



¶ 2 This case involves a dispute over two businesses once owned by Eugene G. Callahan and Gerard Kenny. Callahan and Kenny, who were friends and business associates for decades, owned Fulton Associates, LLC, an Illinois limited liability company, and Canal Partners, an Illinois general partnership. Kenny transferred his interests in both entities to his sons, Michael and Christopher. Callahan refused to acknowledge the transfer or work with Kenny's sons.

¶ 3 Kenny's sons then filed a declaratory judgment action, which led to the trial court entering an interlocutory summary judgment order finding (i) Kenny's transfers to his sons were proper, (ii) Callahan had wrongfully withheld paying the Kenny brothers distributions from Fulton and Canal, and (iii) Kenny was the sole manager of Fulton. After an 11-day bench trial, the trial court entered a judgment affirming its interlocutory summary judgment order and finding: (i) Kenny properly transferred his interest in Fulton and Canal to his sons; (ii) Callahan and Fulton should have recognized those transfers; (iii) Callahan breached his fiduciary duties as a member of Fulton, as a partner of Canal, and as attorney for Fulton and Canal; and (iv) Callahan should be dissociated from Fulton and Canal and the Kenny brothers should facilitate the purchases of his interests in both entities. Callahan refused to comply with the judgment, and additional orders were entered to enforce the judgment, including immediately transferring ownership of Fulton and Canal to the Kenny brothers.

¶ 4 Callahan appeals, arguing the trial court erred in finding (i) Kenny properly transferred his Fulton interest to his sons, (ii) Callahan owed fiduciary duties to the Kenny brothers; (iii) Callahan breached fiduciary duties to the Kenny brothers and his fiduciary duties as attorney. He also appeals from the trial court's ruling that (iv) Callahan must be dissociated from Fulton and Canal and (v) immediately transfer his ownership interests in Fulton and Canal without compensation. We agree with the trial court's reasoning in its entirety, and affirm.

¶ 5

## BACKGROUND

¶ 6

Until 2005, Gerard Kenny was president, chief executive officer, and chief operating officer of Kenny Construction. Gerard is the father of Michael and Christopher Kenny. Heide Kenny is Gerard's wife and Michael and Christopher's mother. Eugene Callahan is a licensed attorney. He is married to Kathleen Callahan. The Kennys and Callahans have known each other for more than 40 years. Initially social acquaintances, Gerard and Eugene later entered into several businesses together, and Callahan, who Kenny described as "almost like a brother," represented Kenny, his children, and extended family members in legal proceedings, and served as an attorney for Kenny Construction and other Kenny family businesses.

¶ 7

### Canal Partners

¶ 8

In 1983, Kenny and Callahan formed Canal Partners and purchased the partnership's only asset, a parking lot at 230 North Canal Street, Chicago. Under the Canal Partnership Agreement, drafted by Callahan, Kenny was listed as the managing partner, but Callahan handled the general management of the lot, including any legal matters that arose; Callahan's son handled the day-to-day management. The Partnership Agreement included a term addressing the transfer of a partnership interest, stating in relevant part:

"Neither of the Partners shall sell, assign, convey, pledge, hypothecate, encumber, exchange or otherwise transfer for consideration, or gift or otherwise transfer for no consideration, their Interest in the Partnership other than to the other Partner, or to immediate members of their family (defined as spouses or children or grandchildren) or to a trustee for the benefit of the immediate members of their family, without the written consent of both Partners, in which event [the] other Partner shall have the

option of purchasing the interest of the Transferring Partner upon the applicable terms and conditions set forth below."

¶ 9 In November 2009, Callahan transferred his interest in Canal to the Eugene G. Callahan Revocable Trust dated May 9, 2007 ("Callahan Trust").

¶ 10 Fulton Associates, LLC

¶ 11 In 2001, Kenny and Callahan formed Fulton Associates, LLC, a member-managed limited liability company. Gerard Kenny and Kathleen Callahan were the initial members of Fulton. Eugene Callahan said he was advised that his wife rather than he should be the named member because a judgment in an unrelated case had been entered against him. Fulton Associate's sole asset was a building at 222 N. Canal Street, next to the parking lot, which Fulton purchased in 2001. The building had different tenants over the years, but its most recent lessee, Access Community Health, departed in March 2014.

¶ 12 Like the Canal Partnership Agreement, the Fulton Operating Agreement addressed the assignment of a membership interest, stating, in part:

"None of the Members shall sell, assign, convey, pledge, hypothecate, encumber, exchange or otherwise transfer for consideration, or gift or otherwise transfer for no consideration, their Membership Interest, which transfer shall include such Member's Economic Interest, in the Company other than to Members of the Company or to immediate family (defined as spouses or children or grandchildren of Members of the Company) or to a trustee for the benefit of the immediate family members of their family, without the written consent of Members holding at least one hundred percent (100%) of the Percentage Interest of the Company, unless they give written notice of such desire to each of the other Members, in which event the other Members, or the

Company, shall have the option of purchasing the interest of the Transferring Member upon the applicable terms and conditions set forth below."

¶ 13 Kathleen Callahan remained the named member of Fulton Associates until August 1, 2009, when she transferred her interest to the Callahan Trust. She did not obtain Kenny's consent before making the transfer.

¶ 14 While Kenny was listed as sole manager of Fulton, Callahan managed the company's day-to-day operations and handled all legal matters that arose. Callahan received a monthly \$1,500 management fee from Fulton until November 2010, when the monthly amount increased to \$1,800. (Plaintiffs contend the fee was paid to Callahan's law firm, not Callahan individually.) Callahan asserts Kenny consented to the \$300 fee increase; Kenny denies that. When Access Health moved out, Callahan stopped paying himself the management fee.

¶ 15 In 2002, Bank One, N.A. sued Kenny for repayment of a loan he took out for a hotel development project. Callahan represented Kenny in the suit and before the case went to judgment, Kenny entered into a settlement agreement with Bank One, which Callahan claims called for a lien against the 222 N. Canal building. Plaintiffs contend, however, that the settlement only called for a lien on the net proceeds of the sale of the building. (The settlement agreement is referred to as the "Cadlerock Settlement," because Cadlerock LLC was Bank One's assignee.)

¶ 16 **Whoriskey Loan**

¶ 17 In 2009, the existing mortgage on the 222 N. Canal building and the parking lot were coming due and Callahan obtained a replacement loan. Fulton and the State Bank of Countryside, as Trustee under Trust Agreement Dated July 26, 2011 and Known as Trust No. 01-2329, were the mortgagors on the loan. (Canal Partners was the sole beneficiary under the

Countryside Trust.) The mortgagee was Whoriskey, LLC, which was managed by John McGarry, a real estate attorney who has known Callahan for more than 40 years. The mortgage listed Kenny and Callahan as the “sole members and managers of Fulton Associates, LLC,” even though Callahan was neither a member or a manger, and it prohibited Fulton from transferring any membership interest without the mortgagee’s prior written consent. The mortgage further provided that any “false or misleading” representations would constitute a default.

¶ 18 On August 9, 2009, a Sunday, Callahan called Kenny early in the morning to ask for signatures on the Whoriskey loan documents, which was scheduled to close the next morning. Callahan, Kenny, and Heide Kenny signed the documents, which included their personal guarantees to pay the promissory note. The loan closed the next day.

¶ 19 **Kenny Transfer**

¶ 20 The day the Whoriskey loan closed, Kenny executed two documents selling his partnership interest in Canal and his membership interest in Fulton to his sons, Michael and Christopher. More than a year earlier, on March 8, 2008, Kenny had entered into a purchase option agreement with his sons for an option to purchase his interest in Fulton and Canal. On July 31, 2009, Michael and Christopher sent their father notice that they were exercising their option to purchase. The transaction was completed on August 10, 2009. Callahan learned of the transfer at a meeting later that day, when Kenny asked him to sign a document consenting to the transfer. Callahan refused to sign, claiming that Kenny had not obtained consents from Cadlerock and Whoriskey for the transfers and he believed Kenny was trying to evade obligations to creditors.

¶ 21 After the transfer, Callahan continued to refuse to acknowledge the Kenny brothers as members of Fulton and partners of Canal and did not consult them or obtain their consent when

he took actions on the companies' behalf. For instance, in September 2009, Callahan unilaterally appointed himself manager of Fulton, falsifying Articles of Amendment, because he "felt we needed a manager." Callahan also refused to make distributions to the Kenny brothers and instead continued to make distributions from Fulton to Kenny, who signed them over to his sons. Further, despite the transfer in ownership, Callahan continued to direct the companies' accountant to file tax returns that did not reflect the Kenny brothers' ownership, which they contend resulted in \$75,000 in tax penalties.

¶ 22 On January 13, 2010, a check in the amount of \$45,000 was paid to the Callahan Trust from a Fulton and Canal checking account at George Washington Savings Bank. Kenny acknowledged that the day before the check was issued, he and Callahan discussed, but had not agreed, to Kenny paying off some mutual investments, including \$45,000 Callahan had invested in a restaurant. Kenny received a \$25,000 check from Callahan, also dated January 13, 2010, which Callahan said he had not requested.

¶ 23 In August 2010, Callahan hired attorney S. Ira Miller to represent Futon and Canal in this litigation. Until March 2012, Callahan paid Miller out of Fulton funds without obtaining the Kenny brothers' consent. Callahan also hired other attorneys to represent him in a complaint filed with the Attorney Registration and Disciplinary Commission and to represent his wife. He also paid his own law firm \$5,000 for representing him in the ARDC complaint with Fulton funds, without consent from the Kennys.

¶ 24 In December 2010, Callahan improperly transferred about \$195,000 of Fulton's money from an account at FirstMerit Bank into his IOLTA account at Bank of America. Callahan testified that the transfer was a mistake and that the money was transferred out of that account the next day and into an account at First National Bank of LaGrange. But, the new account was

under his law firm's name and federal tax number and named his son as a signatory; Fulton Associates was not named on the account. Callahan opened additional bank accounts using Canal funds, were in the name of "Canal Parking" rather than "Canal Partnership," and were only accessible by Callahan and his son.

¶ 25 On February 20, 2013, Access Health, the sole tenant of the 222 N. Canal building, notified Callahan that they were terminating their lease. Callahan did not notify the other Fulton members for two weeks and the Kennys contend they were prevented from trying to negotiate with Access.

¶ 26 On April 10, 2012, Michael, Christopher, and Gerard Kenny, filed a five-count first amended complaint against Eugene Callahan individually and as trustee of the Callahan Trust, and Fulton and Canal, seeking declaratory relief and damages for breach of fiduciary duty and common law fraud. Specifically, in count I, plaintiffs asked the court to declare that the Kenny brothers rightfully purchased, under the terms of the Fulton Operating Agreement, 50% of Fulton Associates on August 10, 2009, and are the rightful owners of 50% of Fulton since that date. They also asked that Fulton Associates be ordered to pay all distributions due since August 10, 2009, which had not yet been paid and to file amended 2009 tax returns showing the August 10, 2009 ownership interest transfer. In count II, plaintiffs asked the court to declare that the Kenny brothers rightfully purchased, under the terms of the Amended and Restated Partnership Agreement of Canal Partners, 50% of Canal on August 10, 2009, and are the rightful owners of 50% of Canal since that date. They also asked that Canal be ordered to pay all distributions since August 10, 2009 that had not been paid and to file amended 2009 tax returns showing the August 10, 2009 ownership interest transfer. In count III, plaintiffs asked the court to declare Kenny the sole manager of Fulton Associates and order Callahan to cease and desist from identifying

himself as a manager. They also asked the court to order Callahan to return all money he unrightfully paid to himself as manager. In count IV, Michael and Christopher alleged that Callahan breached his fiduciary duties to them as members of Fulton and asked for damages and a disgorgement of all payments made to Callahan or his family since the breaches began. Count V alleged common law fraud against Callahan by paying himself a \$45,000 bonus.

¶ 27 Two additional counts added later, VI and VII, asked the court to dissociate Callahan from Fulton Associates under section 35-45(6) of the Limited Liability Company Act (805 ILCS 180/35-45(6) (West 2014)) and from Canal Partners under section 601 of the Uniform Partnership Act (805 ILCS 206/601 (West 2014)).

¶ 28 On June 26, 2012, Fulton and Canal, through attorney Miller, filed a two-count counter-complaint alleging that Kenny (or his sons, if they are deemed owners of Fulton and Canal) are liable for the attorney's fees owed to Miller for representing Fulton and Canal in two citation proceedings and ancillary matters. On plaintiffs' motion, the circuit court stayed one count and dismissed the other. On April 25, 2014, Fulton, Canal, and Callahan, as trustee, added a third count, seeking immediate dissolution of Fulton and winding up of Fulton's business under section 35-1 of the Limited Liability Company Act (805 ILCS 180/35-1 (West 2014)). The plaintiffs filed a motion to dismiss counts I and II of the counter-complaint and a motion to strike the affirmative defenses. The trial court stayed count I, granted the motion to dismiss count II, and granted the motion to strike the affirmative defenses.

¶ 29 Plaintiffs filed a motion for summary judgment as to counts I, II, and III, the declaratory judgment counts of their amended complaint. The trial court entered an interlocutory order granting plaintiff's motion for summary judgment, in part, finding (i) the Kenny brothers are the rightful owners of 50% of Fulton and Canal as of August 10, 2009, (ii) Fulton and Canal must

pay all distributions owed to the Kenny brothers since that date, and (iii) Kenny is the sole manager of Fulton.

¶ 30 A trial was conducted over 11 days in October 2014 and February 2015. On August 3, 2015, the trial court entered its memorandum opinion and judgment. The court first addressed the parties' credibility stating that "[t]he failure of Kenny and Callahan to abide by the terms of their agreements raises questions about their credibility and creates significant challenges now that they require court-ordered determinations under terms that they have essentially ignored in the past." The court noted that Callahan's contention that he could not recognize Kenny's sale of his interest to his sons because he would then become a party to transactions that violated the terms of the Cadlerock settlement and the Whoriskey loan "ring hollow" given that the formation of Fulton Associates did not reflect the parties' true intent when Callahan's wife was named a member to keep Fulton out of the reach of a judgment against Callahan. The court also noted Callahan's misrepresentations in secretary of state filings regarding the formation of the two entities.

¶ 31 The court noted Kenny also lacked credibility because "in many ways, he failed to take responsibility, and he simply let Callahan take charge." The court found "[i]n essence, the LLC turned out to be an enforceability mess. The members were Kenny and Callahan as trustee. Callahan as trustee became a member based on an assignment done without Kenny's consent or approval. The manager under the law was Kenny. The manager in fact was Callahan, not because Kenny abandoned his duties as manager, but because Callahan and Kenny worked it this way until 2009. The Fulton [Operating Agreement] makes it clear that the members may transfer their interests to immediate family members for consideration or not. Kenny's sale to his sons removed Kenny's right to manage, yet he was the manager under the law, no new manager was

agreed upon, and a manager is required for a manager-managed LCC." But, the trial court emphasized that "although Kenny may be a sophisticated businessman and investor, Callahan is a licensed attorney, and Kenny is not."

¶ 32 After laying out its findings of fact, the court concluded that the summary judgment on counts I, II, and III of plaintiffs' complaint should stand. As to counts I and II, regarding the transfer of Kenny's interest in Fulton and Canal, the trial court found that Kenny's sale of his membership interest in Fulton was permitted under the unambiguous language of the Fulton Operating Agreement, because "the Fulton members intended to permit a member to transfer his or her interest to an immediate family member, with or without consideration, and without unanimous written consent." Similarly, the trial court found that "the unambiguous terms of the Canal Partnership Agreement, analyzed as a whole, reflect the partners' intent to permit a partner to transfer his or her interest in the partnership to an immediate family member, with or without consideration, and with or without unanimous consent. \*\*\* In both the Fulton [Operating Agreement] and the Canal [Partnership Agreement], the parties essentially agreed not to treat immediate family members as they would treat a third-party purchaser."

¶ 33 As to count III, regarding the appointment of Kenny as manager of Fulton, the court acknowledged that when Kenny transferred his interest in Fulton, he was no longer a member of the LLC. The court also acknowledged that the Fulton Operating Agreement provided that the manager must be a member of the company. But, the court found that under the Limited Liability Company Act, the manager does not have to be a member and although the Act provides flexibility, having no manager is not a permissible variation. Thus, the court found that the statutory requirements override the Fulton Operating Agreement, "at least pending further action by the members."

¶ 34 Turning to the breach of fiduciary counts, which were not addressed in the summary judgment proceeding, the court held that although Callahan, who was not named a manager under the Fulton Operating Agreement, "exercised managerial authority" and thus, owed a fiduciary duty to the other members of the LLC. Callahan breached that duty when he refused to recognize Kenny's transfer to Michael and Christopher "especially when Callahan had recently obtained his own interest in Fulton through a similar inter-familial transaction without objection or lack of recognition by Kenny." The trial court determined that Callahan's claim that he acted in "good faith" was not credible because he furthered his own interests after the transfer by continuing to conduct the businesses affairs as if he were the legally recognized manager of Fulton and Canal and made unilateral, unauthorized decisions to the detriment of his fellow partners and other members. These unilateral and unauthorized decisions included (i) hiring attorneys S. Ira Miller, Tenney & Bentley, and William Fitzpatrick and compensating them out of company funds with some misattributions in the accounting; (ii) compensating his own law firm from company funds; (iii) receiving and raising the managerial fee paid to his law firm; (iv) falsifying articles of amendment; (v) opening bank accounts with company funds accessible only by him and his son; (vi) directing the accountant from 2009 to 2014 to file tax returns that did not reflect the Kenny brothers' ownership; and (vii) failing promptly to notify the other members of Fulton that Access, their sole tenant, had terminated its lease. As damages, the court found that Callahan must reimburse the Kenny brothers the attorney's fees charged to them.

¶ 35 Next, the court concluded that as an attorney, Callahan breached his fiduciary duties to Fulton and Canal, causing injury to the entities and indirectly to the Kenny brothers. The breach began with his failure to recognize Kenny's transfers to his son and continued after those transfers when he received unauthorized fees, used his law firm accounts to make unauthorized

transfers of funds, and acted as an unauthorized manager. But, the court concluded that the Kenny brothers could not recover in damages for the injuries to Canal and Fulton.

¶ 36 The court rejected plaintiffs' allegation that Callahan committed fraud by inducing them to pay him \$45,000 under a supposed settlement agreement to compensate for a prior investment. Plaintiffs' evidence of fraud was a letter Callahan wrote to Kenny's wife, Heide, stating that he was entitled to a one-time bonus of \$45,000 from Fulton even though he knew there was no bonus agreement. The trial court stated that plaintiffs did not prove fraud because they failed to show that Heide had a right to rely and did rely on that letter or that plaintiffs relied on the letter. Further, the evidence failed to show Callahan sent the letter to Heide to induce plaintiffs to act or that reliance by Heide equates to reliance by plaintiffs.

¶ 37 Next, the trial court found that even if Callahan breached his fiduciary duty to the Kenny brothers by directing an accountant to file tax returns that failed to reflect their interests, he is not liable for their tax penalty because it is a taxpayer's duty to file a timely return based on the best information available subject to possible amendment.

¶ 38 Finally, the trial court ruled that the Callahan Trust must be dissociated from Canal and Fulton under the Uniform Partnership Act and the Limited Liability Company Act, respectively, because his unauthorized acts subjected the company to substantial attorney's fees, he breached his fiduciary duties to other members, and was unwilling to work with the Kenny brothers. The trial court rejected Callahan's request for dissolution rather than dissociation. The trial court stated that after dissociation, the Callahan Trust's right to participate in the management and conduct of Fulton's and Canal's business terminated, the Callahan Trust's fiduciary duties terminated, and the Trust's duty of loyalty and care continued only with regard to matters arising and events occurring before dissociation.

¶ 39 As to Fulton and Canal's counter-complaint, the trial court found the claims meritless and had not been properly authorized by those two entities. The trial court assessed Callahan for the attorney's fees in bringing the counter-complaint.

¶ 40 In sum, the trial court ordered:

- 1) summary judgment on counts I, II, and III stand as the final declaratory judgment and Fulton and Canal pay all distributions due since August 10, 2009 and file amended 2009 tax returns showing the ownership interest transfer;
- 2) Callahan owes the Kenny brothers \$80,958.51, for breaching his fiduciary duties to Fulton, which is the amount deducted from Kenny distributions from Fulton and paid to S. Ira Miller;
- 3) the Callahan Trust dissociated from Fulton Associates and Canal Partners and all interest in those companies be purchased by Fulton or the Kenny brothers; Callahan, individually and as Trustee of the Callahan Trust, turn over within 14 days turn all funds and documents retained or under his control belonging to Fulton Associates and Canal Partner, including all funds on deposit, all original leases, all original documents representing proof of ownership, all company record books and any and all records or property belonging to Fulton Associates, LLC and Canal Partners, and specifically any accounts holding the assets of either Fulton or Canal at First National Bank of LaGrange; and
- 4) Callahan execute within 14 days all documents necessary or required to transfer ownership of the member interest in Fulton, the partnership interest in Canal, or the land trust holding the Canal Partners' property.

¶ 41 Callahan filed a motion to reconsider, which the trial court denied.

¶ 42 Post-Judgment Proceedings

¶ 43 Callahan refused to comply with the terms of the judgment order and initially refused to turn over Fulton's and Canal's books, records, and bank accounts. Plaintiffs filed a motion to compel and a petition for rule to show cause asking the trial court to direct Callahan to immediately comply with the August 3, 2015 order and for Callahan to show cause why he should not be held in contempt of court. Noting that Callahan had failed to transfer ownership of Fulton and Canal as required by the judgment, the trial court made the transfer by court order.

¶ 44 Shortly afterward, plaintiffs filed an emergency motion to enforce the judgment and a second petition for rule to show case asking that the State Bank of Countryside be ordered to modify the trust agreement to place the power of direction into Michael and Christopher Kenny, as Canal's sole remaining partners after the bank claimed it could not do so because Callahan objected. In the motion, the plaintiffs asserted that due to Callahan's actions, the loan on the properties is in foreclosure and that in settling the foreclosure they agreed to refinance, which they cannot do until Callahan no longer has power of direction over the Countryside Trust.

¶ 45 In response to plaintiffs' motion the trial court ordered: (1) Eugene G. Callahan Trustee be removed from authority or power of direction under State Bank of Countryside Trust dated July 26, 2001, known as Trust Number 01-2329; (2) Canal Partners is the sole beneficiary under the Countryside Bank Trust and Callahan or the Callahan Trust have wrongfully objected to the change of the power of direction; (3) a rule to show cause be entered against defendants for failing to comply with the August 3, 2015 judgment; and (4) continuing the case to November 23, 2015, for defendants to show why they should not be held in contempt of court.

¶ 46 A couple days later, plaintiffs filed an emergency motion for turnover and a petition for rule to show cause claiming Countryside was refusing to comply with the court's order and asking the court to order that Countryside be directed to turn over a Trustee's Deed conveying

the property to Canal Partners and to recognize Michael and Christopher Kenny as the sole parties with power of direction under the trust.

¶ 47 On November 6, 2015, the trial court ordered Countryside to convey the trust property to Canal Partners by trustee's deed and release the deed and trust document to plaintiffs in exchange for plaintiffs' payment of trust fees, including attorney's fees, and a release of the collateral assignment of the beneficial interest.

¶ 48 Callahan timely appealed the August 3 judgment and the three post-judgment orders.

¶ 49 ANALYSIS

¶ 50 Callahan argues: (i) Kenny's transfer of his ownership interest in Fulton was improper and thus, Michael and Christopher do not have standing to assert any claims relating to Fulton; (ii) alternatively, that if the transfer was proper, Callahan did not breach his fiduciary duties and Fulton, Canal, and the Kenny brothers were not injured by his actions.; and (iii) the trial court's decision to dissociate him from Fulton and Canal was unwarranted in light of the facts.

¶ 51 Plaintiffs contends Callahan waived all issues regarding Canal by not arguing them in his brief and all issues regarding Fulton because Fulton did not sign the notices of appeal. Alternatively, they ask us to affirm the trial court.

¶ 52 "Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (1st) 121128, ¶ 43. A triable issue of fact exists "where there is a dispute as to material facts, or where, the material facts being undisputed, reasonable persons might draw different inferences from the facts." (Internal quotation marks omitted.) *Wolfram Partnership, Ltd. v. LaSalle National Bank*, 328 Ill.App.3d 207, 215 (2001). The movant for summary judgment has the

initial burden of proof. *Beltran*, 2013 IL App (1st) 121128, ¶ 43. An appellate court reviews a disposition of summary judgment *de novo*. *Id.*

¶ 53

#### Transfer of Fulton Interest

¶ 54

As a preliminary matter, we must address plaintiffs' contention that Callahan has waived all arguments regarding the trial court's order finding that Kenny properly transferred his interests in Fulton and Canal, that Michael and Christopher are entitled to distributions and amended tax returns from Fulton and Canal, and that Kenny is the manager of Fulton. First, plaintiffs argue that because the trial court order is addressed to Fulton, rather than Callahan, Fulton is a necessary party but has not been joined because it did not file a notice of appeal or sign Callahan's notice of appeal. We disagree. All parties of record in the circuit court are still parties of record in the appellate court, even those who do not join in the appeal. *Wm. Aupperle & Sons v. American National Bank & Trust Co.*, 62 Ill. App. 3d 842, 846 (1978). Thus, even though Fulton and Canal are not named on the notice of appeal, they remain parties.

¶ 55

But, we agree that Callahan has waived all claims regarding the trial court's decision to affirm Kenny's transfer of his Canal partnership interest to his sons and to name himself sole manager of Fulton by failing to raise any argument regarding those issues in his brief. Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) provides that "Points not argued [in the appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Defendants' brief raised no arguments regarding the trial court's findings as to counts II and III of plaintiffs' amended complaint, and thus, those arguments are waived and cannot be raised in the reply brief or a petition for rehearing.

¶ 56

Turning to the merits, Callahan first argues the trial court erred in ruling that Kenny properly transferred his interest in Fulton to his sons. Defendants contend the court relied solely

on the language of the Fulton Operating Agreement and ignored the Cadlerock Settlement, in which Kenny agreed to not transfer his interest in Fulton without Cadlerock's approval and the Whoriskey mortgage, which stated that Fulton would not recognize any transfer of ownership in Fulton during the term of the Whoriskey loan. Callahan asserts that Kenny's transfer constituted fraud against the lender and a breach of the Cadlerock Agreement and that he could not, particularly as an attorney, recognize the fraudulent transfer. Callahan contends that if the transfer was improper, the Kenny brothers were not members of Fulton and had no standing to sue on behalf of Fulton and any relief awarded them as members of Fulton must be vacated.

¶ 57 To determine the validity of the transfer, we look to the language of the Fulton Operating Agreement. When construing a contract, we give the contractual terms their plain and ordinary meaning. *Little v. Tuscola Stone Co.*, 234 Ill. App. 3d 726, 728 (1992). Construing the language of a contract presents a question of law appropriate for summary judgment unless the contract is ambiguous. *People ex rel. Burris v. Memorial Consultants, Inc.*, 224 Ill. App. 3d 653, 656 (1992). Ambiguity arises when there is more than one reasonable interpretation (*Pre-Fab Transit Co. v. Northbrook Property & Casualty Insurance Co.*, 235 Ill. App. 3d 103, 106 (1992)) and is a question of law (*Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d at 340, 348 (2000)). A clear and unambiguous contract requires determining the intent of the parties solely from the plain language of the contract. *Id.* at 344. We review a trial court's determination of a contract *de novo*. *Pennsylvania Life Insurance Co. v. Pavlick*, 265 Ill. App. 3d 526 (1994).

¶ 58 Guided by these principles, we examined the Fulton Operating Agreement and find that the provisions regarding the transfer of a membership interest are unambiguous. As noted, paragraph 10.2(a)(1), which addresses the right of first refusal, prohibits transfers of member interest without the written consent of all other members unless the transfer was to other

members of the company “or to immediate members of their family (defined as spouses or children or grandchildren of Members of the Company) or a trustee for the benefit of the immediate members of their family.” Paragraph 10.2 of the Operating Agreement can only be read to provide that a member may sell, assign, convey, pledge, hypothecate, encumber, exchange or otherwise transfer for no consideration, their membership interests except to another member, a spouse, child, or grandchild, or a trustee for the benefit of the immediate family members. Any other type of transfer must have unanimous consent of the members.

¶ 59 Callahan correctly notes that the terms of Whoriskey mortgage prohibited members of Fulton from transferring their interest without Whoriskey's consent. But that language does not preclude or render void this transfer, expressly permitted under the Operating Agreement. Whether it constitutes a default on the loan, which would permit Whoriskey to pursue certain remedies if it chose to, is a question we need not decide because Whoriskey is not a party and Fulton's compliance with the terms of the mortgage has no bearing on this case.

¶ 60 Similarly, the settlement agreement with Cadlerock did not change or override the language of the Operating Agreement. Nor did it preclude a transfer by a Fulton member. If Cadlerock objected to the transfer, which the record does not reflect, then Cadlerock could seek a remedy. Callahan may not pursue that remedy on Cadlerock's behalf.

¶ 61 Under the plain and unambiguous language of the Fulton Operating Agreement, a member may transfer his or her membership interest to an immediate family member without first obtaining the consent of the other members. Michael and Christopher Kenny are immediate family members of Gerard's. Thus, the trial court did not err in declaring the transfer was proper and in affirming summary judgment.

¶ 62 Breach of Fiduciary Duty as Manager of Fulton

¶ 63 Callahan next contends that because Kenny’s transfer of his Fulton interest was improper, Michael and Christopher are not members of Fulton and thus, do not have standing to bring a breach of fiduciary duty claim. Alternatively, he contends that even if Michael and Christopher are members, the trial court erred in finding that he owed them a duty as only the manager of a member-managed LLC owes those duties to members. Lastly, Callahan asserts that even if he had a duty, the trial court erred in finding that he breached it.

¶ 64 We will not reverse a trial court’s judgment after a bench trial unless it is against the manifest weight of the evidence. *Chicago’s Pizza, Inc. v. Chicago’s Pizza Franchise, Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008). Against the manifest weight of the evidence means an opposite conclusion is apparent, or the findings appear to be unreasonable, arbitrary, or not based on evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). We give deference to the trial court as the finder of fact and will not substitute our judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn. *In re Estate of Michalak*, 404 Ill. App. 3d 75, 96 (2010).

¶ 65 Having decided the enforceability of Kenny’s transfer of his membership interest to his sons, we need not address Christopher and Michael’s standing to raise the breach of fiduciary duty claims.

¶ 66 Turning to the fiduciary duty issue, Callahan contends that Fulton is a member-managed company, Kenny was the manager, and thus, Callahan did not assume any fiduciary duties solely by being a member of Fulton.

¶ 67 Prevailing on a claim for a breach of fiduciary duty requires the complainant to establish: (i) a fiduciary duty existed; (ii) the duty was breached; and (iii) the breach proximately caused an injury to the complainant. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). Section 15-3 of the

Limited Liability Company Act defines general standards of conduct for members and managers of LLCs. 805 ILCS 180/15-3 (West 2014). Standards that differ slightly are enumerated for members of both member-managed and manager-managed LLCs. 805 ILCS 180/15-3(a)-(g) (West 2014). Members of member-managed LLCs owe duties of loyalty and care to the LLC and other members (15-3(a)), including acting fairly with regard to the LLC's business (5-3(b)(2)). Further, members of member-managed LLCs must discharge their duties to the LLC and other members with obligations of good faith and fair dealing (15-3(d)). The members of manager-managed LLCs do not owe the same type of duties to the LLC or other members, but can owe the same type of duties if the member "exercises the managerial authority vested in a manager by [the] Act." 805 ILCS 180/15-3(g)(3) (West 2014).

¶ 68 Although the Fulton Operating Agreement named Kenny, not Callahan, the manager, the trial court found Callahan "exercised managerial authority like the authority vested in a manager-managed LLC under the LLC Act. As a result, Callahan owed a fiduciary duty to the other members." At trial, Callahan acknowledged he and his son ran the day-to-day operations of the Fulton owned building at 222 N. Canal, Indeed, he reiterated this point in his brief –since the beginning of the business, he performed the day-to-day management role with Kenny's approval. Thus, the trial court's finding that Callahan had fiduciary duties to other members was not against the manifest weight of the evidence.

¶ 69 Callahan asserts that to the extent he did have a duty to Michael and Christopher, he did not breach it. We disagree. Callahan's breach, as the trial court concluded, began with his refusal to recognize Kenny's transfer to his sons. Callahan's contention that he was acting in good faith, because the transfer gave Whoriskey and Cadlerock grounds for taking legal action against

Fulton, is not credible, particularly given that Callahan made a similar transfer to the Callahan Trust without objection or consent from Kenny.

¶ 70 And, again, as the trial court concluded, Callahan's subsequent breaches stem from this initial breach. Because he refused to acknowledge the proper transfer of membership interest, he unilaterally made unauthorized decisions to the detriment of the other partners. Specifically, he hired attorneys and paid them with Fulton funds, he raised his managerial fee, he falsified articles of amendment to name himself as manager, he opened bank accounts with company funds that were only accessible by him and his son, he directed the accountant to file tax returns for Fulton that failed to show Michael's and Christopher's interests, and he failed to notify the other members that Access, the sole tenant, had terminated its lease. All of these constituted breaches of fiduciary duty by Callahan, who was exercising managerial authority over Fulton.

¶ 71 Callahan asserts, however, that plaintiffs cannot state a claim for breach of fiduciary duty as they were not injured by his purported breaches. Not so. As noted, Callahan used Fulton funds to pay \$80,958.81 attorney's fees to S. Ira Miller, without consent from the other members. Thus, plaintiffs did establish injury, and the findings that Callahan breached his fiduciary duties to Michael and Christopher as members of Fulton were not against the weight of the evidence.

¶ 72 Breach of Fiduciary Duties as Attorney

¶ 73 Callahan contends he did not violate his fiduciary duties as an attorney for Fulton and Canal nor did he cause injury to Michael and Christopher Kenny. Callahan reasserts that he acted in good faith by refusing to recognize Kenny's transfer on the basis that (i) both the Whoriskey loan and the Cadlerock settlement agreement prohibited a transfer and (ii) had he recognized the transfer, he would have breached his fiduciary duties. But, as we already have confirmed, the plain language of the Fulton Operating Agreement permitted the transfer and Callahan's assertion

that he was trying to prevent legal action by Whoriskey and Cadlerock is not credible given that he made a similar transfer to his trust not long before Kenny's transfer. Thus, in his role as an attorney for Fulton and Canal, he breached his duties to those entities by refusing to acknowledge the transfer and then took actions contrary to his duties as an attorney, including executing false articles of amendment, opening bank accounts with Fulton funds over which only he and his son had control, and unilaterally paying himself attorney's fees.

¶ 74 We also reject Callahan's contention that there can be no breach because there was no injury. The trial court found Callahan harmed Fulton and Canal by receiving unauthorized legal fees and making unauthorized transfers of funds from Fulton and Canal accounts. Although the trial court did not quantify the damages (having determined that the Kenny brothers could not personally recover for damages to entities not named as plaintiffs), its finding that the entities were financially harmed was not against the manifest weight of the evidence.

¶ 75 Dissociation from Fulton

¶ 76 Callahan next contends the trial court erred in dissociating him from Fulton and Canal. Under the Limited Liability Act, a member of an LLC can be dissociated if the company or any member requires expulsion by judicial determination because the member: (i) engaged in wrongful conduct that adversely and materially affected the company's business; (ii) willfully or persistently committed a material breach of the operating agreement or of a duty owed to the company or the other members; or (iii) engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the business with the member. 805 ILCS 180/35-45(6) (West 2014).

¶ 77 Similarly, the Uniform Partnership Act provides that a partner is dissociated if (i) the partner engaged in wrongful conduct that adversely and materially affected the partnership

business. (ii) the partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 404 of this Act; or (iii) the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on business in partnership with the partner.805 ILCS 206/601(5) (West 2014).

¶ 78 The trial court agreed with the plaintiffs that dissociation on all three bases was warranted as to both Fulton and Canal. The preponderance of the evidence established that Callahan's unauthorized actions subjected the company and the partnership to substantial attorney's fees, Callahan breached his fiduciary duty to the other members and partners, and he expressed an absolute unwillingness to work with the Kenny brothers. The court rejected Callahan's request for dissolution, finding that the facts required that the Callahan Trust be dissociated from Fulton and Canal.

¶ 79 Callahan, repeating his prior arguments, contends he acted as a prudent person would in refusing to recognize Kenny's transfer of his interests to his sons to prevent default on the Whoriskey loan or legal action by Cadlerock. He also contends that no grounds for dissociation existed after the transfer as he acted reasonably in an effort to manage the business after the transfer. But, as we have noted, we agree with the trial court that Callahan breached his fiduciary duties in refusing to recognize the transfers and later engaged in conduct, including unilaterally hiring lawyers and failing to notify the other members, which adversely and materially affected the companies' business. Further, Callahan has acknowledged that he was unwilling to work with Michael and Christopher, which made carrying on the business with him in it not reasonably practicable. Thus, the trial court's finding that dissociation was justified based on Callahan's

breach of fiduciary duty, the damages to the company, and his unwillingness to work with Michael and Christopher was not against the manifest weight of the evidence.

¶ 80           Alternatively, even if dissociation was proper, Callahan asserts that the trial court acted beyond its authority by ordering the immediate transfer of his ownership interest in Fulton and Canal without compensation. Callahan concedes the trial court has authority under section 35-60 of the Limited Liability Act 805 ILCS 180/35-45(6) (West 2014) and section 701 of the Uniform Partnership Act (805 ILCS 206/801 (West 2014) to order that the membership and partnership interests be sold; nevertheless, he contends the trial court cannot order an immediate transfer without compensation. Specifically, Callahan objects to the language in the judgment order stating that Callahan must "execute within 14 days all documents necessary or required to transfer ownership of the members' interest in Fulton Associates, LLC, the partnership interest in Canal Partners, or the land trust holding the Canal Partners property." Callahan contends this language deprives him of his ownership interest without compensation. Callahan is incorrect.

¶ 81           The trial court stated that the Callahan Trust is dissociated from Fulton and Canal and ordered Michal and Christopher Kenny to facilitate the purchase of the membership interest in Fulton under section 35-60 of the LLC Act (805 ILCS 180/35-60 (West 2014)) and the partnership interest in Canal under section 701 of the Partnership Act (805 ILCS 206/701 (West 2014)). Thus, contrary to Callahan's assertion, the transfers were not without compensation. And, as plaintiffs note, Callahan has a proceeding pending in the Chancery Division of the Circuit Court seeking compensation for his interest in Fulton and Canal.

¶ 82           Moreover, the court did not exceed its authority in ordering Callahan to turn over documents related to Fulton and Canal. Under both the LLC Act and the Uniform Partnership Act, a dissociated member or partner can no longer participate in the management of a

company's business. See 805 ILCS 180/35-55(b)(1) (West 2014) and 805 ILCS 206/803 (West 2014). Because Callahan refused to work with the Kenny brothers, they did not have access to documents needed to carry on the business of Fulton and Canal. Thus, the trial court acted properly in ordering Callahan to turn over documents to Michael and Christopher, while they facilitated the purchase of Callahan's interests.

¶ 83 Post-Judgment Orders to Dissociate

¶ 84 Finally, Callahan asserts that the trial court's postjudgment orders to enforce the judgment were improper and beyond the court's authority. Callahan argues that the trial court was divested of jurisdiction once a notice of appeal was filed and that the orders were not merely matters of enforcement but were substantive because they resulted in the immediate transfer of Callahan's interest in Fulton and Canal, without following the proper procedures laid out in the LLC Act and the Partnership Act.

¶ 85 A circuit court generally retains jurisdiction over cases pending before it until a final judgment is entered and the litigation is effectively terminated between the parties in that court; however, as an exception to this general rule, a circuit court has the inherent authority to enforce its orders and judgments. *County of Cook v. Illinois Fraternal Order of Police Labor Council*, 358 Ill. App. 3d 667, 671 (2005). Therefore, the trial court did have jurisdiction to enforce its own orders, even though a notice of appeal had been filed. The post-judgment orders entered on September 18, 2015, November 2, 2015, and November 6, 2015, were designed to do just that, enforce the terms of the August 3, 2015 judgment, which Callahan refused to comply with to the detriment of Fulton's remaining members and Canal's remaining partners. Thus the judgment order and the orders entered to enforce that judgment are affirmed.

¶ 86 Affirmed.