2016 IL App (2d) 150715-U
No. 2-15-0715
Order filed April 18, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

SEAN T. HUGHES and MICHAEL V. HUGHES, Plaintiff-Appellants, v. CLOONLARA-HUGHES LIMITED PARTNERSHIP, JAMES P. HUGHES, JR., MAUREEN R. MCKANNA and SHEILA M. FITZSIMMONS, Defendants-Appellees.	)	Appeal from the Circuit Court of Kane County. No. 13-CH-1458 Honorable David R. Akemann, Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in granting dispositive motions on claims brought by minority partners.

¶ 2 This appeal arises out of an ongoing dispute over the management of a farm held by a family's limited partnership, the defendant Cloonlara-Hughes Limited Partnership (Cloonlara). The plaintiffs, Sean and Michael Hughes, are two of the five siblings who are the general partners of Cloonlara. They contend that the individual defendants (the three remaining general

partners, James Hughes, Jr., Maureen McKanna, and Sheila Fitzsimmons) have effectively frozen the plaintiffs out of any meaningful input into management decisions and have breached their fiduciary duties toward the plaintiffs. The trial court either dismissed or entered summary judgment in favor of the defendants on all of the plaintiffs' claims. The plaintiffs appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The Cloonlara limited partnership was formed in 1998. The initial partnership agreement named the five siblings as the general partners and also named certain limited partners.

¶ 5 In 2009, Sean and Michael filed suit against Cloonlara and the three other siblings, alleging that they had been denied access to partnership books and records and had been prevented from participating in the management and conduct of the partnership. The suit was settled. As relevant here, the settlement agreement provided that none of the parties to that suit, nor their attorneys, could "seek reimbursement or payment from Cloonlara for any legal fees, costs or expenses incurred by them for any legal work" completed before the date of the settlement. Further, going forward, Cloonlara would pay only those fees and costs incurred solely on its own behalf.

¶ 6 As was contemplated by the settlement agreement, the parties also entered into an amended partnership agreement. Relevant portions of that agreement provide:

> "Section 1.3 Purpose. The purpose of the Partnership is to acquire, improve, lease, operate, hold for investment, and sell or otherwise dispose of a farm of approximately 718 acres located at 41 W. 296 Hughes Rd., Elburn, Illinois, including three residences appurtenant thereto (the "Property" or the "Cloonlara Farm"), and to

engage in any and all activities related or incidental thereto. The Partnership shall engage in no other business.

* * *

Section 5.4 Powers of the General Partners. Subject to the management covenants and conditions in this Agreement, including, but not limited to, Section 5.1 [a clause relating to the duties of the farm manager], the General Partners shall have the right to manage the business of the Partnership and shall have all of the rights and powers that may be possessed by general partners under the Act [the Delaware Revised Uniform Limited Partnership Act, 6 Del. C. § 17-101 *et seq*.] including, without limitation, the right and power to:

(a) Acquire by purchase, lease, or otherwise any real or personal property that may be necessary, convenient, or incidental to the accomplishment of the purposes of the Partnership;

(b) Operate, maintain, finance, improve, construct, own, grant options with respect to, sell, convey, assign, mortgage, and lease any real estate and any personal property necessary, convenient, or incidental to the accomplishment of the purposes of the Partnership;

* * *

(d) Borrow money and issue evidences of indebtedness necessary, convenient, or incidental to the accomplishment of the purposes of the Partnership, and secure the same by mortgage, pledge, or other lien on any Partnership Property;

(e) Execute, in furtherance of any or all of the purposes of the Partnership, any deed, lease, mortgage, deed of trust, mortgage note, promissory note, bill of

> sale, contract, or other instrument purporting to convey or encumber any or all of the Partnership Property;
>
> (f) Prepay in whole or in part, refinance, recast, increase, modify, or extend any liabilities affecting the Partnership Property ***;
>
> (g) Care for and distribute funds to the Limited Partners and other Unit Holders by way of cash, income, return of capital, or otherwise ***;
>
> * * *
>
> (l) Institute, prosecute, defend, settle, compromise, and dismiss lawsuits or other judicial or administrative proceedings brought on or in behalf of, or against, the Partnership or the Partners in connection with activities arising out of, connected with, or incidental to this Agreement, and to engage counsel or others in connection therewith."

Section 5.2 of the partnership agreement provided that all business of the partnership would be conducted by the majority vote of the general partners, unless the agreement required a supermajority (80%) for a specific action or decision. The agreement specified that its validity, the construction of its terms, and the rights and duties of the partners, would be governed by Delaware law.

¶ 7 In 2013, Cloonlara applied for a $1.8 million loan, to be secured by a mortgage on its property. The plaintiffs disagreed with the decision to seek the loan, which they contended was being sought purely as a way to extract additional monies from the business for the personal benefit of the other partners. In June 2013, the plaintiffs filed this suit. Counts I through III stated claims of breach of fiduciary duty against James, Maureen and Sheila individually, arising from the decision to apply for the loan as well as other decisions relating to the management of

the farm and certain legal actions. Counts IV and V were directed to all of the defendants. Count IV sought a declaratory judgment that (a) the partnership agreement did not permit Cloonlara to take on debt solely for the personal benefit of the partners unless that action was approved unanimously, and (b) the incurrence of such debt was in fact contrary to the partnership agreement. Count V sought judicial dissolution of the partnership, alleging that the management of Cloonlara was "completely dysfunctional" in that the plaintiffs' attempts to weigh in on business decisions had been repeatedly ignored and the other partners had sought to bar the plaintiffs from "interfering" in matters previously decided by a majority vote. This count also alleged that the loan would threaten Cloonlara's ability to carry on its purpose. In December 2013, the plaintiffs filed an amended complaint adding count VI, in which the plaintiffs alleged that the individual defendants had breached the settlement agreement by allowing Cloonlara's attorneys to bill Cloonlara for attorney fees incurred on behalf of the individual defendants in this lawsuit.

¶ 8 To pursue their claim relating to attorney fees, the plaintiffs served a subpoena upon the law firm representing the partnership, seeking documents relating to, among other things, the attorney fees paid by the partnership. The defendants, who had entered into a joint defense agreement, asserted privilege over documents responsive to this subpoena. In December 2013, the plaintiffs filed a motion to strike the defendants' privilege log.

¶ 9 The 2013 loan application ultimately was not granted. However, it was clear that James, Maureen and Sheila still desired to have Cloonlara obtain such a loan, while Sean and Michael continued to oppose it.

¶ 10 In January 2014, the defendants filed a number of motions seeking to dispose of the amended complaint. Specifically, each of the defendants filed a motion to dismiss pursuant to

section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)), or in the alternative, for summary judgment, with respect to counts I through III (against James, Maureen, and Sheila, respectively) and count IV. Those motions argued that, as a matter of law, the partnership agreement permitted Cloonlara to borrow money upon a majority vote to do so. Thus, the defendants argued, they were entitled to judgment in their favor on count IV, and on those portions of count I though III that alleged breaches of fiduciary duty relating to the 2013 loan application. The defendants also filed motions seeking the dismissal of (or grant of summary judgment on) count V, on the basis that the partnership agreement signed by all of the partners did not permit dissolution of the partnership except in the event of specific "liquidating events," none of which had occurred. Finally, the defendants filed motions seeking the dismissal of count VI pursuant to section 2-619(a)(9), on the basis that the claim was barred by the terms of the settlement agreement and partnership agreement.

¶ 11 On February 7, 2014, the trial court heard oral arguments on the plaintiffs' motion to strike the defendants' privilege log. On February 21, 2014, the trial court entered an order requiring the plaintiffs and the individual defendants to appear for deposition within the next week. On March 5, the trial court heard oral arguments on the dispositive motions filed by the defendants, and took that matter under advisement. A week later, the trial court entered a memorandum order finding that the majority of the documents in the privilege log were indeed privileged, but ordering the production (or production in redacted form) of certain of the documents.

¶ 12 On April 4, 2014, the trial court issued a memorandum opinion discussing each count in detail and granting substantially all of the defendants' dispositive motions. As to count IV, in which the plaintiffs sought a declaratory judgment that the 2013 loan application was *ultra vires*,

the trial court held that the partnership agreement unambiguously provided that such a loan could be undertaken upon the affirmative vote of a majority of the general partners. It therefore granted summary judgment in the defendants' favor on this issue.

¶ 13 This holding disposed of almost all of the allegations in counts I through III, the claims that the individual defendants had breached their fiduciary duties toward the plaintiffs. However, the trial court declined to enter summary judgment on certain allegations in those counts, including allegations that the individual defendants had: (1) directed Cloonlara's attorneys to seek a court order barring the plaintiffs from participating in the partnership and from "interfering" in transactions approved by a majority of the Cloonlara partners and the actions of the farm manager; and (2) failed to operate Cloonlara in the best interest of that partnership, maximize the revenue of Cloonlara, or remove the farm managers despite their failure to properly manage the farm. Finally, the trial court denied summary judgment on the plaintiffs' allegations that James breached his fiduciary duty by directing his attorney to make false representations (to the extent that those representations did not relate to the 2013 loan application). As to all of these specific allegations in count I through III, the trial court struck them with leave to replead them in a more definite form.

¶ 14 The trial court also granted summary judgment in favor of the defendants on count VI, the claim that the individual defendants had breached the settlement agreement by directing Cloonlara to pay attorney fees related to the representation of the individual attorneys. The trial court found that the partnership agreement expressly permitted Cloonlara to defend itself against suits such as the one brought by the plaintiffs, and that any benefit that might accrue to the individual defendants as a result of Cloonlara's expenditures on attorney fees in its own defense did not violate the settlement agreement.

¶ 15 Finally, the trial court also granted summary judgment in favor of the defendants on count V, in which the plaintiffs sought to dissolve the partnership. The trial court noted that it was undisputed that none of the triggering events necessary for dissolution under the terms of the partnership agreement had occurred. As to judicial dissolution, although this remedy was available under Delaware law and the plaintiffs "likely" had not waived (through the partnership agreement) their right to seek such dissolution, the high bar necessary for such judicial dissolution "likely" was not met.

¶ 16 The plaintiffs did not file any motion to reconsider or clarify the trial court's order of April 4, 2014. Instead, on May 1, 2014, the plaintiffs filed a second amended complaint comprising only three counts: counts I through III, claiming breaches of fiduciary duties by each of the individual defendants. The second amended complaint included many new allegations spelling out the variety of ways in which the plaintiffs contended that the defendants had breached their fiduciary duty by: applying for the 2013 loan without ascertaining whether such a loan would be financially prudent, and despite an asserted inability of the farm to make the loan payments in the future; improperly hiring attorneys to defend the partnership and take other legal actions against the plaintiffs; failing to maximize the revenue from the farm, often by choosing farm managers, realtors, tenants and others with whom the family members had previous personal relationships; and placing the partners and partnership "in jeopardy" by permitting a tenant to carry on a commercial business on the farm. The second amended complaint did not state any claim against Cloonlara, or refer to counts IV through VI of the amended complaint. The defendants filed a motion pursuant to section 2-619 of the Code, seeking dismissal of the second amended complaint.

¶ 17 On August 6, 2014, Cloonlara entered into a loan agreement whereby it received $1.62 million, mortgaging the partnership property as security. Shortly thereafter, the partnership distributed $250,000 to each general partner. Each of the general partners accepted and deposited the funds he or she received.

¶ 18 On January 15, 2015, the trial court issued a memorandum decision partially granting the defendants' section 2-619 motion, dismissing those paragraphs asserting a breach of fiduciary duty through the hiring and directing of attorneys. The trial court permitted the remainder of the allegations to stand.

¶ 19 On January 21, 2015, with leave of court, the plaintiffs filed a third amended complaint. The allegations were substantially similar to those of the second complaint, with the following differences: the plaintiffs alleged the existence of the 2014 loan (and complained of it in the same manner as the previous allegations relating to the 2013 loan application); and the paragraphs relating to the hiring and direction of attorneys were restated, but with a notation that they had been dismissed and were being included solely to preserve them for appeal. Counts IV through VI were also included with the same notation, despite the fact that those counts had not been dismissed but rather had been resolved through summary judgment in favor of the defendants.

¶ 20 The defendants filed three motions to dismiss the third amended complaint. The first sought to strike the allegations previously dismissed or stricken by the trial court, as well as counts IV through VI, upon which summary judgment had been entered. The trial court denied this motion, finding that most of the allegations and counts at issue had been repled solely to preserve them for appeal and had not been forfeited by the fact that they were not included in the

second amended complaint. As to the remaining allegations that were the subject of that motion, the plaintiffs had been given leave to replead them when the amended complaint was dismissed.

¶ 21 The second motion filed by the defendants was a combined motion that sought dismissal pursuant to section 2-619(a)(9) or, in the alternative, summary judgment, as to paragraphs 22 and 30 of the third amended complaint. Those paragraphs asserted that the individual defendants' conduct with respect to the 2013 loan application and the 2014 loan breached their fiduciary duties. The defendants' motion argued that these claims were barred by the trial court's earlier grant of summary judgment on count IV and its holding that loans were permissible upon the affirmative vote of a majority of the partners. The trial court granted this motion, finding that Delaware law provided that no partner could be liable to another partner for breach of fiduciary duty premised on the first partner's "good faith reliance on the provisions of the partnership agreement." 6 Del. C. § 17-1101(e) (2014). Because the court had already held that the 2013 loan application (any by extension the 2014 loan) was a permissible action under the partnership agreement, the alleged loan-related acts could not form the basis for claims that the individual defendants breached their fiduciary duties.

¶ 22 The third motion sought dismissal of paragraphs 25, 26, 33, 34, 37, and 38 of the third amended complaint, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)), on the ground that they did not state a valid cause of action. The essence of this third motion was that none of the acts complained of in those paragraphs (pertaining to the operation of the farm and the decision to allow the tenant to engage in certain allegedly commercial activities) could be undertaken by any of the individual defendants acting alone; rather, they were the result of decisions made by a majority of the partners. As such majority rule was the procedure established in the partnership agreement for the operation of the partnership, these actions by the

majority could not, as a matter of law, form the basis for a claim of breach of fiduciary duty. The trial court agreed with this argument and dismissed these paragraphs of the third amended complaint.

¶ 23 The trial court issued its memorandum decision regarding the three motions on May 5, 2015. On June 16, 2015, upon the plaintiffs' request, the trial court issued an order regarding its May 5, 2015, order, clarifying that the effect of that order had been to dismiss with prejudice all of the substantive paragraphs of counts I through III. The June order included a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason to delay enforcement or appeal, but it did not specify which orders this finding pertained to. On July 1, 2015, the trial court entered an order amending the Rule 304(a) finding in its June order to state that the finding applied to its orders dated April 4, 2014; January 5, 2015; and May 5, 2015. The plaintiffs filed a timely notice of appeal.

¶ 24 II. ANALYSIS

¶ 25 The plaintiffs raise a multitude of issues on appeal, addressing separately each of the three orders appealed from. Rather than take this motion-by-motion approach, we have organized our analysis to focus on the particular claims raised by the plaintiffs. We begin with a preliminary issue: whether the trial court erred in granting summary judgment on most of the claims in the amended complaint on April 4, 2014, given that some discovery was still pending at the time it heard oral arguments.

¶ 26 A. Outstanding Discovery and the Entry of Summary Judgment

¶ 27 Where a party contends that it cannot adequately respond to a dispositive motion because material facts necessary to that response are not yet available or cannot be obtained in time, that party may submit an affidavit pursuant to Illinois Supreme Court Rule 191(b). An affidavit

submitted under that rule must contain "a statement that *** material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise," and the affidavit must "nam[e] the persons and show[] why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief." Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013). When an affidavit of the form specified in Rule 191(b) is filed, "the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof." *Id.* The plaintiffs argue that the trial court's entry of summary judgment on April 4, 2014, was premature, because their response to the motions included an affidavit by Sean regarding pending discovery. In addition, the trial court had not yet ruled on the plaintiffs' motion to strike a privilege log.

¶ 28 In evaluating the plaintiffs' argument on this point, we consider the relevant procedural history. The defendants' motions to dismiss or grant summary judgment on the amended complaint were filed in January 2014. The plaintiffs received 28 days to file their response. The record does not reflect any request by the plaintiffs for additional time to conduct discovery before responding.

¶ 29 On February 18, the plaintiffs filed a combined response to the motions, to which they attached an affidavit by Sean. The affidavit stated that the depositions of all of the parties would take place over the next 10 days, and the depositions of between 8 and 10 non-parties would be taken before the end of March. The affidavit also described the likely areas of inquiry in some detail. However, nowhere (in either the response or the affidavit) did the plaintiffs state that they

could not respond adequately to the pending motions without completing the listed discovery. To the contrary, the plaintiffs filed their response without requesting any additional time to allow the completion of that discovery. (The plaintiffs did file a motion to compel the defendants' appearances for deposition, but that was after filing their response.) Nor did Sean, in his affidavit, identify what testimony he believed the deponents would give, state the reasons for his belief, or describe how that testimony could permit the plaintiffs to stave off dismissal or summary judgment. Thus, the affidavit did not comply with the requirements of Rule 191(b). Accordingly, the affidavit did not trigger any obligation by the trial court to consider whether the plaintiffs needed more time to conduct discovery before responding, and the plaintiffs cannot now complain that discovery was still pending. *Giannoble v. P&M Heating & Air Conditioning, Inc.*, 233 Ill. App. 3d 1051, 1064-65 (1992) (the failure to comply with Rule 191(b) defeats an argument on appeal that summary judgment was prematurely entered when discovery was still pending; that rule requires more than a general assertion that outstanding discovery may provide additional information about relevant issues); see also *Emerson Electric Co. v. Aetna Casualty & Surety Co.*, 281 Ill. App. 3d 1080, 1089 (1996); *Intercontinental Parts, Inc. v. Caterpillar, Inc.*, 260 Ill. App. 3d 1085, 1091 (1994).

¶ 30 In support of their contention that the trial court entered summary judgment prematurely, the plaintiffs cite *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, in which this court affirmed a trial court's decision to stay the resolution of a pending motion for summary judgment until the plaintiff received answers to outstanding discovery requests and was able to depose certain key witnesses. *Jiotis* is distinguishable, however, because the plaintiff there filed a motion asking the court to order the completion of discovery and allow the plaintiff extra time to respond, and the trial court did just that. Here, by contrast, despite pointing out that discovery

was not complete, the plaintiffs did not argue that this fact prevented them from adequately responding to the defendants' motions, and they did not seek more time. Thus, they waived the protection offered by Rule 191(b). *Jiotis* does not compel us to reach a different result.

¶ 31 The plaintiffs also point out that their motion to strike the defendants' privilege log was still pending at the close of briefing and when oral arguments were heard. However, the trial court ultimately resolved the motion to strike prior to issuing its decision on the defendants' dispositive motions. Having been resolved, the motion to strike did not prevent the trial court from properly ruling on the dispositive motions.

¶ 32 We also note that all of the parties' depositions had been taken by the time of the oral argument. If material facts preventing the entry of summary judgment had come to light in those depositions, the plaintiffs could have so advised the court and sought leave to file a supplemental response. Indeed, even after the trial court ruled, the plaintiffs could have moved for reconsideration on the basis of any late-discovered facts, but they did not do so. Nor have they identified, on appeal, any facts that emerged after their response was filed that should have prevented the entry of summary judgment. For all of these reasons, we find that the trial court did not err in reaching the merits of the defendants' dispositive motions in its April 4, 2014, order. Having resolved this procedural issue, we now turn to the substantive issues raised on appeal.

¶ 33 B. Claims Relating to the 2013 Loan Application and 2014 Loan

¶ 34 On April 4, 2014, the trial court granted summary judgment in favor of the defendants on on count IV of the amended complaint, and the related portions of the breach of fiduciary duty claims in counts I through III. Count IV requested a declaratory judgment about whether, under the partnership agreement, the 2013 loan application was within the partnership's powers, and if

so, whether it could be approved by a simple majority of the partners. Counts I through III alleged breaches of fiduciary duty by James, Maureen and Sheila based on, among other things, these defendants' conduct in initiating the 2013 loan application. The plaintiffs realleged these claims in the second amended complaint and the third amended complaint, supplementing them with additional details including allegations about the 2014 loan. The trial court never reconsidered its initial entry of summary judgment on these claims, however, and in its May 5, 2015, order, it relied on that initial determination in dismissing the allegations relating to the 2014 loan. Thus, our review focuses on whether the entry of summary judgment was correct.

¶ 35 "The purpose of summary judgment is to determine whether a genuine issue of material fact exists, not to try a question of fact." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). Therefore, summary judgment is proper only when the pleadings, depositions and admissions on record, together with any affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2008); *Gaylor v. Village of Ringwood*, 363 Ill. App. 3d 543, 546 (2006). Although summary judgment has been called a "drastic measure," it is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001) (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). In reviewing a trial court's grant of this relief, we consider only whether the evidence presented was sufficient to create an issue of fact. See *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001). We review the grant of summary judgment under a *de novo* standard (see *Morris*, 197 Ill. 2d at 35), and will reverse if we find that a genuine issue of material fact exists.

¶ 36 The trial court found that the terms of the partnership agreement were unambiguous and that section 5.2(d) of the agreement expressly permitted the partnership, through the usual procedure of a majority vote of the partners, to borrow money as "necessary, convenient, or incidental to the accomplishment of the purposes" of the partnership. The plaintiffs alleged that the 2013 loan application and the 2014 loan did not fall within this clause, because the purpose of borrowing money was to permit the distribution of cash to the partners, an objective driven by the personal needs of some of the defendants. On appeal, the plaintiffs argue that there were disputed questions of fact on this issue.

¶ 37 To determine whether the 2013 loan application (and the 2014 loan) were permitted by the partnership agreement, we begin by examining the terms of that agreement. "The primary objective in construing a contract is to give effect to the intent of the parties." *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). "When construing a contract, courts traditionally apply the 'four corners rule' and look to the language of the contract alone to give effect to the intent of the parties." *West Bend Mutual Insurance Co. v. Talton*, 2013 IL App (2d) 120814, ¶ 19 (citing *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999)). If the language of a contract is clear and facially unambiguous, the court interprets the contract as a matter of law without the use of extrinsic evidence. *Id.;* see also *Gallagher*, 226 Ill. 2d at 233 (the language of a contract, given its plain and ordinary meaning, is the best indication of the parties' intent). Thus, if a motion for summary judgment is grounded in a legal issue involving contract interpretation, a court resolving that motion may not consider extrinsic evidence regarding the contract's terms unless the contract is ambiguous. *Talton*, 2013 IL App (2d) 120814, ¶ 19; *Air Safety*, 185 Ill. 2d at 462; see also *Hickey v. A.E. Staley Manufacturing*, 995 F.2d 1385, 1389 (7th Cir. 1993) ("when one party files a motion for summary judgment requiring interpretation of a contract, the

*** court must determine (1) if the contract is ambiguous or unambiguous and (2) if it is ambiguous, whether after consideration of the extrinsic evidence, there are any triable issues of fact"). The construction of a contract is an issue of law, which we review *de novo*. *Gallagher*, 226 Ill. 2d at 219.

¶ 38 In this case, the trial court found that the terms of the partnership agreement were unambiguous, and the plaintiffs have not argued otherwise. Accordingly, we look solely to the language of that agreement to determine whether the 2013 loan application (and 2014 loan) were permissible and whether the plaintiffs' allegations about the purpose of the loan create any dispute about that issue.

¶ 39 As noted above, section 5.4(d) of the partnership agreement permitted Cloonlara, upon the affirmative vote of a majority of the partners, to borrow money as "necessary, convenient, or incidental to the accomplishment of the purposes" of the partnership. Under this clause, the loan need not have been *necessary* to accomplish the purposes of the partnership—a loan was permitted even if it was merely "incidental" to those purposes. The purposes of the partnership, as defined in section 1.3 of the partnership agreement, are quite broad: "to acquire, improve, lease, operate, hold for investment, and sell or otherwise dispose of *** [Cloonlara Farm], and to engage in any and all activities related or incidental thereto." The plaintiffs argue that borrowing money and mortgaging partnership property in order to finance a cash distribution to the partners is not within the purposes of the partnership. However, section 1.3 essentially permits the partners to take almost any action with respect to the partnership that they wish, including treating the farm property as an investment, selling it entirely, or otherwise disposing of it. Even assuming that the loan was motivated by the individual defendants' desires for a cash payout and did not directly "benefit the partnership," the 2013 loan application and 2014 loan did not exceed

the broad purpose stated in the partnership agreement and was not *ultra vires*. The plaintiffs have not shown the existence of any factual disputes that would vary this result.

¶ 40 We also reject the plaintiffs' contention that, even if a loan under these circumstances was within the power of the partnership, such a loan could only be undertaken pursuant to a unanimous vote of all partners. Section 5.2 of the partnership agreement permits the exercise of most powers upon a majority vote of the partners, and the plaintiffs have not shown why this provision would not apply to the voting procedure for a loan. Accordingly, the trial court properly granted summary judgment in favor of the defendants on count IV.

¶ 41 In light of this holding, summary judgment in favor of the individual defendants was also correct as to all portions of counts I through III that were based on the alleged impropriety of the 2013 loan application and 2014 loan. As the trial court noted in its May 5, 2015, order, under Delaware law, actions taken by a partner in good-faith reliance on the provisions of the partnership agreement cannot give rise to a claim of breach of fiduciary duty. See 6 Del. C. § 17-1101(e) (2014). The plaintiffs argue that this provision applies only when a partnership agreement's terms are ambiguous, citing *Continental Insurance Co. v. Rutledge & Co., Inc.*, 750 A.2d 1219, 1240 (Del. Ch. 2000). There, however, the defendant's interpretation was contrary to the unambiguous terms of the contract; the Delaware court merely held that the safe harbor of section 17-1101(e) did not extend to such clearly contrary interpretations. Here, as the terms of the partnership agreement unambiguously permitted Cloonlara to apply for and take out a loan pursuant to a majority vote, the acts of the individual partners in doing so cannot subject them to liability for a breach of fiduciary duty.

¶ 42 The plaintiffs argue that, because the loan provided a personal benefit to the individual defendants (in the form of a payout from the partnership), their actions in approving the 2013

loan application and 2014 loan were equivalent to "self-dealing," a breach of the fiduciary duty that partners owe each other. However, this argument reflects a misunderstanding of the concept of self-dealing, which is the enrichment of a fiduciary at the expense of those to whom the fiduciary owes a duty. See *Prignano v. Prignano*, 405 Ill. App. 3d 801, 812 (2010).

¶ 43 "A majority shareholder, or a group of shareholders who combine to form a majority, has a fiduciary duty to the corporation and to its minority shareholders if the majority shareholder dominates the board of directors and controls the corporation. *In re Reading Co.*, 711 F.2d 509, 517 (3rd Cir.1983) *** (applying Delaware law); *Kaplan v. Centex Corp.*, 284 A.2d 119, 122-23 (Del. Ch. 1971)." *Feldheim v. Sims*, 344 Ill. App. 3d 135, 149 (2003). Majority shareholders or partners may not abuse their position of power by engaging in self-dealing. "Self-dealing occurs when the majority shareholders cause the dominated corporation to act in such a way that the majority shareholders receive something from the corporation to the exclusion and detriment of the minority shareholders." *Id*. at 150.

¶ 44 Here, in opposition to the motions for summary judgment, the plaintiffs produced no evidence that the individual defendants, who form a majority bloc of the partners in Cloonlara, obtained any unequal benefit from the loan. To the contrary, it is undisputed that the proceeds from the 2014 loan were distributed in equal shares to the five partners, including the plaintiffs. The fact that the payments may have been particularly beneficial to some of the partners because of the personal circumstances of those partners does not transform an otherwise proper course of conduct into "self-dealing." Similarly, although the plaintiffs allege that the loan exposed them to "phantom income and tax obligations" and "placed them in financial jeopardy," the record does not reflect that these alleged negative consequences fell disproportionately on the plaintiffs.

Accordingly, we reject the plaintiffs' argument that the individual defendants engaged in self-dealing in connection with the 2013 loan application or the 2014 loan.

¶ 45 We affirm the trial court's April 4, 2014, grant of summary judgment on count IV and those portions of counts I through III of the amended complaint that alleged breaches of fiduciary duty related to the loan application and loan, and also the court's May 5, 2015, dismissal of similar allegations in the third amended complaint.

¶ 46 C. Claims About the Hiring, Direction, and Payment of Attorneys

¶ 47 We next consider the plaintiffs' claims relating to the hiring, direction, and payment of lawyers. These claims included, among others, count VI of the amended complaint, the claim that the individual defendants breached the earlier settlement agreement by causing Cloonlara to pay their individual legal expenses from this lawsuit. In addition, portions of counts I through III of the second amended complaint also fall within this category, alleging that the individual defendants breached their fiduciary duty by: selecting counsel to represent Cloonlara on the basis of previous affiliation; entering into a joint defense agreement between the individual defendants and Cloonlara; barring the plaintiffs from communicating with Cloonlara's attorneys; directing attorneys to file an emergency motion against the plaintiffs; and (in an echo of count VI) using partnership funds to pay the legal expenses of the individual defendants.

¶ 48 As to count VI, the defendants moved for summary judgment, arguing that the plaintiffs could not show that Cloonlara had paid any of the individual defendants' legal fees. The plaintiffs' response essentially conceded this point. However, the plaintiffs noted that the partnership's legal fees amounted to $30,000, far more than "the known legal bills" of any other defendant, the highest of which was about $650. Further, Cloonlara and the individual defendants had entered into a joint defense agreement, and Cloonlara's filings and discovery

responses were almost identical to those of the individual defendants. The plaintiffs argued that these facts showed that Cloonlara was improperly carrying the burden of the defense and that this amounted to a breach of the settlement agreement.

¶ 49 The trial court rejected this argument, noting that the partnership agreement expressly permitted Cloonlara to defend any lawsuit brought against it, and the settlement agreement did not eliminate Cloonlara's authority in this regard. As the plaintiffs had elected to sue Cloonlara (in addition to suing James, Maureen and Sheila), Cloonlara was entitled to pay lawyers to defend itself. The fact that its own defense might overlap with that of the other defendants, or that the other defendants might make use of the work product of Cloonlara's attorneys, did not render Cloonlara's defense improper under either of the relevant agreements.

¶ 50 On appeal, the plaintiffs repeat their earlier arguments, citing the additional facts that, as of the date of discovery responses, James' and Sheila's attorneys had not yet billed those defendants at all, and Maureen's attorney had sent her only one bill. The plaintiffs argue that the fact that Cloonlara's legal bills were so much larger than those of the individual defendants, who had not been billed despite the filing of pleadings on their behalf, is sufficient to show a genuine issue of fact as to whether Cloonlara was improperly paying the legal bills of the individual defendants. However, two of Cloonlara's attorneys filed affidavits averring that Cloonlara had not "knowingly charged to the Partnership fees or expenses of the individual defendants." The plaintiffs have not produced any contrary evidence. Thus, there is no factual dispute that the express terms of the settlement agreement have not been breached. Further, insofar as the products of Cloonlara's defense may have been shared with the attorneys for the individual defendants, we agree with the trial court that nothing in the settlement agreement or partnership agreement prohibits this. Accordingly, the entry of summary judgment on count VI was proper.

¶ 51 The trial court also dismissed the allegations of counts I through III, the breach of fiduciary duty claims, that related to the hiring, direction, and payment of attorneys. In its order of January 15, 2015, the trial court noted that the partnership agreement gave the general partners the right, upon a majority vote, to hire and direct attorneys as they saw fit. Nothing in the partnership agreement prevented Cloonlara from entering into a joint defense agreement with the individual defendants, and having done so, the defendants could exclude the plaintiffs from decisions regarding the conduct of the defense. Similarly, attorney-client privilege and conflict-of-interest principles prevented Cloonlara's attorneys from communicating with the plaintiffs once this lawsuit was filed. Thus, there was no legal basis for the plaintiffs' claims of breach of fiduciary duty based on these allegations. We agree with the trial court's analysis.

¶ 52 The final allegations in this category relate to actions taken by James's attorney, purportedly on behalf of the partnership, in the spring of 2013. First, after the plaintiffs told the lender from whom Cloonlara was attempting to borrow money that Cloonlara was not authorized to do so because such loans required a unanimous vote, James's attorney wrote to the lender, denying the plaintiffs' assertions and urging the lender to proceed with the loan. Second, James filed an emergency motion seeking declaratory and injunctive relief against the plaintiffs. The motion noted the plaintiffs' interference in the 2013 loan application process, and also the plaintiffs' direct contact with the farm manager of Cloonlara Farm in contravention of the partnership agreement, which provides that the elected managing partner will be the sole representative of the partnership in all dealings with the farm manager. (The managing partner of Cloonlara at the time was Maureen.) The motion sought a declaration that the loan application was proper and an order preventing the plaintiffs from "interfering" in actions approved by a majority of the partners, unless the plaintiffs obtained prior leave of court. Shortly

after the emergency motion was filed, the plaintiffs filed this lawsuit. The trial court ultimately denied the emergency motion.

¶ 53 The plaintiffs contend that these actions by James were improper for two reasons: first, because they lacked a legal basis or improperly attacked some partners' actions; and second, as to the emergency motion, because although the motion was purportedly filed by both Cloonlara and James, the partnership did not authorize in advance the filing of the motion. As to the first reason, the defendants respond that James's actions were in fact legally sound, because the 2013 loan application was within the power of the partnership upon a majority vote and the plaintiffs were violating the partnership agreement. We agree. As we have held herein, the 2013 loan application was a proper action by the partnership. Further, the emergency motion did not constitute a unilateral breach of the fiduciary duty of loyalty owed by partners to each other: it was a response to the plaintiffs' own unilateral decision to ignore and thwart the majority vote of the partners regarding the loan.

¶ 54 As to the propriety of James's representation that he was acting on behalf of the partnership in filing the emergency motion, despite his lack of advance authorization, it is undisputed that Maureen provided an affidavit stating that she, as managing partner, subsequently ratified the filing. (The plaintiffs argue that there is some conflict between the affidavits submitted by James and Maureen on this point, and their deposition testimony. However, our review of the record does not support their argument.) The plaintiffs have not argued that Maureen lacked the power under the partnership agreement to direct the filing of the motion on behalf of the partnership, or that her ratification was legally ineffective in any way. Thus, regardless of its initial lack of authorization, James' action of filing the emergency motion was not improper. These allegations, too, cannot support a claim that the individual defendants

breached their fiduciary duty toward the plaintiffs. Accordingly, we find no error in the trial court's dismissal of all of the allegations in counts I, II, III and VI relating to the defendants' hiring, direction, and payment of attorneys.

¶ 55 D. Remaining Allegations in Breach of Fiduciary Duty Claims

¶ 56 Even after the trial court granted summary judgment as to some of the allegations forming the basis for the plaintiffs' claims of breach of fiduciary duty in counts I through III (the allegations arising from Cloonlara's pursuit of a loan), and dismissed other allegations (relating to the hiring, direction, and payment of attorneys,) there were still some allegations remaining in those counts. The allegations fell into two broad categories: failing to maximize the revenue generated by the farm, as shown by various instances of alleged mismanagement; and subjecting the partnership to unspecified liability by allowing a tenant to operate a commercial activity on the farm, which is zoned for agriculture. On May 5, 2015, the trial court dismissed all of the paragraphs containing these allegations, on the basis that all of the alleged acts and omissions arose from partnership decisions that were properly approved by a majority of the partners. Thus, as discussed in ¶ 41 *supra*, pursuant to section 17-1101(e) of the Act (6 Del. C. § 17-1101(e) (2014)), these acts and omissions cannot form the basis for a claim that the defendants breached their fiduciary duty.

¶ 57 The plaintiffs argue on appeal that the freedom of management allowed by the majority-vote provisions of the partnership agreement is not unlimited. While this may be so, the plaintiffs' allegations reveal only a difference of opinion between themselves and the defendant partners over the best way to manage the farm and whether the farm's zoning really prohibits the tenant's activities. (We note that the plaintiffs have not alleged any concrete harm, such as a financial or other penalty imposed on the partnership or the partners, arising from the tenant's

activities.) The cases cited by the plaintiffs are inapposite, as they concern self-dealing by some partners at the expense of others, a situation that we have already noted is not present here. To the contrary, as fellow partners in a business, the defendants and plaintiffs share a common desire to conduct the business so that it continues to benefit them all in the future. That the plaintiffs disagree with the defendants about the best way to achieve this goal does not transform that difference of opinion into a breach of fiduciary duty. The trial court did not err in dismissing the remaining allegations in counts I through III, the breach of fiduciary duty claims.

¶ 58 We note that, in dismissing these allegations, the trial court stated that although they did not support a claim of breach of fiduciary duty, they could perhaps be repled as a breach of contract claim. Indeed, the possibility that the plaintiffs might assert breach of contract claims was raised at several points during the arguments on the various dispositive motions, but that possibility was always rejected by the plaintiffs. On appeal, the plaintiffs ask that, if we affirm the dismissal of the breach of fiduciary duty claims, we remand with instructions to allow them to file a new complaint asserting breach of contract claims. However, the plaintiffs had ample opportunity to file such breach of contract claims in the trial court, but chose not to do so. We decline their request to assert such claims now.

¶ 59 E. Summary Judgment on Dissolution Claim

¶ 60 The sole remaining issue is the trial court's order on April 4, 2014, granting summary judgment in favor of the defendants on count V, the plaintiffs' request for judicial dissolution of the partnership. The trial court found that this remedy was available under Delaware law and the plaintiffs had not waived their right to seek this remedy by adopting, in the partnership agreement, enumerated methods for dissolving the partnership. However, judicial dissolution is available only when it is "not reasonably practicable to carry on the business in conformity with

the partnership agreement" (6 Del. C. § 17-802 (2014)), and the trial court found that this standard was not met.[1]

¶ 61 The plaintiffs argue that the trial court erred in granting summary judgment on this claim because the statutory standard is met here, or at least there is a genuine factual dispute as to whether the standard is met. In response, the defendants argue that none of the factors justifying judicial dissolution of a limited partnership are present here, and thus the trial court correctly dismissed the plaintiffs' request for such dissolution. The defendants also argue that the plaintiffs agreed to waive their right to seek statutory dissolution by signing the partnership agreement, which provides that, "notwithstanding any provision of the Act," dissolution can take place only after the occurrence one of the enumerated "liquidating events." (It is undisputed that none of the "liquidating events" have occurred.) We need not reach this latter argument, as we agree with the trial court that the plaintiffs have not shown the existence of the circumstances necessary to support judicial dissolution under section 17-802 of the Act.

¶ 62 Section 17-802 of the Act permits a court, within its discretion, to order the dissolution of a limited partnership "whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement." 6 Del. C. § 17-802 (2014). An almost identical provision in the Delaware Limited Liability Corporation Act permits the judicial dissolution of limited liability corporations. 6 Del. C. § 18-802 (2014). Delaware courts look to the case law

[1] Although the trial court qualified its findings with the word "likely," it is clear that the trial court considered them sufficiently established to warrant the entry of summary judgment. Further, the parties have not argued that the trial court's use of "likely" was determinative of any of the legal questions relevant to this claim. Accordingly, when reviewing the correctness of these findings, we treat them as if they did not contain the word "likely."

interpreting both provisions when considering judicial dissolution under either statute. See *Fisk Ventures, LLC v. Segal*, C.A. no. 3017-CC, 2009 WL 73957 *3 (Del. Ch. Jan. 13, 2009).

¶ 63 "Given its extreme nature, judicial dissolution is a limited remedy that [Delaware courts] grant[] sparingly." *In re Arrow Investment Advisors, LLC*, C.A. No. 4091-VCS, 2009 WL 1001682 *2 (Del. Ch. April 23, 2009).[2] However, "not reasonably practicable" does not mean "impossible"—the purpose of the business need not be utterly frustrated to support judicial dissolution. *PC Tower Center, Inc. v. Tower Center Development Associates Ltd. Partnership*, C.A. No. 10788, 1989 WL 63901 *6 (Del. Ch. June 8, 1989). Generally speaking, Delaware courts have found judicial dissolution warranted where either: (1) the management of the business was irretrievably deadlocked, such as where control over the business was split 50/50 between two adverse partners or owners; or (2) the business was insolvent or otherwise unable to perform its purpose as defined in the partnership agreement or corporate charter. See *Haley v. Talcott*, 864 A.2d 86 (Del. Ch. 2004) (granting judicial dissolution where two 50% owners of LLC were deadlocked); *Fisk Ventures*, 2009 WL 73957 *4 (dissolution granted where both

[2] Delaware Supreme Court Rule 14(g)(ii) permits the citation of unreported opinions in briefs. Most observers view this rule as permitting such opinions to be cited as authority. See, *e.g.*, *Cameron International Corp. v. Guillory*, 445 S.W.3d 840, 848 n.1 (Tex. App. 2014) (this rule assigns unpublished cases precedential value); see also *Case Financial, Inc. v. Alden*, C.A. No. 1184-VCP, 2009 WL 2581873, at *6 (Del. Ch. Aug. 21, 2009) (stating that unpublished opinions in Delaware have precedential value); *cf*. Brett R. Turner, *Unpublished Opinions: A 50-State Survey*, 18 No. 11 Divorce Litig. 195 (Nov. 2006) (interpreting the rule as permitting unpublished Delaware opinions to be cited as persuasive authority only).

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factors present); *PC Tower*, 1989 WL 63901 *5 (same). Compare *Roth v. Laurus U.S. Fund, L.P.*, C.A. No. 5566-VCN, 2011 WL 808953 *4 (Del. Ch. Feb. 25, 2011) (dismissing petition for judicial dissolution where purpose of limited partnership could still be carried out, even though continuing the business would require the partnership and its investors to bear "significant costs"); *Homer C. Gutchess 1998 Irrevocable Trust v. Gutchess Cos., Ltd.*, C.A. No. 4916-VCN, 2010 WL 718628 *2 (petition for dissolution could not stand "in the absence of unachievable business purpose and/or deadlock"); *Arrow*, 2009 WL 1101682 *4 (dismissing petition for dissolution where neither factor was present; additional allegations of breach of fiduciary duty were insufficient to save petition).

¶ 64 Applying these principles here, summary judgment was properly granted on count V, as the plaintiffs have not shown the existence of either (1) deadlock preventing the management from acting or (2) frustration of the partnership purpose. The plaintiffs argue that they did raise a factual question as to the existence of the latter factor, because they alleged that the loan application and loan did not align with the purpose of the partnership. However, we have already held that the loan was within the purpose of the partnership. And, although the plaintiffs have alleged that the loan will impair Cloonlara's ability to turn an annual net profit, they have not supported these allegations with any evidence that Cloonlara's continued financial existence is in doubt.

¶ 65 We note that, although the plaintiffs do not argue that the governing body of Cloonlara (the five general partners) is deadlocked—it clearly is not, as the three-two voting pattern the plaintiffs complain of is sufficient to allow the continued operation of the business—they argue that it is so dysfunctional that the partnership should be dissolved to allow the partners to part ways. The plaintiffs point to various events showing the high level of conflict between the

partners: two lawsuits filed since 2008; continued disagreement over the operation of the farm; and a letter from James threatening the plaintiffs with charges of harassment, elder abuse, and criminal trespass if the plaintiffs entered one of the residences on the farm. In addition, in June 2013 the defendants filed the aforementioned emergency motion, seeking a court order to prevent the plaintiffs from interfering in matters previously decided by a majority vote of the partners. None of these facts is disputed; the issue is their legal significance.

¶ 66 Although there is no denying that the plaintiffs are in significant conflict with the other partners of Cloonlara, the plaintiffs have not provided this court with any Delaware case law suggesting that intra-partner conflict is a legally sufficient basis for judicial dissolution where that conflict does not result in management deadlock. The only Delaware cases cited by the plaintiffs are *Haley* and *Polak v. Kobayashi*, No. 05-330-SLR, 2008 WL 4905519 (D. Del. 2008), but both of these cases involved a 50/50 split in control and a resulting deadlock. That deadlock meant that those businesses could no longer truly function because operational decisions could not be made. Here, by contrast, Cloonlara's ability to function through majority vote is not imperiled. There is no suggestion in these cases that mere "dissension among business partners," as the plaintiffs put it, would be sufficient to justify judicial dissolution. The plaintiffs also cite non-Delaware cases, but we decline to consider these as the partnership agreement specifies the application of Delaware law.

¶ 67 As noted above, Delaware courts view the forced dissolution of a business by a court as a "limited remedy" that should be granted "sparingly." *Arrow*, 2009 WL 1001682 *2. Applying Delaware law, as we must, we conclude that the facts shown by the plaintiffs are insufficient to raise a genuine issue about whether judicial dissolution is warranted. The trial court did not err

in granting summary judgment in favor of the defendants on count V, the claim for judicial dissolution.

¶ 68 III. CONCLUSION

¶ 69 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 70 Affirmed.