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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THOMAS LEE,

Plaintiff, Cross-Defendant and
Respondent,

v.

TONY ING et al.,

Defendants, Cross-Complainants
and Appellants.

B253965

(Los Angeles County
Super. Ct. No. KC062546)

APPEAL from judgment of the Superior Court of Los Angeles County,
R. Bruce Minto, Judge. Affirmed.

Tony Ing, in pro. per., for Defendant, Cross-Complainant and Appellant.

Wong & Mak and Steven W. Hashimoto, for Plaintiff, Cross-Defendant and
Respondent.

Tony Ing appeals from a money judgment in favor of respondent Thomas Lee. He argues that Lee's claims, based on Ing's alleged misappropriation of \$1 million Lee had given Ing in 2008 to invest in currency trading, were barred by the statute of limitations and not subject to the delayed discovery rule. Ing also argues that the unclean hands doctrine precludes Lee's recovery because Lee engaged in tax fraud in an earlier investment in a medical center. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

Ing is a leader of a church, the Seventh Day Church of Christ. He holds himself out as an investment banker, specializing in mergers and acquisitions, and he lectures the congregation on finance, business, and investments. Lee is a physician specializing in obstetrics and gynecology. He was introduced to Ing in late 2007 and began attending his church.

In May 2008, Ing convinced Lee to invest \$1 million in currency trading. He represented that Lee could make 20 to 30 percent profit a year, part of which he could donate to the church. Lee gave Ing a signed check, which Ing filled out. Ing made the check out to his investment company, Hypo Capital Markets, and wrote "investment(s)" on the memo line. Within a month of making the investment, Lee asked for an account statement. Ing told Lee he already had made \$100,000, but could not give him a statement because that would expose the other investors in what he represented as a "pool international investment." Based on Ing's assurance that the investment was profitable, Lee bought a Mercedes in June 2008. After a year, Lee asked Ing for the 20 percent profit, but Ing told him it could not be separated from the pool.

During the same period, Ing and Lee were involved in another business venture. When they first met, Lee had a pending lawsuit against a Dr. Sayad for allegedly misappropriating Lee's earlier \$1 million investment in a 40-percent ownership of the Maximum Surgery Center (Maximum) in Chino. Ing agreed to help Lee take control of the center. At their first meeting with Sayad, Ing offered Sayad \$1 million, but Sayad

rejected the offer as too low. In April 2008, Ing told Lee that he had negotiated a buy-out deal, and the two discussed running the center for the benefit of the church. Lee signed documents transferring control of Maximum, as well as its liabilities, to Genesis Development and Investment, Inc., a company originally owned by Ing. In 2009, stock ownership of Maximum was transferred to church member Lina Wong. According to Lee, the transfer was engineered by Ing in order to reduce the center's liabilities. Ing's wife, Wendyfer Zhong, ran the center until it closed in 2011.

Several months before Maximum shut down, Lee asked Ing to return a portion of his investment in currency trading, so that he could pay off loans and leases he had signed on behalf of the center. Ing promised to wire the money, but did not. He had not invested the \$1 million in currency trading; instead, he had donated \$540,000 of it to the church to buy a property in Rowland Heights, and he had spent the rest on personal expenses. The church property was placed in the name of church member Fujiko Suzuki, who held it in trust for the church.

In November 2011, Lee sued Ing for breach of oral contract, fraud, conversion, common counts, civil conspiracy, and constructive trust, based on his failure to invest in currency trading. Suzuki was a named party to some of the causes of action. Ing cross-complained for breach of oral agreement, alleging that Lee had agreed to compensate him for his services during the buy-out and subsequent running of the medical center, as well as for securing a contract with the California Prison Health Care Services. During the bench trial, Lee dismissed the fraud claim against Suzuki and the civil conspiracy claim against both defendants.

Ing's position at trial was that the \$1 million check to Hypo Capital Markets represented Lee's investment in the buy-out of Maximum, and that Lee agreed to compensate Ing for his services in whatever amount was left over after the negotiations with Sayad; since Sayad gave up control of Maximum for no additional compensation, Ing testified that, pursuant to his agreement with Lee, he was entitled to receive the entire

\$1 million. Lee testified he did not authorize Ing to offer Sayad \$1 million and did not agree to compensate Ing in that amount.

The trial court found that Ing was not credible, that he had breached the agreement to invest the \$1 million in currency trading, that he had made misrepresentations and concealed material facts in order to induce the investment. The court found Lee did not obtain full control of Maximum and there existed no enforceable agreement to compensate Ing for his services with respect to the center. Ing objected to the statement of decision.

Judgment was entered against Ing in the amount of \$1,808,556.67, which included compensatory and punitive damages, as well as prejudgment interest. A constructive trust was placed on the church property. Ing and Suzuki filed a timely notice of appeal, but only Ing filed an opening brief.

DISCUSSION

I

Ing argues the statement of decision is deficient because the trial court did not address application of the statute of limitation to Lee's complaint, and the court erred in not dismissing Lee's complaint as time barred. Ing is incorrect.

The effect of an appellant's objection to a statement of decision is that we will not imply findings in a respondent's favor on controverted issues if the trial court's omission or ambiguous resolution of those issues was brought to its attention. (Code Civ. Proc., § 634; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133–1134.) The general rule is that “only when [a statement of decision] fails to make findings on a material issue which would fairly disclose the trial court's determination would reversible error result. [Citations.]” (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.)

The trial court made findings of fact pertaining to the statute of limitation issues raised by the parties in paragraphs 26 and 66 of its statement of decision. As to Lee's

complaint, it found that Ing “did not prove that his breach of contract or fraud or basis of the common count cause of action was known or should have been known to Plaintiff within months after the funds were delivered or the contract breached, or that Plaintiff failed to file this case within two years of such actual or constructive knowledge.” This finding fairly reflects the trial court’s rejection of Ing’s statute of limitation argument.

“When a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the evidence . . . can support only one reasonable conclusion. [Citation.]” (*Broberg v. Guardian Life Ins. Co. of America* (2009) 171 Cal.App.4th 912, 921.) We review the court’s factual findings for substantial evidence and its conclusions of law de novo. (*ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1266.) Delayed accrual of a cause of action under the discovery rule applies to tort and breach of contract actions involving fraud or misrepresentation by the defendant. (*NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1233.) For purposes of the rule, “[a] plaintiff is on inquiry notice when she ‘suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her.’ [Citation.]” (*Id.* at p. 1236.)

Ing argues that Lee was immediately placed on notice of the misappropriation of his investment because he asked Ing for a statement after the first month, and Ing refused to give him one. According to Lee, Ing said he could not provide a statement because he did not want to disclose the names of other investors in what he represented was a “pool international investment,” but he assured Lee that he already had made \$100,000 in profit. At about the same time, Ing reportedly told other church members, “I made so much money and we’re going to make money for the church. I didn’t make money for him to buy Mercedes-Benz.” Ing misinterprets Lee’s testimony to mean Lee knew Ing had bought himself a Mercedes with Lee’s money. However, the trial court allowed Lee to reopen his case and explain that Ing’s reported comment referred to Lee’s own purchase of a Mercedes in June 2008. Lee explained that he bought the car on Ing’s

assurance that the investment already was profitable. The trial court found Lee to be credible, and on appeal we generally do not redetermine issues of credibility. (*Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201 [trial court’s credibility determination cannot be reversed on appeal unless testimony is incredible on its face or inherently improbable].)

Ing’s representations did not place Lee on notice that his investment was being misused; on the contrary, Ing misled Lee into believing the money had been successfully invested, and only privacy concerns prevented Ing from providing the statement. The delayed discovery rule typically applies in situations where a defendant “had reason to believe the plaintiff remained ignorant he had been wronged.” (*NBCUniversal Media, LLC v. Superior Court, supra*, 225 Cal.App.4th at p. 1233.) Such a defendant “‘should not be allowed to knowingly profit from [the plaintiff’s] ignorance.’ [Citation.]” (*Id.* at p. 1234.) Because Ing himself led Lee to believe the investment was profitable, he cannot now argue that Lee was on inquiry notice that the money had not been invested at all. Additionally, the trial testimony established that Lee and Ing engaged in other ventures together in 2008 and 2009, supporting the inference that Lee did not and had no reason to suspect Ing of any nefarious conduct at that time. The evidence indicates that the rift between the two occurred around the closing of Maximum in 2011, and the complaint in this case was filed that same year. The trial court did not err in rejecting Ing’s statute of limitation defense under the circumstances.¹

¹ Lee also argues he and Ing were in a confidential, fiduciary relationship. While the delayed discovery rule has been applied to “causes of action involving the breach of a fiduciary relationship” (*NBCUniversal Media, LLC v. Superior Court, supra*, 225 Cal.App.4th at p. 1233, fn. 5), no such cause of action was alleged in this case. We need not decide whether Ing and Lee had a fiduciary or confidential relationship as church leader and church member (see *Richelle L. v. Roman Catholic Archbishop* (2003) 106 Cal.App.4th 257) or investment banker and investor. Even in fiduciary relationships, “facts which would make a reasonably prudent person suspicious” may trigger the duty to investigate. (*Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921.)

II

Ing argues that Lee's recovery was barred by the doctrine of unclean hands. The argument is based on Lee's testimony that he had given Sayad \$1 million "to buy 40 percent of the Maximum Surgery Center. But in order to avoid taxation, that's what he told me—he even have his accountant explain to me, don't pay the tax that way, invest 40 percent ownership of the Surgery Center. But we would make a lot of money, and yet you don't need to pay any tax."

As Lee points out, this argument is made for the first time on appeal and therefore may be treated as forfeited. (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal.App.4th 333, 355 [unclean hands argument forfeited for failure to raise in trial court].) Even on its merits, the argument fails to convince. Ing assumes that Lee's original investment in Maximum was structured to illegally avoid taxation, but Lee's fleeting reference to tax avoidance is not necessarily an admission of tax fraud. (See *Roscoe Terrace v. City of Los Angeles* (1985) 170 Cal.App.3d 559, 568 [““““a transaction, otherwise within the exception of the tax law, does not lose its immunity, because it is actuated by a desire to avoid, or, if one choose[s], to evade taxation””””].) Moreover, Lee recovered damages in this case based on his investment in currency trading, not based on his earlier investment in Maximum. Whether or not he engaged in tax fraud in an unrelated transaction is irrelevant because the doctrine of unclean hands “demands that a plaintiff act fairly in the matter for which he seeks a remedy.” (*Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4th 970, 978.)

In his reply brief, Ing argues the agreement to invest in currency trading was illegal and unenforceable because he was not licensed to engage in such trading. He also takes issue with the trial court's finding that Lee “never gained complete control of Maximum.” Issues raised for the first time in reply may be deemed forfeited.² (*Inyo*

² Ing references other cases involving Lee (e.g. *Wong v. Lee* (Aug. 12, 2014, B251401 [nonpub. opn.]), but fails to show they have preclusive effect. He also references trial exhibits, but no exhibits have been lodged on appeal.

Citizens for Better Planning v. Inyo County Bd. of Supervisors (2009) 180 Cal.App.4th 1, 14, fn. 2.) Nor would these issues change the result on appeal. As to the first issue, there is no evidence that the investment agreement required Ing himself to engage in currency trading. As to the second, Lee's testimony that Ing's wife ran Maximum until it closed down and that Ing engineered the transfer of the center to Wong supports the court's finding that Lee was never in complete control of the center.

DISPOSITION

The judgment is affirmed. Respondent is entitled to recover his costs on appeal.

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EPSTEIN, P.J.

We concur:

WILLHITE, J.

COLLINS, J.