-615 motion to dismiss, "[e]xhibits attached to the complaint are a part of the complaint and must be considered." *Kirchner v. Greene*, 294 Ill. App. 3d 672, 677 (1998). "An exhibit attached to a complaint becomes part of the pleading for every purpose, including the decision on a motion to dismiss. [Citations.] Where an exhibit contradicts the allegations in a complaint, the exhibit controls. [Citations.]" *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. A complaint is subject to dismissal for failure to state a claim if the exhibits attached to the complaint contradict an essential allegation of the complaint. *Brunette v. Vulcan Materials Co.*, 119 Ill. App. 2d 390, 395-96 (1970) (affirming dismissal of complaint for breach of contract for failure to state a cause of action where exhibits attached to complaint demonstrated parties had not entered a contract but merely exchanged correspondence agreeing to terms to be reduced to writing for formal execution). See also *Jones v. Lazerson*, 203 Ill. App. 3d 829, 836 (1990) ("if the petition were fatally defective because of factual allegations incorporated therein through attached exhibits, this would be tantamount to saying that the petition fails to state a cause of action, a matter properly raised under section 2-615").

¶ 38 In this case, the trial court's written memorandum and order establish that the court only considered the settlement agreement attached to plaintiff's complaint. Despite the trial court's assertion it considered defendants' motion brought pursuant to section 2-619, "[i]n light of the record, we find that defendants did not include matters beyond those which can

be considered by a court in a section 2-615 motion and, thus, did not convert their section 2-615 motion into a section 2-619 motion." *Kirchner*, 294 Ill. App. 3d at 678-79. Nor do we find that plaintiff was prejudiced in its ability to present evidence of ambiguity in the written settlement agreement. The trial court was required to make the initial determination of whether the written settlement agreement was ambiguous from the face of the contract. *Chicago Investment Corp. v. Dolins*, 93 Ill. App. 3d 971, 974 (1981) ("the trial court must decide whether a document's language is ambiguous or not, since that decision itself is a matter of law [Citation.]"); *USG Interiors, Inc. v. Commercial & Architectural Products, Inc.*, 241 Ill. App. 3d 944, 947 (1993) ("The Illinois Supreme Court has held that courts must initially determine, as a question of law, whether the language of a purported contract is ambiguous as to the parties' intent and, if the language of the contract is clear and explicit, then courts, as a matter of law, must derive the parties' intent and the meaning of the instrument solely from the writing itself").

¶ 39 The trial court's written memorandum and order does not suggest the court considered any matters that did not appear on the face of the pleadings, including the exhibits attached thereto, to determine that the written settlement agreement was unambiguous. The trial court found that the written settlement agreement specifically provided that defendants' obligations under the noncompetition agreements and the exclusive software license were terminated and that there was no ambiguity in the release language. "If the language in the contract is clear and unambiguous, the judge must determine the intention of the parties solely from the plain language of the contract and may not consider extrinsic evidence outside the 'four corners' of the document itself. [Citation.]" (Internal quotation marks omitted.)

Owens v. McDermott, Will & Emery, 316 Ill. App. 3d 340, 344 (2000). Plaintiff would have been prohibited from presenting evidence to refute the trial court's construction of the written settlement agreement as a matter of law. Accordingly, plaintiff did not suffer prejudice from the manner in which the trial court decided defendants' motion to dismiss.

¶ 40 2. Ambiguity in the Written Settlement Agreement

¶ 41 Since we determine that the plaintiff suffered no prejudice in the manner in which the trial court considered the motion to dismiss, we next turn to our review of the trial court's determination that the written settlement agreement is not ambiguous and that the parties' intent must be derived from the four corners of the contract. We disagree with the finding of the trial court that plaintiff has not sufficiently alleged ambiguity.

¶ 42 Plaintiff does not dispute that the language of the general release provision, standing on its own, does in fact release defendants from their obligations under the noncompetition agreements and the exclusive software license. The only real dispute is whether the written settlement agreement is ambiguous, such that the question of the parties' intent when entering the general release provision becomes a question of fact that cannot be resolved on a motion to dismiss. *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 288-89 (1990) ("If the language of an alleged contract is ambiguous regarding the parties' intent, the interpretation of the language is a question of fact which a circuit court cannot properly determine on a motion to dismiss").

¶ 43 Plaintiff argues the written settlement agreement is ambiguous as to whether it was the parties' intent to terminate defendants' obligations under the noncompetition agreements and the exclusive software license. Plaintiff argues this ambiguity is evidenced by the fact the

parties did not specifically and expressly terminate those obligations in the settlement agreement while the parties did specifically and expressly terminate the promissory note and letter of credit, and because nothing about those ancillary agreements was the subject of the arbitration proceeding. Plaintiff also asserts the parties never discussed terminating the noncompetition agreements and exclusive software license as further evidence of the parties' intent they remain in effect. Defendants respond the provisions regarding the promissory note and letter of credit are inapposite. Defendants also cite *Goodman v. Hanson*, 408 Ill. App. 3d 285 (2011), in support of their argument that this court may not inquire into the circumstances surrounding the entry of the release because the release at issue is specific, and the obligations at issue fall within the scope of the specific language of the release.

¶ 44 In construing releases from liability, the court has drawn a distinction between a general release and a specific release. A "general release" releases a party from, for example, "any and all manner of actions, whatsoever, known or unknown, in law or in equity, or for any other reason whatsoever, from the beginning of the world to the date hereof." *Goodman*, 408 Ill. App. 3d at 293. A "specific release" references a specific transaction, occurrence, or category of harm on its face. *Thornwood v. Jenner & Block*, 344 Ill. App. 3d 15, 21 (2003) ("In many cases, a release makes clear on its face what claims were within the contemplation of the parties at the time the release was given"). See also *Goodman*, 408 Ill. App. 3d at 294 (release of claims arising out of specific litigation or related to administration of estate); *Gavery v. McMahon & Elliott*, 283 Ill. App. 3d 484, 485 (1996) (release of all claims against law firm related to its work on a purchase agreement and a noncompetition agreement).

¶ 45 The release provision in the written settlement agreement in this case contains both general and specific language. The release states, in pertinent part, as follows:

> "Except for the right to enforce the terms of this Agreement, the Stericycle Parties, on behalf of themselves and their predecessors, successors, affiliates, directors, officers, shareholders, and assigns, hereby release the RQA Parties *** from any and all claims, demands, obligations, liabilities or causes of action in law or equity, or as a result of arbitration, whether known or unknown, suspected or unsuspected, liquidated or unliquidated, whether or not presently accrued or known by the Parties, including but not limited to any and all claims, demands, obligations, liabilities or causes of action arising from or pertaining in any way to the APA Agreements."

¶ 46 Releases containing the language before the phrase "including but not limited to" have been held to constitute a general release. *Goodman*, 408 Ill. App. 3d at 293 ("the release as a whole is general"). The language following the phrase "including but not limited to" is in the nature of a specific release. In this case, a specific release of, in pertinent part, defendants' obligations under the noncompetition agreements and exclusive software license. See *Id.* at 294. The court has held that a release listing both specific claims, dates, and injuries, as well as more general language regarding any other accident or injury "is ambiguous because it contains conflicting release provisions that express different intentions." *Countryman v. Industrial Comm'n*, 292 Ill. App. 3d 738, 741 (1997).

¶ 47 The *Goodman* court, also construing a release with both general and specific terms, limited the release to its "specific" terms to determine if the claim at issue was barred, but only because the "plaintiff stated in his complaint and affidavit that he was unaware of other claims at the time of signing the release." *Goodman*, 408 Ill. App. 3d at 293-94 ("If a release is a general release and the releasing party was unaware of other claims, the release is restricted to the specific claims contained in the release agreement"). The *Goodman* court found that the release in that case did bar the claim at issue because the claim fell within the specific category of claims delineated in the release even though the release did not expressly list the exact claim. *Id.* at 297. However, the *Goodman* court's rationale for construing the release as a specific release, rather than a general release, would not apply in this case where plaintiff makes no claim it was not aware of the existence of any exhibit to the purchase agreements and especially not the noncompetition agreements and exclusive software license. Therefore, in the context of this case, the release at issue is not a specific release.

¶ 48 Moreover, the release purported to relieve the parties of all "claims, demands, obligations, liabilities or causes of action arising from or pertaining in any way to" every one of the agreements between the parties even though some of those agreements were separated by 4 years, they involved distinct corporate entities, and their effects spanned North America, Europe, Australia, and Asia. As between these parties, the release "contains sweeping language which makes it very general." *Thornwood*, 344 Ill. App. 3d at 22. See *Paluch v. United Parcel Service, Inc.*, 2014 IL App (1st) 130621, ¶ 13, *modified*, ("instead of focusing on one clause or provision in isolation we must read the entire contract in context and construe it as a whole"). In *Carlile v. Snap-on Tools*, 271 Ill. App. 3d 833, 835 (1995), the plaintiff entered

an agreement with the defendant for the plaintiff to become a dealer for the defendant. When the plaintiff later terminated the dealer agreement he signed a termination agreement that contained the following release language: "[B]oth parties to this Agreement freely waive any and all claims they may have against each other arising out of the Dealership terminated by this Agreement." *Carlile*, 271 Ill. App. 3d at 836. Although the release referred specifically to the dealership, which was the sole relationship between the parties and the only grounds from which any claims between them might arise, the court construed the language as a general release. *Id.* at 840. The release in this case is similarly all-encompassing of the relationship between plaintiff and defendants.

¶ 49 In *Myers v. Health Specialists, S.C.*, 225 Ill. App. 3d 68, 70 (1992), the court construed the following release language:

> "[Plaintiff] * * * has remised, released and forever discharged and, by these Presents, does * * * remise, release, and forever discharge [defendant] of and from all manner of actions, causes, and causes of actions, suits, debts, sums of money, accounts, * * * damages, judgments, executions, claims and demands, whatsoever, in law or in equity, and particularly, without limiting the generality of the foregoing, from all claims which were or might have been asserted in ***, or in any manner arising from or related to the subject matter of such action or, arising from any employment agreement between the [parties], which [plaintiff] now has against [defendant] or ever had, * * *

> by reason of any matter, cause, or thing, whatsoever, on or at any time prior to the date of these Presents." *Id.* at 70.

¶ 50 The *Myers* court held that the release was not a "special or particular release" as the trial court had found. *Id.* at 75. Rather, the court found that the "sweeping language of the release *** renders it general." *Id.* The court made this finding despite the " 'particularly' provision *** which at first seems to specify a certain set of claims." *Id.* The *Myers* court found that the breadth of the language in the "particularly" clause was "sufficient to transform the 'particularly' provision itself into a general release." *Id.* In this case, because the language following the "including but not limited to" language in the release is so broad and reaches every aspect of the parties' relationship and potential basis for liability, even the "specific" language in the release is itself a general release. *Id.*

¶ 51 The release in this case is a general release, and "[w]here there are only words of general release, the courts will restrict the release to the thing or things intended to be released and will refuse to interpret generalities so as to defeat a valid claim not then in the minds of the parties." *Carlile*, 271 Ill. App. 3d at 839. In this case, we refuse to interpret the generalities in the written settlement agreement to defeat a valid obligation not then in the mind of the parties to eliminate.

> "[A] release will not be construed to include claims that were not within the contemplation of the parties. [Citations.] No form of words, no matter how all encompassing, will foreclose scrutiny of a release [citation] or prevent a reviewing court from inquiring into surrounding circumstances to ascertain whether it

> was fairly made and accurately reflected the intention of the parties. [Citations.]" (Internal quotation marks omitted.) *Goodman*, 408 Ill. App. 3d at 292-93.

¶ 52 The written settlement agreement in this case is ambiguous as to the parties' intent regarding releasing defendants from their obligations under the noncompetition agreements and the exclusive software license. *Countryman*, 292 Ill. App. 3d at 741; *Farm Credit Bank of St. Louis v. Whitlock*, 144 Ill. 2d 440, 447 (1991). In *Whitlock*, the plaintiff bank made separate loans secured by the farm belonging to the parents of children wishing to purchase a farm (first loan) and a second secured by the farm the children purchased (second loan). *Id.* at 443-44. The children defaulted on the second loan and to avoid foreclosure negotiated a transfer of the farm securing the second loan to the bank. *Id.* at 444. As part of the transfer transaction, the children and the bank executed a release of the bank's claims. *Id.* The bank later sought to foreclose the parents' farm. *Id.* at 445. The question on appeal was whether the release was a bar to the bank's foreclosure action. *Id.* The bank argued that the release pertained only to the second loan while the children contended the release applied to both loans. *Id.* at 445-46. The *Whitlock* court found there were specific references in the release agreement to the second loan and none to the first loan. *Id.* at 448. The court also noted, however, that the release agreement released the borrowers from all actions and claims. *Id.* The court held that "[i]t is not clear on the face of the release agreement whether the parties intended to limit the release to Loan # 2 or to extend it to Loan # 1 as well. Thus, we conclude that the parties' intent must be determined from an examination of extrinsic evidence by the trier of fact." *Id.*

¶ 53 The parties in this case entered the written settlement agreement to resolve a dispute over the purchase price of a limited category of assets under the 2010 purchase agreement and monies allegedly owed to plaintiff under a separate agreement. The dispute did not involve the noncompetition agreements, the exclusive software license, or the purchase of any of the other significant assets plaintiff purchased. Further, as plaintiff notes, the parties expressly terminated both the promissory note and irrevocable letter of credit but never mentioned the noncompetition agreements or exclusive software license. *Whitlock* asked whether a specific release that contained general release language was intended to be broad enough to encompass a claim other than the specifically delineated claim. We realize that this case presents the mirror image of *Whitlock*, where the question is whether a general release (and as explained above we construe the release as to the exhibits to the purchase agreements to be a general release) was intended to be more narrow than the general release suggests where the document as a whole contains reference to specific obligations. *Whitlock*, 144 Ill. 2d at 448. The release may or may not relieve defendants of their obligations under the noncompetition agreements and exclusive software license. See *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1017 (2010) ("because the language of the release is broad and general, it may not contemplate release of breach of fiduciary and fraud claims. Even if the release was not a general release, plaintiff has alleged he did not intend to release breach of fiduciary duties and fraud claims thereby creating an additional factual issue"). The answer to that question requires a determination of the parties' intent based on an examination of extrinsic evidence by the trier of fact. *Whitlock*, 144 Ill. 2d at 448. The trial court's judgment dismissing counts I through III of plaintiff's complaint is, accordingly, reversed.

¶ 54 B. Reformation and Rescission Claims

¶ 55 Next, we turn to a consideration of the claims for reformation and rescission of the written settlement agreement to determine whether plaintiff adequately pled those causes of action.

¶ 56 1. Reformation

¶ 57 "An action for reformation is in essence an action to change a written agreement to conform the intention of the parties and the agreement between them. [Citation.] To state a cause of action for reformation of a contract, a plaintiff must allege: (1) the identity of the parties and the existence and substance of an agreement; (2) that the parties agreed to reduce their agreement to writing; (3) the substance of the written agreement; (4) that a variance exists between the parties' original agreement and the writing; and (5) mutual mistake or some other basis for reformation. [Citations.]" *Ringgold Capital IV, LLC v. Finley*, 2013 IL App (1st) 121702, ¶ 31. "Pleadings shall be liberally construed with a view to doing substantial justice between the parties." (Internal quotation marks omitted.) *All Brake & Drive Unit Service, Inc. v. Peterson*, 69 Ill. App. 3d 594, 597 (1979). "[T]he essential test of whether a complaint should stand is whether the complaint informs the defendant of the nature of the claim which he is called upon to meet." *Id.* (citing Ill. Rev. Stat. 1975, ch. 110, par. 42(2), currently 735 ILCS 5/2-612 (West 2012)). "We review *de novo* the trial court's dismissal of these claims pursuant to section 2-615 of the [Code.]" *Id.* ¶ 11.

¶ 58 First, we must clarify the standard that will apply to plaintiff's allegations of "mistake."

> "Mistakes are divided into two groups. The first group consists of those fundamental in character, relating to an essential element of the contract which prevent a meeting of the minds of the parties and so no agreement is made. [Citation.] *** The second group of mistakes involve circumstances in which an actual understanding has been reached by the parties but, through some error, their written contract does not express their actual understanding. The former of these classes constitutes ground for rescission but not reformation, while the latter may be reformed." *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 871 (2008).

¶ 59 "In stating the basis for reformation, a party seeking reformation based on mutual mistake need not allege in express terms that the written instrument was erroneously executed through mistake as long as his pleading sets out specific facts from which such a conclusion is inevitable or fairly deductible. [Citations.] Such facts must be sufficient to answer the basic question of who, when, and where so as to apprise the defendant of the facts giving rise to the claim. [Citation.]" *Schafer v. UnionBank/Central*, 2012 IL App (3d) 110008, ¶ 23. A complaint for reformation is sufficient if it alleges facts from which it appears that the contract does not conform to the intention and agreement of the parties. *Peterson*, 69 Ill. App. 3d at 597 ("While the word 'mistake' is not employed by plaintiff in the complaint where it alleges what the total contract price should have been, plaintiff alleges other facts

from which it appears that the contract does not conform to the intention and agreement of the parties").

¶ 60 Defendants argue (1) the amended complaint fails to allege mutual mistake because plaintiff alleges only silence regarding the noncompetition agreements and exclusive software license and silence on an issue is insufficient to allege mutual mistake, and (2) plaintiff failed to identify a specific provision in the oral settlement agreement that varies from the written settlement agreement. Defendants' arguments primarily address "mistake of fact" as it pertains to a claim for rescission. Defendants do argue that plaintiff's allegation that on information and belief defendants intended to remain bound by the noncompetition agreements and exclusive software license after settlement of the arbitration proceedings is not supported by allegations of specific fact. Defendants also argue that, as alleged in the amended complaint, the addition of the general release is not a variance from the oral settlement agreement but is merely "an additional term that the Parties had not specifically discussed."

¶ 61 The question presented is whether plaintiff alleged sufficient facts to state a claim that the release of defendants' obligations was not the intention of the parties such that the current agreement is contrary to the parties' intent. *In re Marriage of Agustsson*, 223 Ill. App. 3d 510, 518 (1992) ("A mutual mistake occurs when an actual good-faith agreement is reached, but, due to error, the contract is written in terms that violate the understanding of both parties"). In *Agustsson*, the court held there was a mutual mistake of fact where one party interpreted the language of a marital settlement agreement one way while the other party construed the same language to mean something different. *Agustsson*, 223 Ill. App. 3d at 518 ("The evidence reveals that Ann interpreted the language *** to mean she will never pay taxes on her share of

the distribution. Magnus, however construed the same language to mean that each party will be responsible for paying taxes on his share should he decide not to roll the amount over"). *Id.* at 518. The court found that "no specific language concerning tax liability was included" in the marital settlement agreement. *Id.* at 518. Nonetheless, the court held that "[s]ince the tax implications were not discussed at the time of execution, there was no error in failing to include a more specific provision in the agreement." *Id.* at 519. Finally, the court held that even assuming the mistake concerning the agreement was unilateral its decision would be the same. *Id.* at 518. The determining factor was that "by reason of a mistake of fact by one of the parties, not due to his negligence, the contract is different with respect to the subject matter or terms from what was intended." *Agustsson*, 223 Ill. App. 3d at 519. Thus "there was no mutual assent to the terms of the contract." *Id.*

¶ 62 In *Peterson*, the plaintiff-seller filed a complaint to reform a contract for the sale of a tractor to the defendant. *Id.* at 595. The parties had agreed to the purchase price of the tractor and the amount of an allowance against the purchase price for the value of a trade-in. *Id.* The parties were both aware of a lien on the trade-in and, considering the lien, the final purchase price of the tractor should have been approximately $38,000. *Id.* at 595-96. However, when the parties executed the contract they misstated the amount of the lien resulting in the contract stating a purchase price of approximately $26,000. The defendant filed a motion to dismiss the complaint on the grounds "the parties never discussed, and did not agree, that the purchase price *** would be $38,916.30." *Id.* at 596. Specifically, the defendant argued that the complaint did not allege that the parties affirmatively agreed that the purchase price should be $38,916.30 and that a mutual mistake caused the $26,916.30

purchase price to be inserted instead. *Id.* at 597. The court held that the complaint stated a cause of action for reformation. *Id.*

¶ 63 In *Peterson*, the contract included a term to which the parties did not expressly agree (the incorrect sale price) and which was contrary to the parties' true intent. The defendant in *Peterson* argued that the parties were required to have expressly agreed to a contrary term in conformity with their agreement (the correct sale price--which they had not done) for the plaintiff to state a claim for reformation based on the presence of a term that was allegedly not in conformity with their agreement. Stated differently, the defendant in *Peterson* argued the parties must have previously expressly agreed to $38,916.30 as the final purchase price for the plaintiff to state a valid claim to reform the contract to state $38,916.30 as the final purchase price even though the parties did not intend a different price. The *Peterson* court rejected that argument and so do we.

¶ 64 In this case, plaintiff alleges that a release of defendants' obligations under the noncompetition agreements and exclusive software license was (1) not expressly agreed to, (2) contrary to the parties' intent, and (3) erroneously included in the written settlement agreement; just as in *Peterson*, where the wrong price was (1) not agreed to, (2) contrary to the parties' intent, and (3) erroneously included in the written agreement. Defendants in this case argue the parties must have agreed to an exclusion of the noncompetition agreements and exclusive software license from the general release (or to a more specific release provision that delineated the obligations actually released) for plaintiff to state a cause of action for reformation; just as the defendant in *Peterson* argued the parties would have to have agreed to

the purchase price that did conform to the parties' intent for the plaintiff to state a cause of action for reformation. We disagree.

¶ 65 It is not enough to say the parties did not agree that defendants would still be bound after the settlement if plaintiff sufficiently alleges that the parties did not intend that defendants would not be bound. In *Agustsson*, the trial court vacated the judgment incorporating the marital settlement agreement based on a mutual mistake of fact with regard to a provision in the agreement that the parties interpreted differently. The court held their divergent intents with regard to the effect of the provision caused a mutual mistake of fact which justified vacation. *Id.* at 517-18. Similarly, in this case, the amended complaint alleges that the written settlement agreement contains a provision which is contrary to both parties' intent. In this case, plaintiff alleges it interpreted the language in the release one way--so as not to include the noncompetition agreements and exclusive software license--while defendants interpreted the release provision to mean something different. The alleged reason plaintiff interpreted the release that way is irrelevant at this stage of the proceedings. *Howard A. Koop & Associates v. KPK Corp.*, 119 Ill. App. 3d 391, 400 (1983) (intent is a question of fact for the trier of fact). Plaintiff has alleged that both parties intended the agreements at issue to remain in effect after settlement, and we must accept that allegation as true. *Weems*, 2014 IL 115811, ¶ 33.

¶ 66 Plaintiff's allegation is supported by specific fact when the complaint is construed as a whole rather than in isolation. *DuQuoin National Bank v. Vergennes Equipment, Inc.*, 234 Ill. App. 3d 998, 1003 (1992) ("[T]o ascertain the intention of the parties, a court must look to the agreement as a whole, to its nature, purpose, and the subject matter with which it deals ***").

The fact that the payments under the purchase agreements formed part of the consideration for the noncompetition agreements is only evidence of the parties' intent to release defendants' obligations thereunder. The written settlement agreement contains specific releases of the promissory note and letter of credit. The specific release of those agreements, as well as the specific references in the written settlement agreement to (a) plaintiff's enforcement of the guaranty provision relating only to the purchase of the RR Assets, and to transition agreements, and defendants' counterclaims against plaintiff; and (b) both parties' desire to "compromise their differences amicably" in reference to those specific disputes, when contrasted with the sweeping general release of all other obligations, evinces differing intentions as to what the parties intended to release, creating a question of fact. *Countryman*, 292 Ill. App. 3d at 741.

¶ 67 Plaintiff was not required to allege that defendants were mistaken in their understanding of the scope of the release or to point to a specific provision in the oral settlement agreement that varies from the written settlement agreement. The mistake of fact results from the allegation of the presence of a contract term that contradicts the parties' intent. The parties' intent controls and not their express agreements. The court has held that:

> "As the plaintiff in a reformation action is seeking not to rescind or avoid the contract, but instead, to enforce a contract different from that which he signed, he must be able to point to the contract he intended to make and prove a like intention on the part of the defendant. In each of those cases where reformation of [a] contract has been allowed there has been a

> clear showing of what the plaintiff intended to procure from the defendant *** and of the latter's knowledge of that intention, as a result of either express directions *** or by knowledge on the part of the [defendant] of circumstances wholly inconsistent with the provisions of the [contract] as issued." *Phillips v. Salk, Ward & Salk, Inc.*, 20 Ill. App. 3d 359, 368 (1974).

¶ 68 Although the release provision in the written settlement agreement refers to exhibits to the purchase agreements as the obligations being released, plaintiff has alleged that neither the noncompetition agreements or the exclusive software license were discussed in the parties' negotiations. Accordingly, we find that there was no error in failing to include a more specific provision regarding those two agreements. *Agustsson*, 223 Ill. App. 3d at 519. Plaintiff has alleged the substance of the contract the parties' intended to make, pointing to their oral agreement, and alleged that the written settlement agreement is inconsistent with that agreement. Here, the release provision, which does not contain limiting language or a more specific description of what is being released, is allegedly different from what was intended. *Agustsson*, 223 Ill. App. 3d at 519. Under *Agustsson*, the allegations amount to a mutual or unilateral mistake of fact. *Id.* at 518-19.

¶ 69 "[T]here is a vast difference between a mistake in the preparation of a written contract because of which such contract does not fully and truly express the agreements and intentions of the parties, and a mistake of the parties in not agreeing upon a matter which they might have agreed upon[.] [A] court of equity may reform an instrument by inserting a provision therein as to which the parties have agreed and by mistake have omitted, but it cannot make a

new contract for the parties by inserting therein a provision as to which the parties have not agreed." *Smith v. Material Service Corp.*, 312 Ill. App. 433, 457 (1942). For purposes of defendants' motion to dismiss for failure to state a claim, we hold that the amended complaint does allege a mistake of fact and variance from the parties' actual agreement sufficient to support plaintiff's claim. The trial court's judgment dismissing plaintiff's claim for reformation is reversed.

¶ 70 2. Rescission

¶ 71 Next, defendants argue plaintiff's amended complaint fails to state a claim for rescission because the complaint fails to allege a mutual mistake of fact and fails to allege facts demonstrating that enforcement of the settlement agreement as written would be unconscionable, or that plaintiff exercised due care. To state a claim to rescind a contract based on mutual mistake, a party must plead that (1) both parties were mistaken regarding a material feature of the contract; (2) this matter is of such grave consequence that enforcement of the contract would be unconscionable; (3) the plaintiff's mistake occurred despite the exercise of reasonable care; and (4) the other party can be placed in the *status quo*. *Stewart v. Thrasher*, 242 Ill. App. 3d 10, 18 (1993). We are now dealing with that group of mistakes consisting of those fundamental in character, relating to an essential element of the contract which prevent a meeting of the minds of the parties and so no agreement is made. *Wheeler-Dealer, Ltd.*, 379 Ill. App. 3d at 871.

> "A mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in an unconscious ignorance or forgetfulness of a fact

> past or present material to the contract, or belief in the present existence of a thing material to the contract which does not exist, or in the past existence of a thing which had not existed. [Citation.] A mutual mistake is one where both parties understand that the real agreement is what one party alleges it to be, then, unintentionally, a drafted and signed contract does not express the true agreement. [Citation.] The party asserting mutual mistake must show that both parties were mistaken as to a material matter at the time of the execution of the instrument. [Citation.]" *Cameron v. Bogusz*, 305 Ill. App. 3d 267, 272 (1999).

¶ 72 Defendants argue the amended complaint does not identify a fact about which the parties were ignorant or forgetful or which they believed to exist which did not exist, therefore no mistake of fact is alleged. Defendants also argue that plaintiff failed to allege any facts that show that defendants themselves signed the written settlement agreement with a mistaken understanding of its scope. Rather, the only "mistake" is, according to defendants, plaintiff's mistaken belief about the legal operation of the release.

¶ 73 Plaintiff relies on his allegations of mistake of fact in support of the claim for reformation in support of his claim for rescission. But, as we noted, the "mistakes" that support each claim are in different groups. Our review of plaintiff's amended complaint reveals that plaintiff never alleged ignorance of a material fact or a belief in the present or past existence of a material fact which had not existed. *Bogusz*, 305 Ill. App. 3d at 272. There is no need to address whether enforcement of the general release would be unconscionable or

whether plaintiff exercised reasonable care. We find that plaintiff's amended complaint fails to state a claim for rescission based on mutual mistake.

¶ 74 However, a party can also establish an equitable claim for rescission on the basis of fraud and misrepresentation. *23-25 Building Partnership v. Testa Produce, Inc.*, 381 Ill. App. 3d 751, 758 (2008). To state a claim for rescission based on fraud the complaint must allege (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) intended to induce the other party to act; (4) acted on by the other party in reliance on the truth of the representation; and (5) resulting damage." *Testa Produce, Inc.*, 381 Ill. App. 3d at 758. "A misrepresentation is 'material' if the recipient would have acted differently had he been aware of the falsity of the statement, or if the person making it knew the statement was likely to induce the recipient to engage in the conduct in question. [Citation.]" *Id.*

¶ 75 Plaintiff's amended complaint alleges the written settlement agreement resulted from a unilateral mistake of fact based on defendants' intentional omission of a material fact. Specifically, plaintiff's amended complaint alleges defendants did intend for the general release to cancel their obligations under the noncompetition agreements and exclusive software license even though plaintiff never agreed to those terms, and also knew that the general release did not reflect the terms to which the parties did agree in the oral settlement, and intentionally withheld that material fact from plaintiff. The complaint alleges defendants did this to induce plaintiff to consent to the written settlement agreement and that plaintiff relied on defendants' omission to its detriment, because had defendant not omitted those facts plaintiff would not have executed the written settlement agreement. This is not an allegation of unilateral mistake of fact but of fraud.

¶ 76 Defendants respond plaintiff made no attempt to allege that defendants did anything to mislead plaintiff and support that assertion by characterizing plaintiff's allegations as a claim that defendants were required to correct plaintiff's mistaken understanding of the written settlement agreement. Defendants then argue that they had no notice that plaintiff was mistaken and no allegations suggest defendants were on notice that the release encompassing the noncompetition and software obligations was not intended by the parties. Finally, defendants argue plaintiff's mistake about the release was a mistake of law as to the effect of the language and not a mistake of fact that would justify rescission.

¶ 77 Plaintiff's allegation is not that defendants should have corrected plaintiff's mistaken view of the legal effect of the language of the general release on its face. Plaintiff's allegations do not state a mistaken opinion about the legal effect of the general release provision on its face. Plaintiff alleges a mistaken opinion about defendants' intent with regard to the scope of the general release and that their mistake resulted from defendants' omission. It is true that "[t]he parties' intent as to the scope of a contract is irrelevant where the language of the contract is clear and unambiguous." *Bysom Enterprises, Ltd. v. Peter Carlton Enterprises, Ltd.*, 267 Ill. App. 3d 1, 9 (1994). However, we have found that this contract is ambiguous. *Countryman*, 292 Ill. App. 3d at 741; *Whitlock*, 144 Ill. 2d at 447. We have also found no error in failing to include a more specific provision regarding the two agreements at issue. *Agustsson*, 223 Ill. App. 3d at 519. Therefore, plaintiff could have relied on defendants' omission of defendants' intent to plaintiff's detriment.

¶ 78 Plaintiff properly alleges it relied on defendants' silence to enter into a contract where the parties had different intentions with regard to its scope. An omission of material fact is

equivalent to a false statement of material fact for purposes of a fraud claim. *Butler v. Harris*, 2014 IL App (5th) 130163, ¶ 31 ("To prove common law fraud, the plaintiffs must prove that the defendants intentionally made a false statement of material fact or failed to disclose a material fact"). Plaintiff also alleges facts from which we may reasonably infer that defendants knew that the scope of the settlement agreement and defendants' intent in entering the agreement were material and that defendants remained silent to induce plaintiff to enter the agreement without questioning defendants' intent. There is no dispute as to the importance of the noncompetition agreements and exclusive software license to plaintiff's ability to enjoy the full benefit of the assets it purchased from defendants. Moreover, whether or not defendants' correspondence seeking clarification of the scope and effect of the general release evinces defendants' belief that a mistake had been made (an argument about which we make no determination), a reasonable trier of fact could infer, from the timing and language of the correspondence, that defendants lay in wait for the written settlement agreement to be executed before revealing their true intention. In fact, any other purpose for this correspondence is not revealed by the information before this court.

¶ 79 Accordingly, the trial court's judgment granting defendants' motion to dismiss as to plaintiff's claim for rescission is affirmed as to a claim based on mutual mistake and reversed as to a claim based on fraud.

¶ 80 CONCLUSION

¶ 81 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in part, reversed in part, and remanded for further proceedings consistent with this order.

¶ 82 Affirmed in part, reversed in part, and remanded.