

NOT TO BE PUBLISHED

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Calaveras)

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JOHN OMAHEN,  
  
Plaintiff and Respondent,  
  
v.  
  
VINCENT SERVIDIO,  
  
Defendant and Appellant.

C069607  
  
(Super. Ct. No. CV35822)

In this partnership case, the trial court awarded plaintiff John Omahen over \$70,000 in damages for defendant Vincent Servidio's breach of his fiduciary duties to Omahen. On appeal, Servidio contends the action was time barred because the limitations period for breach of fiduciary duty is two years when the underlying partnership agreement is oral. He also contends the amount of damages the court awarded was twice what it should have been because the court found there was a partnership.

Servidio is wrong on both points. The limitations period for breach of fiduciary duty in this circumstance was four

years, not two. And as for the amount of damages, the trial court's calculation showed that the court took the existence of the partnership into account in reaching the figure it did. Accordingly, we affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

In 2006, Omahen and Servidio orally established a partnership involving the purchase of real property. After one deal in which Omahen "'didn't make a dime,'" Servidio proposed the purchase of a house on Kingston Avenue in Napa that was subject to foreclosure and was being sold in probate. Omahen ended up paying all of the expenses of purchasing the property, and Servidio paid nothing.

At some point, Servidio told Omahen that he had a friend named Ray who could sell the Kingston Avenue property, and he said Ray needed \$12,500 for office space. Omahen paid that amount to Servidio as an inducement for Ray to find a buyer for the property, but Omahen was never introduced to Ray, the property was never sold, and "evidence was presented to prove that the money was not received by Ray." Servidio did not account to Omahen for the dispersal of this money.

Following the Kingston Avenue matter, the parties got involved with a residence on Littlejohn Road in Copperopolis. Servidio claimed he could purchase the property for \$410,000 and sell it for \$500,000. Servidio failed to disclose to Omahen that he had been trying to purchase the property himself.

Omahen paid \$17,000 to stop foreclosure proceedings on the Littlejohn Road property. Servidio promised to reimburse Omahen

after they sold the property. When Servidio could not pay his half of the down payment, Omahen paid \$33,126.89 to complete the purchase.

Pending resale of the property, Servidio was to rent the property out, manage the rental, and pay the rental payments to Omahen. Servidio failed to make any payments to Omahen, failed to account for and share the tenant's security deposit and first month's rent, and failed to supervise the tenant. When Omahen sought to evict the tenant for nonpayment, the property was "'like a garbage dump'" and required a great deal of clean up.

When escrow closed on the purchase of the Littlejohn Road property in November 2006, Omahen learned that the seller had executed a promissory note to Servidio for \$100,000. Apparently, the note was paid off from the proceeds of the sale. Servidio told Omahen that he paid the seller a finder's fee of \$6,000 and each of her two children \$1,000, plus additional unidentified expenses.

After the close of escrow, the parties agreed to meet in Napa to "'settle up.'" At the meeting, Servidio offered Omahen his Corvette and other unspecified settlement. Servidio finally tendered a check in the sum of \$16,000 but stopped payment on the check before Omahen could cash it.

On June 18, 2009, Omahen commenced this action by filing a complaint against Servidio alleging breach of fiduciary duty and promissory fraud. Omahen alleged that as his partner, Servidio breached his fiduciary duty to Omahen by taking approximately \$100,000 of partnership funds.

The case was apparently tried to the court in May 2011. In a posttrial brief, Servidio argued that Omahen's cause of action for breach of fiduciary duty was "in reality a Breach of Contract allegation," and he argued that it was barred by the two-year statute of limitations because Omahen had not commenced the action until more than two years after escrow closed on the Littlejohn Road property (and Omahen learned of the promissory note).

The trial court issued a statement of decision in June 2011, finding that Servidio "breached his fiduciary duty to [Omahen] by his failure to account for and to distribute funds received on behalf of the partnership." The court further found that the action was not barred by the two-year statute of limitations. The court awarded Omahen \$70,558.89 in damages.

Servidio filed numerous objections to the statement of decision, including arguing that since the court found the parties "were engaged in a partnership on the Littlejohn property, [Servidio] should only owe [Omahen] one-half of the amount of \$70,558.89, or \$35,479.45." In response, the court issued an amended statement of decision. Servidio again filed numerous objections, including an objection to the amount of damages because Servidio did not know how the Court arrived at the amount it awarded. In response, the trial court issued a second amended statement of decision. This time, the court awarded Omahen \$71,034.95 in damages and specifically explained that the damages figure consisted of the following:

"One-half of the following amounts:

"\$33,126.89 Plaintiff's purchase deposits & closing costs on 4800 Littlejohn, Copperopolis, property.

"\$ 2,700.00 First month rent and security deposit on 4800 Littlejohn.

"\$ 590.00 Sewer charge paid by plaintiff on 4800 Littlejohn.

"\$ 400.00 Disposal bin charges paid by plaintiff on 4800 Littlejohn.

"\$ 189.00 Homeowner fees paid by plaintiff on 4800 Littlejohn.

"\$ 64.00 Landfill fee[.]

"\$80,000.00 Promissory note delivered to defendant by seller (less finder's fee) of \$20,000.00.

"Full reimbursement of \$12,500.00 which defendant claimed to have paid one 'Ray' for assistance in purchasing realty at 3105 Kingston, Napa."

The court entered judgment for Omahen in August 2011. Servidio timely appealed.

## DISCUSSION

### I

#### *Statute Of Limitations*

Section 339 of the Code of Civil Procedure<sup>1</sup> provides a two-year limitations period for "[a]n action upon a contract, obligation or liability not founded upon an instrument of writing." Section 343 provides that "[a]n action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

Servidio contends section 339 governs here because the partnership agreement between the parties was an oral agreement, and therefore this action is one upon a "contract" "not founded upon an instrument of writing." In support of his argument, Servidio cites only a *depublished* appellate decision,<sup>2</sup> in violation of the California Rules of Court. (See Cal. Rules of Court, rule 8.1115.)

"The statute of limitations that applies to an action is governed by the gravamen of the complaint, not the cause of action pled." (*City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 889.) Here, the gravamen of the

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<sup>1</sup> All further section references are to this code.

<sup>2</sup> Servidio's citation is to "Workmans Auto Insurance Co. v. Guy Carp, California Court of Appeal Decision filed May 4, 2011." The opinion in *Workmen's Auto Ins. Co. v. Guy Carpenter & Co., Inc.* (2011) 194 Cal.App.4th 1468, to which Servidio apparently meant to refer, was *depublished* and rendered unciteable when the Court of Appeal granted rehearing in the case on June 2, 2011.

complaint was not that Servidio breached the terms of an oral agreement between the parties, but rather that Servidio "intentionally, knowingly, wrongfully and fraudulently [took] approximately \$100,000.00 of partnership funds." "[T]he relationship between partners is of a fiduciary character which imposes upon the parties the duty of good faith and fair dealing and requires that none of the partners may be permitted to take any unfair advantage." (*Wind v. Herbert* (1960) 186 Cal.App.2d 276, 284.) What Omahen alleged and proved here was not the breach of an oral partnership agreement, but rather the breach of the fiduciary duties Servidio owed him as a matter of law because they were partners. "The statute of limitations for breach of fiduciary duty is four years. (§ 343.)" (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230.) Accordingly, Omahen's action, which he commenced less than three years after learning of the promissory note, was timely.

## II

### *Damages*

In challenging the award of damages, Servidio asserts "[t]he actual amount owed . . . should be one-half of the Judgment awarded" because "[h]ow the Court got to \$71,034.95 appears to be based upon primarily the \$100,000.00 received by [Servidio] when [Omahen] closed escrow on the Littlejohn property. [Servidio] believes that [Omahen] would only be entitled to one-half of that amount because of the existence of the partnership."

This argument is specious and patently frivolous. In its second amended statement of decision, the court clearly explained exactly how it calculated the \$71,034.95 in damages, specifically noting that it was awarding Omahen *one-half* of several amounts, including the \$80,000 that represented the net proceeds of the \$100,000 promissory note (minus a \$20,000 finder's fee).<sup>3</sup> It is apparent from the statement of decision that by dividing these various amounts in half in making its award, the court *did* take into account the existence of the partnership. Incredibly, counsel for Servidio completely ignores this statement by the court. The challenge to the award of damages has absolutely no merit.

DISPOSITION

The judgment is affirmed. Omahen shall recover his costs on appeal. (Cal. Rules of Court, Rule 8.278(a)(1).)

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ROBIE, J.

We concur:

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RAYE, P. J.

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BLEASE, J.

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<sup>3</sup> The evidentiary basis for this \$20,000 offset is not clear to us, but neither party has challenged this aspect of the court's award.