FIRST DIVISION
August 29, 2016

No. 1-15-3261

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES HERRICK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 CH 52995
	)	
JUMPFORWARD LLC, and	)	
ADAM MCCOMBS,	)	Honorable
	)	Sophia Hall,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

Held: The trial court did not err when it granted summary judgment on Counts I, II, and VII of Plaintiff's Amended Complaint. Moreover, the trial court's entry of judgment on counts III, IV, V, VI, and VIII in favor of Defendants following a bench trial was not against the manifest of the evidence.

¶ 1 Plaintiff-appellant, James Herrick, was contacted by Defendant-appellee, Adam McCombs, in 2007 to assist in the development of a web application which would help high

school athletes and college coaches manage the college sports recruitment process in a more efficient manner. Throughout 2007 and into 2008, Plaintiff worked on the web application. In January 2008, Plaintiff became Chief Technology Officer of Defendant Jumpfoward LLC. He was allocated 20% ownership of JumpForward, subject to several contractual conditions with one-third of this interest vesting immediately, while one-third vested on Plaintiff's one year employment anniversary and the final one-third vested on his second year anniversary. Thereafter, for a variety of reasons detailed hereafter, Plaintiff's working relationship with defendants, co-workers, and customers soured. This lead to his "for cause" termination from Jumpfoward LLC six weeks prior to his two-year anniversary. As a result of his termination JumpForward, per the contractual terms of the Operating Agreement, redeemed Plaintiff's ownership interest.

¶ 2 Plaintiff then brought an action against defendants alleging breach of partnership, unjust enrichment, breach of the their employment agreement, breach of the operating agreement, breach of fiduciary duty, and a declaratory judgment that he was 30% owner of JumpForward LLC. The trial court granted summary judgment in favor of defendants on the breach of partnership, unjust enrichment, and breach of fiduciary duty counts. Following a bench trial, the trial court ruled in defendants' favor on the remaining counts.

¶ 3 Plaintiff now appeals from the trial court's entry of judgment in favor of Defendants on all counts. Upon review, we find the trial court did not err in granting summary judgment nor was its entry of judgment in favor of Defendants following trial against the manifest weight of the evidence.

¶ 4 Accordingly, we affirm the orders of the trial court.

¶ 5 JURISDICTION

¶ 6 On September 19, 2014, the trial court granted defendants' motion for summary judgment as to counts I, II, and VII. On October 14, 2015, following a bench trial, the trial court entered judgment in favor of defendants on the remaining counts. On November 12, 2015, Plaintiff filed a notice of appeal. Accordingly, this court has jurisdiction over this matter pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 7 BACKGROUND

¶ 8 Plaintiff-appellant, Jim Herrick (hereinafter Plaintiff) and Defendant-appellee, Adam McCombs (hereinafter Defendant) first met in 2002. Plaintiff and Defendant lived together between 2002 and 2004, and became friends. During that time, Plaintiff worked as a webmaster for a company named SG2. He also did some work building a web application for his cousin who owned Kunis Jewelers.

¶ 9 At some point after 2004, Plaintiff went to work for a different company in Tennessee through 2007. His job responsibilities included building a web application which allowed customers to make updates. He testified having worked with the following software programs: (1) Microsoft .Net Framework, (2) Microsoft Visual SourceSafe, (3) Macromedia Homesite, (4) Macromedia Dreamweaver, (5) Microsoft Visual Studio, and (6) Microsoft's SQL Server.

¶ 10 Prior to 2007, Defendant and his wife, Sarah, came up with an idea that would become JumpForward LLC. They were former high school athletes who had gone through the college recruitment process. They wanted to find a way to make the recruiting process easier, both for the athletes and college recruiters, using the advantages of the internet. They needed someone to help them with the technical aspects of creating a website to implement their idea.

¶ 11 In January 2007, after finding web development cost prohibitive, Defendant asked Plaintiff if he was interested in developing the website. While Plaintiff considered the offer, he performed a study of two different technology platforms that could be used to build the web application – PHP and Microsoft.NET. Plaintiff gave the Defendant the results, which he thought were comprehensive. They agreed to do the project. They began planning sessions for both the technical aspects of the web application and their business relationship. They spoke almost daily during 2007.

¶ 12 In February or March 2007, during his off time hours from the other company, Plaintiff started building the proposed web application. Defendant subscribed to an internet service provider to host the web application, and Plaintiff would upload his work product to that provider. Whenever Plaintiff updated the web application, Defendant would look at it and make notes of additional features, errors, and other ideas.

¶ 13 As they began their work, the parties discussed using a combination of Microsoft Visual Studio and Microsoft .NET 2.0 to develop a flexible and scalable website. They intended that adjustments could be made and, as usage of the site grew, the website would accommodate the increased traffic. They agreed Visual Studio would be the best software program to use. Defendant testified that Plaintiff's representations about his experience with Microsoft Visual Studio and Microsoft .NET 2.0 were important to him.

¶ 14 During the course of the litigation, Plaintiff gave several versions of his communications with Defendant about his experience with Visual Studio prior to being hired by JumpForward. Defendant testified that in early 2007, Plaintiff represented to him that Plaintiff had used Visual Studio for three years to build an "intensive web application database" as part of his job responsibilities at his company in Tennessee. At trial, Plaintiff did not contradict Defendant's

testimony about these representations. Plaintiff admitted that he talked to Defendant about Visual Studio before he signed the Employment Agreement with JumpForward on January 31, 2008. At his deposition however, Plaintiff denied that he discussed Visual Studio with Defendant at any time before he signed the agreements.

¶ 15 At trial, Plaintiff testified that before January 30, 2008, he had worked with a free version of Visual Studio, not the one that is purchased. In his interrogatory responses, he stated that "Microsoft's free version of Visual Studio [was] named 'Visual Web Developer Express…'" On cross-examination, Plaintiff also stated that the product he had used before was Visual Web Developer Express, not Visual Studio. Plaintiff agreed that free versions of software typically do not have all of the features of the full version of the software product. The trial court took the position that the free version known as Visual Web Developer Express lacked features found in Visual Studio.

¶ 16 Plaintiff's testimony showed that, he had never used the fully featured version of Visual Studio before he began his work on the JumpForward website and database. He testified that he used his license for Macromedia Homesite to build the web application for JumpForward because he did not have a copy of Visual Studio. During discussions with Plaintiff about Visual Studio, Defendant decided not to purchase Visual Studio because Defendant determined that the cost of Visual Studio outweighed its benefit. In January 2009, JumpForward received a membership in Microsoft's BizSpark program. This program allowed certain small businesses to use Microsoft software for free including Visual Studio. As soon as Plaintiff received confirmation of acceptance into the program, he downloaded a copy of Visual Studio and began using it on the web application he had already developed.

¶ 17 As previously stated, in the pre-employment communications between Plaintiff and Defendant, they discussed the advantages of using Microsoft .NET 2.0 along with Visual Studio, to build a flexible and scalable for JumpForward. Plaintiff was concerned about the timeline proposed by Defendant to complete the website in 2007 given the features and functionality the two had previously discussed. Plaintiff suggested they use older code, that he had from other projects, to more quickly launch the web application. The trial court concluded that the "older code" Plaintiff referred to was not .NET 2.0, but was .NET 1.1. Plaintiff also told Defendant that a decision to use "older code" would require them to do a redesign of the web application at some time in the future. Defendant indicated that he understood, but that it was important for them to meet the summer 2007 delivery date.

¶ 18 Plaintiff's representations to the Defendant concerning his skill and experience working with .NET 2.0 varied. In early 2007 meetings between Plaintiff and Defendant, Plaintiff represented to Defendant that he had previously worked with .NET 2.0. Specifically, Plaintiff told Defendant that for about a year he had used .NET 2.0 to build an application while he was employed by the Tennessee company. At trial, Plaintiff testified that he had worked with .NET 2.0 at his Tennessee employer. At his deposition, Plaintiff admitted that he never had used .NET 2.0 before he began working on the JumpForward website. Plaintiff also discussed .NET 1.1 and at trial he denied that he had used .NET 1.1 for the JumpForward website. However, at his deposition he had admitted the website was created using .NET 1.1. When shown his deposition testimony, Plaintiff admitted to using .NET 1.1. He also acknowledged at trial that when he attempted to incorporate .NET 2.0 with .NET 1.1 code already in the application, he learned that the two were not compatible. He further admitted that the compatibility issues between the .NET 1.1 and .NET 2.0 contributed to the improper operation of the website.

¶ 19 During the course of Plaintiff's employment at JumpForward, Defendant inquired of Plaintiff as to whether the database and website were built with .NET 2.0. On February 12, 2008, Plaintiff suggested Defendant should "say" they were running .NET 2.0. The testimony of JumpForward's expert, Carl Franklin was that .NET 1.1 was two generations old at the time Plaintiff began using it in 2007. The expert opined that .NET 1.1 was not suitable for JumpForward's business. .NET 2.0 was dramatically enhanced from .NET 1.1, which was not compatible with .NET 2.0 and not designed for use with Visual Studio.

¶ 20 Defendant admitted that by the end of October 2007 he had the opportunity to test the web application in "unlimited fashion." Defendant felt that Plaintiff's progress was slower than what they had discussed. Plaintiff's progress was so slow that Defendant considered finding someone else to build the web application. However, given the cost, Defendant decided to stick with Plaintiff. Between October 2007 and the time JumpForward hired Plaintiff on January 31, 2008, Defendant was able to test the web application at least 20 more times. Defendant found numerous issues and errors, along with missing features.

¶ 21 Plaintiff became an employee and owner of JumpForward on January 31, 2008. Plaintiff's Employment Agreement, signed January 31, 2008, provided him with a "fully diluted ownership of 20% of the units" of JumpForward, one-third of which was to vest immediately, one-third of which was to vest on the first anniversary of Plaintiff's start date. This Agreement also provided: "If JumpForward decides to terminate you with Cause …, before you are fully vested, then vesting ends with regard to your grant described above on your date of termination." This provision was subject to the terms and conditions of the Operating Agreement.

¶ 22 In January 2008, JumpForward did not have a finished website, did not have any users, and did not have income. Defendant admitted that he relied upon the web application Plaintiff

had been building for JumpForward since March 2007 when making his decision to hire Plaintiff. Plaintiff was hired as an "at-will" employee to fill the role of Chief Technology Officer. He was also a "non-voting member service provider" of JumpForward.

¶ 23 In January 2009, Defendant offered Plaintiff a new one-year employment agreement. Plaintiff executed the contract on January 22, 2009. The new agreement raised Plaintiff's ownership interest in JumpForward from 20% to 30%, two-thirds of which vested immediately and one-third of which was to vest on January 31, 2010. Plaintiff remained JumpForward's Chief Technology Officer but Defendant insisted that Plaintiff's job description be changed because of a belief that in 2008 Plaintiff had ignored his input regarding the features and functionality of JumpForward's web application.

¶ 24 The trial court also heard a great deal of testimony concerning Plaintiff's conduct while he was an employee of JumpForward. In June 2009, JumpForward was being considered to appear on the reality television show "Shark Tank." Although Plaintiff was a non-voting, non-management member of JumpForward, Defendant attempted to get Plaintiff involved in the decision as to whether to accept the Shark Tank opportunity. Plaintiff was skeptical about JumpForward's participation in Shark Tank because the producers of the show would have control over JumpForward's image and how it was portrayed to the general public. Plaintiff sent an e-mail to Defendant stating that he thought it was "being handled very badly." Plaintiff felt that he was being rushed into making a decision.

¶ 25 Brian Duggan, JumpForward's Chief Financial Officer, responded to Plaintiff's concerns about Shark Tank and after reviewing the paper work for the show informed Plaintiff only Defendant would need to worry about executing the contracts. Plaintiff decided not to participate in the preplanned phone call on the subject because once he realized his opinion

wasn't a factor in the decision, he dropped the subject. While JumpForward did not receive any funding from the show, it did increase their exposure and increased inquiries about the service. At one meeting related to the Shark Tank appearance, Plaintiff yelled an obscenity at Duggan loud enough for other employees to hear. Plaintiff's yelling continued throughout the meeting and Defendant was forced to address the outburst after the meeting.

¶ 26 In May 2009, as more college coaches signed up to use the site, the data load on the site increased, as did the need to increase capacity of the site to handle the traffic. Plaintiff acknowledged that at least as early as July 3, 2009, the website was working more slowly than expected, and that, through the remainder of his employment with JumpForward, he was unable to fix the problem.

¶ 27 Sarah McAdams, who was JumpForward's Vice President of Communications from January 2008 through 2009, testified Plaintiff was "difficult to speak with" and "easily angered." She testified that Plaintiff had a hard time responding to e-mails and he had a tendency to take things out of context. The trial court found the testimony of Defendant and Sarah McAdams established that in 2009, Plaintiff acted with increasing disrespect towards Defendant as CEO and disregarded his directives. The court found Plaintiff's conduct became more and more confrontational, abusive and defensive. Sarah testified that she heard Plaintiff curse and hang up on Defendant multiple times. Defendant had to reprimand Plaintiff about his unprofessional behavior on various occasions. Beginning in mid-2009, other employees at JumpForward were unable to work with Plaintiff. He was confrontational and hostile. This resulted in other employees taking technical issues directly to Defendant and to avoid communicating with Plaintiff.

¶ 28 Also beginning in mid-2009, Plaintiff became much less responsive to inquires related to his work. Plaintiff, who had previously timely responded to e-mails or calls, became less responsive and at times would not respond at all. On June 11, 2009, after receiving an e-mail relating to the University of Kentucky softball team, Plaintiff sent an e-mail to Defendant stating that he would not fulfill the request. Another employee had to take care of the request. The trial court heard a significant amount of testimony that mirrored this event. When various issues and performance problems were brought to his attention, Plaintiff responded with disrespect and indifference. The trial court heard testimony of how Plaintiff repeatedly failed to respond to issues which arose with coaches' use of the application. This included issues raised by some of the company's premier clients. When Plaintiff was terminated, he admitted that he still had not addressed issues raised by these clients.

¶ 29 Plaintiff's conduct of failing to respond to communications from other employees and clients continued throughout 2009. Plaintiff also displayed indifference to customer threats to withdraw from using the service because of the continuing issues with the website. Many of the customers were expressing concerns over the same issues with the website and service. Evidence was introduced that when Plaintiff would respond to a customer concern, the response was often dismissive. In October 2009, Defendant sent Plaintiff an e-mail discussing ongoing issues with the website and rather than address the problems, Plaintiff responded that he was "tired of being the bad guy" and that another employee should "get his act together and do his job."

¶ 30 By late October 2009, Plaintiff's actions had become almost a weekly problem. On October 29, 2009, Defendant again e-mailed Plaintiff about problems coaches were having with the website, and at trial Plaintiff admitted he did not address these issues. That same week,

Plaintiff made another employee cry and Defendant informed him his actions were destroying morale and would have consequences. In November 2009, two important clients, North Carolina State University and University of Kentucky were expressing serious concerns about their continued use of the website. When Defendant reached out to Plaintiff to discuss the concerns which had been raised, Plaintiff expressed indifference as to the possible loss of such high-profile clients. The trial court heard testimony that at least six clients left the start-up because of continuing technical issues with the service.

¶ 31 The trial court also heard testimony that Plaintiff's conduct was not limited to other employees or clients but also extended to consultants working with JumpForward. The trial court heard testimony that Plaintiff engaged in unprofessional communications with a vendor providing critical support to JumpForward's mobile application. Additionally, in response to an e-mail sent by Defendant stating that Plaintiff was out of line for criticizing company employees, Plaintiff stated that he was "done" and "this whole conversation is a joke." On December 1, 2009, Defendant sent a huge list of items and issues to Plaintiff, including those raised by big name clients. At trial Plaintiff testified he may have addressed some, but not all, of these issues.

¶ 32 Plaintiff traveled to Chicago to visit the JumpForward offices on December 14, 2009. For three days while he was in Chicago, Plaintiff and Defendant discussed business and Plaintiff's next employment contract with JumpForward. During this time no one informed Plaintiff that JumpForward was getting ready to terminate both his employment and his ownership interest. Nor did anyone mention any of the behavior that JumpForward complained about in the eventual lawsuit. On the day of his termination, Plaintiff and Defendant went to lunch and at the conclusion of the meal, Defendant handed Plaintiff a letter and left the

restaurant. Upon opening the envelope, Plaintiff was informed he was being terminated for cause. Plaintiff's termination took place just six weeks before the vesting of the final one-third of the thirty percent ownership in JumpForward.

¶ 33 Defendant made the decision to terminate Plaintiff's employment in conjunction with other senior members of JumpForward. Defendant felt that it was necessary to terminate Plaintiff's employment because a) he did not follow Defendant's directives; b) he was unable to work with others; c) he was isolated; d) he would hang up on Defendant and not return phone calls; e) he had a hostile and confrontational attitude towards his co-workers; f) he could not produce a workable website; g) he did not use the tools that he said he had experience working with and that he said he would use for JumpForward. After Plaintiff departed, Defendant brought in a consultant to analyze Plaintiff's work. The consultant found the code, database, and website to be almost unworkable. Based on the consultations, Defendant made the decision to rebuild everything from scratch.

¶ 34 Prior to the start of trial, Defendant moved for summary judgment on all of Plaintiff's claims. After briefing, the trial court entered summary judgment on three of Plaintiff's claims. The trial court found no genuine issue of material fact and Defendants were entitled to judgment as a matter of law on counts I, II, and VII. Specifically, the court found that all of the duties and obligations between the parties had been incorporated into the written agreements executed by the parties and they were not in a partnership.

¶ 35 After being presented with the above facts at trial, the trial court determined that Plaintiff's conduct was injurious to the company and, therefore, constituted cause for termination pursuant to the provisions of section 1.11(c) of the Operating Agreement. The trial court also found that Plaintiff had breached his employment contract with JumpForward based on

misrepresentations made to Defendant prior to the start of his employment. The trial court specifically found Plaintiff made misrepresentations about his experience with different technologies and that those representations were material and not true. This specifically related to Plaintiff's experience with .NET 2.0 and Visual Studio. This represented a separate basis to terminate Plaintiff. Finally, the court rejected Defendant's counterclaim for fraud.

¶ 36 Plaintiff timely filed this notice of appeal.

¶ 37 ANALYSIS

¶ 38 Before this court, Plaintiff seeks reversal of both the grant of summary of judgment and the trial court's entry of judgment following trial. However, before turning to the merits of the appeal, we must address two procedural matters.

¶ 39 The record indicates that Defendants filed a cross-appeal on December 16, 2015, seeking a reversal of judgment in favor of Plaintiff on Defendants' counterclaim for fraud. However, no separate brief was received and Defendants do not address the cross-appeal in their response brief. Supreme Court Rule 341 states that "[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7). Accordingly, the Defendant’s not filing a separate brief and not addressing the cross-appeal in their response brief is deemed to be a knowing waiver and we do not address the merits of Defendants' cross-appeal. Next, during the briefing of this case, Defendants filed a motion to strike portions of Plaintiff's Reply brief related to his argument concerning the termination of his ownership interest in JumpForward LLC. As just mentioned above, according to Rule 341(h)(7) any point not argued is waived, and cannot be raised for the first time in a reply brief. See *Tivoli Enterprises, Inc. v. Brunswick Bowling and Billiards Corp.*, 269 Ill. App. 3d 638, 642 (1995) (striking arguments raised for the first time in a Reply brief). We agree with Defendant

that Plaintiff did not raise the 30-day notice argument in his opening brief and may therefore not raise the argument in his Reply brief. Accordingly, we deem the failure to argue this issue in his opening brief to be a knowing waiver and we will not consider Plaintiff's 30-day notice argument as it relates to the loss of his equity.

¶ 40 Turning to the merits of the appeal, Plaintiff challenges both the trial court's order granting summary judgment and its entry of judgment in favor of Defendant on the remaining counts following the trial. In granting summary judgment in favor of Defendant, the trial court found that as a matter of law there was no breach of partnership agreement, unjust enrichment, or breach of fiduciary duty. The court found that all of the duties and obligations between the parties had been incorporated into the written agreements and showed no partnership between the pair. Plaintiff also argues that the trial court's entry of judgment in favor of Defendants on the remaining counts was against the manifest weight of the evidence.

¶ 41 We first address Plaintiff's argument related to the summary judgment order. Summary judgment should only be granted where the pleadings, depositions, admissions, exhibits, and affidavits in the record demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005 (West 2014); *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 285 Ill. App. 3d 201, 208-09 (1996). The non-movant need not prove his case at the summary judgment stage, but need only establish a genuine issue of material fact. *Hart v. Boehmer Chevrolet Sales, Inc.*, 337 Ill. App. 3d 742, 747-48 (2003). In determining whether a genuine issue of material fact exists, the trial court has a duty to construe the evidence strictly against the movant and in favor of the non-moving party. *Perlman v. Time, Inc.*, 64 Ill. App. 3d 190, 194 (1st Dist. 1978). "An

appellate court reviews a disposition of summary judgment *de novo*." *Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716, ¶ 10.

¶ 42 First, Plaintiff does not address any argument to his unjust enrichment count and has therefore waived review of the issue. We note that " '[a] reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the Plaintiff may dump the burden of argument and research.' " *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 877 (2010), quoting *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1995).

¶ 43 Ill-defined and insufficiently presented issues that do not satisfy the rules are considered waived. *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007). Plaintiff fails to set forth any substantive argument concerning his unjust enrichment count. Accordingly, we will not review the dismissal of the unjust enrichment count.

¶ 44 In granting summary judgment in favor of Defendant, the trial court found that all of the duties and obligations between the parties were incorporated into the written agreements. Plaintiff argues that he and Defendant were partners as early as 2007 and thus owed each other fiduciary duties with respect to the venture that would become JumpForward.

¶ 45 A partnership is an association of two or more persons to carry on as co-owners a business for profit. *Maloney v. Pihera*, 215 Ill. App. 3d 30, 42 (1991). The elements of a partnership are that the parties have joined together to carry on a trade or venture for their common benefit, with each contributing property or services to the enterprise, and with the parties having a community of interest in the profits. *Peck v. Peck*, 16 Ill. 2d 268, 280 (1959). A partnership is a contractual relationship and as such, contract law applies and a partnership is accordingly controlled by the terms of the agreement under which it is formed. *Fisher v. Parks*,

248 Ill. App. 3d 666, 674-75 (1993). There must be a meeting of the minds of the parties to create a partnership. The intention of one party cannot create a partnership. *Ramacciotti v. Simpkins*, 130 Ill. App. 2d 733, 735 (1970). Under Illinois law, "[a] complete, valid, written, contract merges and supersedes all prior and contemporaneous negotiations and agreements dealing with the same subject matter. *Courtois v. Millard*, 174 Ill. App. 3d 716, 720 (1988).

¶ 46 We agree with the trial court that the Employment and Operating Agreements control the parties' relationship and the agreements do not reflect the formation of a partnership. Since a complete written agreement, supersedes all prior agreements on the same subject matter, the Employment Agreement and Operating Agreement superseded all prior dealings regarding the formation of JumpForward. While the parties may have contemplated some type of partnership related to the business venture, when they memorialized the relationship in writing, they formed a limited liability company, and not a partnership. Despite having an ownership stake in the newly formed LLC, Plaintiff agreed to become an at-will employee and report to Defendant in exchange for a bi-monthly salary. Plaintiff became a non-voting member of the newly formed LLC, while Defendant became a voting manager. Plaintiff testified that he signed the Employment Agreement and Operating Agreement after reading and understanding the terms. Accordingly, when Plaintiff read and signed the Employment and Operating Agreement, he knew that Defendant was not contemplating a partnership with him.

¶ 47 We find Plaintiff's reliance on *Illinois Rockford Corp. v. Kulp* misplaced. 41 Ill. 2d. 215 (1968). In that case, Kulp and Leeb were equal shareholders of the Pullman Couch Company. *Kulp*, 41 Ill. 2d at 216. The company was having financial problems, so Kulp attempted to sell all of the company's stock, telling Leeb that he would inform him if it appeared as though he had found a prospective buyer. *Kulp*, 41 Ill. 2d at 218. Kulp found a purchaser, who offered him

and Leeb $25,000 each; the purchaser and Kulp both assured Leeb that Kulp was not receiving more than $25,000 for his shares. *Kulp*, 41 Ill. 2d at 219. In fact, Kulp had negotiated for additional compensation. *Kulp*, 41 Ill. 2d at 220–21.

¶ 48 Our supreme court held that there was a fiduciary relationship between Kulp and Leeb by virtue of their relationship. *Kulp*, 41 Ill. 2d at 222. It noted that " '[t]heir decision to form and operate as a corporation rather than a partnership does not change the fact that they were embarking on a joint enterprise, and their mutual obligations were similar to those of partners.' " *Kulp*, 41 Ill. 2d at 222 (quoting *Tilley v. Shippee*, 12 Ill. 2d 616, 624 (1958)). The court focused on the facts that Kulp and Leeb had been close personal friends for a long period of time and did not acquire the Pullman stock independently; the court also noted that if the tax advantages had favored a partnership, the two would have formed a partnership instead of a corporation. *Kulp*, 41 Ill. 2d at 222–23.

¶ 49 The factual circumstances of *Kulp* are distinguishable from those in the case at bar. Kulp and Leeb had "been close business and personal friends for a long period of time," and "[e]ach did not proceed independently of the other to acquire the Pullman stock." *Id.* at 222. While the parties to this case were roommates for a period of time, they did not have a close personal or business relationship until JumpForward. Moreover, there is no indication Defendant would not have pursued the project had Plaintiff not joined.

¶ 50 Furthermore, Kulp and Leeb had entered into a written agreement "setting forth their plans and commitments to each other relative to the matter." *Id.* at 217. They contemplated being equal owners and equal partners, whether they decided to actually form a partnership or retain the corporate structure. *Id.* Importantly, "they were to confer on all major company policies." *Id.* at 223. Unlike Kulp and Leeb, when the parties to this case decided to formalize

their relationship, they created a limited liability company with Plaintiff having no decision making authority concerning company actions. Additionally, Defendant McCombs was not an actual party to the formation of JumpForward; instead it was a limited liability company he controlled. Finally, all of the Unit Holders who are parties to the Operating Agreement expressly disclaimed "any intent to form a partnership under the laws of any jurisdiction" in Section 13.8 of the Agreement. Based on these facts, we find *Kulp* distinguishable from the case at bar. Accordingly, the trial court correctly entered summary judgment in favor of Defendant on Plaintiff's breach of partnership claim.

¶ 51 For similar reasons, we also agree with the trial court's grant of summary judgment in favor of Defendant on the breach of fiduciary duty count. Simply because the parties have engaged in a business or contractual relationship does not mean a fiduciary relationship has been established. *State Sec. Ins. Co. v. Frank B. Hall & Co.*, 258 Ill. App. 3d 588, 597 (1994). "Generally, where parties capable of handling their own business affairs deal with each other at arm's length, and there is no evidence that the alleged fiduciary agreed to exercise its judgment on behalf of the alleged servient party, no fiduciary relationship will be deemed to exist." *Dewitt County Public Building Comm'n v. County of DeWitt*, 128 Ill. App. 3d 11, 26 (1984). The "essence" of a fiduciary relationship is dominance of one party by the other, and the absence of such dominance and influence means there is no fiduciary relationship. *Lagen v. Balcor Co.*, 274 Ill. App. 3d 11, 21 (1995).

¶ 52 The record is devoid of any evidence that there was the kind of trust and dominance between Plaintiff and Defendant needed to form a fiduciary relationship. Defendant never acted or held himself out to be the agent of Plaintiff and nothing in the record demonstrates Plaintiff considered Defendant his agent. While Defendant may have been familiar with the

college recruiting process, there was not a gross disparity in the parties' business knowledge. Moreover, even if Defendant had more experience in the college athlete recruitment field, " '[n]ormal trust between friends or businesses, plus a slightly dominant business position, do not operate to turn a formal, contractual relationship into a confidential or fiduciary relationship.' " *Gary-Wheaton Bank v. Burt*, 104 Ill. App. 3d 767, 774 (1982) (quoting *Carey Electrical Contracting, Inc v. First National Bank*, 74 Ill. App. 3d 233, 238 (1979)). There is nothing in the record to suggest the influence, trust, and dominance needed to establish a fiduciary relationship. Accordingly, the trial court properly entered summary judgment on Plaintiff's breach of fiduciary duty count.

¶ 53 Plaintiff next challenges the trial court's entry of judgment on his remaining claims following a bench trial. Plaintiff argues that the trial court's ruling that JumpForward had cause to terminate his vested ownership rights was against the manifest weight of the evidence. "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). For the reasons which follow, we are unable to say that the judgment entered in this case was against the manifest weight of the evidence.

¶ 54 Section 11.5(b)(iv) of the Operating Agreement provides that a "[i]f a Unit Holder is terminated (expelled) by the Manager hereunder for Cause, the Units of such Unit Holder shall be subject to redemption by the Company at any time." Section 1.11 of the Operating Agreement defines "cause" with respect to Unit Holders in JumpForward LLC. Section 1.11 states, in its entirety:

> "Cause" means, with respect to any Unit Holder. (a) the failure of such Unit Holder, any Affiliate thereof or any Unit Holder Associate thereof to substantially

perform his, her or its duties to the Company or its Affiliates, if any (whether such duties are set forth in this Agreement, any employment agreement or any other agreement to which such Unit Holder, Affiliate or Unit Holder Associate thereof is party to or bound by), for a period of thirty (30) days after a written demand requesting such substantial performance is delivered to such Unit Holder by the Manager, which demand identifies the manner in which such Unit Holder or Unit Holder Associate has not performed or has not satisfactorily performed his, her or its duties, (b) a violation of a federal or state law, regulation or rule of a self-regulatory body applicable to such Unit Holder or the business of the Company or its Affiliates due to or resulting from the action or inaction of such Unit Holder or one of his, her or its Unit Holder Associates, (c) an action or inaction by such Unit Holder or one of his, her or its Unit Holder Associates that constitutes gross misconduct, moral turpitude or that is injurious to the Company or its Affiliates, (d) a violation by such Unit Holder or one of his, her or its Unit Holder Associates of any the provisions set forth in Section 6.4 or the agreements referenced therein, (e) a conviction of, or a plea of nolo contendere, a guilty plea or a confession by such Unit Holder or one of his, her or its Affiliates or Unit Holder Associates for or to an act of fraud, dishonesty, misconduct, misappropriation or embezzlement or for or to a felony, (f) the failure of such Unit Holder or one of his, her or its Unit Holder Associates to maintain any required registration, license or other governmental authorization required to perform such Person's duties hereunder, which failure has not been cured within a reasonable period established by the Manager after such Person has received

> written notice from the Company of the need to obtain such required registration, license or other governmental authorization, (g) such Unit Holder's Unit or Units (or that or those of one of his, her or its Unit Holder Associates) being subject to a voluntary or involuntary Transfer due to a divorce, court order Bankruptcy of or with respect to such Person or such Person's beneficiaries, or (h) any other reason agreed to in writing between such Unit Holder and the Company in connection with the issuance to such Unit Holder.

Based on the above contract language, JumpForward could redeem any Unit Holder's ownership interest who was expelled by the manager for any of the reasons listed in Section 1.11(a) – (h). In making its decision, the trial court relied on subsection (c) which describes actions that "constitutes gross misconduct, moral turpitude, or is injurious to the Company."

¶ 55 In arguing that the trial court abused its discretion, Plaintiff argues that the trial court focused on his conduct as an employee and not as an owner, and that is "it is impossible for an owner of a company to be insubordinate." We find these arguments unpersuasive. First, Plaintiff does not cite to any case for the proposition that it is impossible for an owner of a company to be insubordinate. Accordingly, we reject such a proposition. Second, Section 1.11 of the Operating Agreement does not distinguish between employee conduct versus owner conduct, and we cannot and will not read such a distinction into it. See *Ruffolo v. Jordan*, 2015 IL App (1st) 140969, ¶ 10 (noting that under Illinois law a contract must be interpreted as a whole and the plain and ordinary meaning must be ascribed to unambiguous terms); see also *In re Marriage of Schlichting*, 2014 IL App (2d) 1401568, ¶ 63 (stating a court should not interfere with the terms of a contract that parties entered into freely).

¶ 56 The Operating Agreement at Section 1.11(c) states "an action or inaction" and does not distinguish in what role the action complained of needs to be taken. Plaintiff takes issue with the trial court's reliance on *Selch v. Columbia Management*, 2012 IL App (1st) 111434, because that case involved the termination of an employee for cause and not the termination an owner's vested ownership for cause. However, this is a distinction without a difference when applied to this case. The trial court here relied on *Selch* for what type of action may be considered "injurious" to a company and would therefore constitute "cause." In *Selch*, an employee's exposure of his rear end to his superiors was considered "misconduct that injures the company," and thus constituted "cause" for termination. *Id.* at ¶ 49. The trial court below found Plaintiff's conduct worse than that discussed *Selch*. The trial court found Plaintiff's conduct throughout 2009 was injurious to JumpForward and thus constituted "cause" pursuant to Section 1.11(c). Based on the record, we agree with this conclusion. The testimony and evidence at trial established that Plaintiff created a hostile work environment, often clashing with other JumpForward employees. He showed indifference and often disdain for the technological issues complained of by customers. He also displayed unprofessional behavior to one of JumpForward's critical consultants. Based on this record, we agree that Plaintiff's actions constituted conduct injurious to JumpForward. Finally, Plaintiff's misstatements concerning his use and experience with Visual Studio and .NET 2.0, resulted in a flawed database and website which ultimately required a complete rebuild. Accordingly, the trial court's decision that JumpForward had cause to strip Plaintiff of his ownership interest pursuant to the Operating Agreement was not against the manifest weight of the evidence.

¶ 57 Finally, we address Plaintiff's argument that the trial court's finding that JumpForward had cause to terminate his employment was against the manifest weight of the evidence. While

normally such a finding would be reviewed for an abuse of discretion, we note that a reviewing court may sustain the lower court decree by any argument based upon issues appearing in the record. *In re Leichtenberg's Estate*, 7 Ill. 2d 545, 549 (1956). In reaching the conclusion that Plaintiff was not wrongfully terminated from his position, the trial court found both that JumpForward had cause to terminate Plaintiff and Plaintiff made pre-employment material misrepresentations which breached his employment agreement.

¶ 58 A review of the 2008 Employment Agreement and the 2009 Employment Agreement shows that Plaintiff's employment was on an "at-will" basis. Under the general rule, " 'at-will' employment is terminable at any time for any or no cause." *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 128 (1981). "This general rule is a harsh outgrowth of the notion of reciprocal rights and obligations in employment relationships that if the employee can end his employment at any time under any condition, then the employer should have the same right." *Id.* Both the 2008 Employment Agreement and the 2009 Employment contain this definition of "at-will." Plaintiff acknowledges this in his own brief, "Adam could have terminated Jim's employment at any time for any reason – Jim's employment was at-will." Because Plaintiff's employment was at-will and thus could be terminated at any time and any reason, the cause of Plaintiff's termination is immaterial in this instance. Accordingly, we affirm the trial court's decision finding Plaintiff's termination was proper.

¶ 59 CONCLUSION

¶ 60 For the foregoing reasons, we affirm the orders of the trial court which entered judgment in favor of Defendants-Defendants.

¶ 61 Affirmed.