

Filed 10/19/17 Corman v. Superior Court CA2/1

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REPORTS**

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**IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA**

SECOND APPELLATE DISTRICT

DIVISION ONE

ROGER M. CORMAN et al.,

Petitioners,

v.

LOS ANGELES COUNTY
SUPERIOR COURT,

Respondent;

ESTATE OF HILLEL CHODOS et
al.,

Real Parties in Interest.

B282280

(Los Angeles County
Super. Ct. Nos. BP164845,
BP163587)

ORIGINAL PROCEEDINGS in mandate. Clifford
Klein, Judge. Petition denied.

Parker Mills, David B. Parker, Joel Osman, Melissa Kurata; Lewis Brisbois Bisgaard & Smith and Lann G. McIntyre for Petitioners.

No appearance for Respondent.

Deborah Chodos; Law Offices of Jonathan P. Chodos, Jonathan Chodos and Rafael Chodos for Real Parties in Interest.

Attorneys Hillel and Rafael Chodos¹ sued former clients Roger and Brian Corman (the Corman Brothers) for unpaid attorney fees. Hillel died while the action was still pending. Although the Corman Brothers subsequently filed a cross-complaint in the case, they did not file a timely claim against Hillel's estate in probate court, thereby failing to toll the applicable statute of limitations under Code of Civil Procedure section 366.2.

The trial court denied the Corman Brothers' petition and motion to file a late claim in probate court, finding that Code of Civil Procedure section 366.2's one-year limitations period, which requires actions against the decedent to be filed within one year of the decedent's death, barred their claims. In so holding, the trial court found that the Corman Brothers' filing of the cross-complaint in the attorney fee case did not satisfy the timely claim filing requirements of the probate court.

¹ We refer to Hillel Chodos and Rafael Chodos by their first names for the sake of clarity, intending no disrespect.

We affirm.

BACKGROUND

The Corman Brothers retained attorneys Hillel and Rafael, also brothers, to represent them in pursuing claims against the Corman Brothers' parents. Hillel and Rafael were unsuccessful in pursuing the claims and the court ultimately entered a \$2.9 million judgment against the Corman Brothers.² The court's statement of decision described several ways in which it believed Hillel and Rafael's legal representation had caused the adverse outcome. The court also found the action was brought "without reasonable cause and in bad faith." Hillel and Rafael had billed the Corman Brothers hundreds of thousands of dollars in attorney fees during the case and eventually sued the Corman Brothers for \$667,421 in unpaid legal fees. The Corman Brothers elected to proceed with a mandatory fee arbitration.

On May 27, 2015, during the pendency of the fee arbitration, Hillel passed away. The next day, Rafael emailed various counsel—with a "cc" to David B. Parker and William K. Mills, the Corman Brothers' attorneys at Parker Mills LLP—notifying them of Hillel's death. On July 2, 2015, the arbitrator found against Hillel and Rafael and in

² The protracted litigation and subsequent appeals in this particular case have led to two unpublished Court of Appeal decisions—*Corman v. Corman* (Nov. 3, 2015, B248816) [2015 WL 6690238] and *Corman v. Corman* (Aug. 29, 2016, B251513) [2016 WL 4501991].

favor of the Corman Brothers, ordering Hillel and Rafael to reimburse their former clients \$305,000. Rafael rejected the arbitration award, however, and the attorney fee case proceeded.

On July 20, 2015, Rafael began the process of administering Hillel's estate. On August 5, 2015, Rafael filed a notice of petition to administer the estate. Although the notice was served on the estate's heirs and beneficiaries, it was not served on any of its creditors, including the Corman Brothers.³ Rafael also published notice of Hillel's death in a local legal newspaper on three separate dates in August 2015.

Meanwhile, the attorney fee case continued course. On August 24, 2015, the Corman Brothers filed a cross-complaint in the case against Hillel and Rafael for legal

³ The Los Angeles Superior Court has posted two forms personal representatives can use when notifying creditors of an estate's administration—DE-121 "Notice of Petition to Administer Estate" and DE-157 "Notice of Administration to Creditors." (See <<http://www.courts.ca.gov/formname.htm>> [as of Sept. 19, 2017].) Both are fillable .pdf forms and easily downloaded. Both warn creditors they must file their claims four months after letters are first issued to a general personal representative or 60 days after notice of administration is mailed or personally delivered to the creditor, whichever comes later. Although Rafael did not provide the Corman Brothers with either form, the Corman Brothers do not contend they were unaware of the statutory deadlines noted on the forms. Rather, they contend the deadlines were never triggered in the first place.

malpractice. On August 28, 2015, Rafael was appointed executor of Hillel's estate in the probate case. Letters of administration were issued to Rafael on September 15, 2015. On September 21, 2015, Rafael filed a motion for trial preference in the attorney fee case based on his relatively advanced age.

The Corman Brothers opposed the motion, noting that although Rafael was the executor of Hillel's estate, and was seeking to wrap up any issues with the estate, Rafael should not receive preferential treatment because he was the one actually responsible for delaying the case "due to his failure to timely file a motion to substitute in for Hillel upon his death almost five months ago." In his reply, emailed to the Corman Brothers' attorney David Parker at his Parker Mills LLP email address on October 28, 2015, and mailed to Parker at the law firm that same day, Rafael responded that it was the Corman Brothers who were responsible for the delay because they had not yet filed a creditor claim in the probate matter.

"[The Corman Brothers] say that Rafael has 'delayed' the prosecution of this case, by failing to file a motion to be substituted in for his late brother. . . . But the fact is that the case has proceeded, and can proceed, as it is—except that cross-complainants must file a claim in the probate estate if they want to proceed against Hillel as a cross-defendant. It is after all THEY who have been lax in their obligation to file a claim."

On July 12, 2016, Rafael moved to dismiss the Corman Brothers' cross-complaint in the attorney fee case. Rafael argued that the time to file creditor claims in the probate case had expired and, having failed to file such claims, the Corman Brothers could not continue with their cross-complaint. The Corman Brothers opposed the motion to dismiss. Nevertheless, on the same day Rafael moved to dismiss the cross-complaint in the attorney fee case, the Corman Brothers filed creditor claims in the probate case. The claims sought more than \$13 million from the estate.

On July 20, 2016, Rafael moved to dismiss the Corman Brothers' creditor claims in the probate case. The Corman Brothers opposed the motion, arguing that they had not been served with notice of the administration of the estate as required by Probate Code section 9050 and that their claims were therefore timely. Rafael replied to both motions.

On September 13, 2016, Rafael's motion to dismiss the cross-complaint in the attorney fee case was continued to January 12, 2017. The trial court ordered the Corman Brothers to file a petition to file a late claim in the probate case. The Corman Brothers complied with the trial court's order. When the matter was re-set on the motions calendar, they also filed a motion to file a late claim. The Corman Brothers again argued they had never been served with a notice to creditors regarding the probate proceedings and that their creditor claims were therefore timely.

Rafael opposed the Corman Brothers' petition to file a late claim, arguing that the petition was untimely filed and

that the creditor claims and petition were also barred by the one-year statute of limitations in Code of Civil Procedure section 366.2. In reply, the Corman Brothers contended, in relevant part, that Rafael had not presented evidence of valid publication of death and that actual knowledge of Hillel's death was not a substitute for the requisite service of notice of the administration of probate proceedings.

The trial court denied the Corman Brothers' petition and motion to file a late claim, finding that the one-year statute of limitations in Code of Civil Procedure section 366.2, which requires actions against the decedent to be filed within one year of the decedent's death, barred their claims. In so holding, the trial court found that the Corman Brothers' filing of the cross-complaint in the attorney fee case did not satisfy the timely claim filing requirements of the probate court.

This appeal followed.

APPLICABLE STATUTES

Pursuant to Probate Code section 9050, "the personal representative shall give notice of administration of the estate to the known or reasonably ascertainable creditors of the decedent. . . . [A] personal representative has knowledge of a creditor of the decedent if the personal representative is aware that the creditor has demanded payment from the decedent or the estate." (Prob. Code, § 9050, subd. (a).) Notice may be mailed or personally delivered as provided. If mailed to an address within the United States, notice must be sent by first-class mail to the person's place of business or

place of residence.⁴ (Prob. Code, § 1215, subd. (b)(1), (d), § 1216.)

Under Probate Code section 9100, a creditor must file a claim against an estate before expiration of the later of the following times—“four months after the date letters are first issued to a general personal representative” or “[60] days after the date notice of administration is mailed or personally delivered to the creditor.” (Prob. Code, § 9100, subd. (a)(1)-(2).) The subdivision specifically notes that “[n]othing in this paragraph extends the time provided in Section 366.2 of the Code of Civil Procedure.” (Prob. Code, § 9100, subd. (a)(2).) Indeed, the statute again emphasizes, “[n]othing in this section shall be interpreted to extend or toll any other statute of limitations or to revive a claim that is barred by any statute of limitations. The reference in this subdivision to a ‘statute of limitations’ includes Section 366.2 of the Code of Civil Procedure.”⁵ (Prob. Code, § 9100, subd. (c).)

⁴ It is undisputed that Rafael failed to serve notice on the Corman Brothers. Indeed, Rafael admits he did not serve notice on any creditors of Hillel’s estate.

⁵ Under Code of Civil Procedure section 366.2, “[i]f a person against whom an action may be brought . . . whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.” (Code Civ. Proc., § 366.2,

Nevertheless, a court may allow a claim to be filed after expiration of the time for filing a claim provided in Probate Code section 9100 if “[t]he personal representative failed to send proper and timely notice of administration of the estate to the creditor, and that petition is filed within 60 days after the creditor has actual knowledge of the administration of the estate.”⁶ (Prob. Code, § 9103, subd. (a)(1).) Once again, however, “[n]othing in this section authorizes allowance or approval of a claim barred by, or

subd. (a).) This one-year limitations period is tolled only in limited circumstances as specified in the statute, including filing a timely claim against the estate. (See Code Civ. Proc., § 366.2, subd. (b)(2).)

⁶ From 1988 to 1997, the statute allowed a late creditor claim to be filed only if the creditor *and* the attorney representing the creditor did not have actual knowledge of the estate’s administration more than 15 days before the time to file a creditor claim expired. The petition to file a late claim had to be filed within 30 days after either the creditor or the creditor’s attorney had actual knowledge of the estate’s administration, whichever occurred first. Even in previous versions of the statute, however, “[n]othing in this paragraph authorizes allowance or approval of a claim barred by, or extends the time provided in, Section 366.2 of the Code of Civil Procedure.” (Prob. Code, former § 9103, amended by Stats.1988, c. 1199, § 84.5; Stats.1990, c. 140, § 10, Stats, 1996, c. 862, § 23.)

extends the time provided in, Section 366.2 of the Code of Civil Procedure.”⁷ (Prob. Code, § 9103, subd. (f).)

A creditor who fails to file a timely claim against a decedent’s estate cannot proceed with any other civil case against the decedent. Under Probate Code section 9351, an action may not be commenced against a decedent unless a claim is first filed in probate court and the claim is rejected in whole or in part. Under Probate Code section 9370, subdivision (a), an action or proceeding pending against the decedent at the time of death may not be continued unless the claim is filed in probate court and the claim is rejected in whole or in part. To that end, a creditor must file a motion in the civil case to continue the action and the court will not grant the motion to continue unless the creditor shows proof of compliance with this Probate Code requirement. (See Code Civ. Proc., § 377.41.)

DISCUSSION

I. Summary

We have been presented with dueling negligent, perhaps purposeful, actions, with each side accusing the

⁷ A creditor who is omitted because he or she had no knowledge of the estate’s administration is not limited to the remedy provided in this section. If assets have been distributed, a remedy may be available against distributees under Probate Code section 9392. If the creditor can establish that the lack of knowledge is a result of the personal representative’s bad faith failure to notify known creditors, recovery may be available against the personal representative under Probate Code section 9053.

other of unclean hands and questionable motives. According to Rafael, the Corman Brothers' failure to file creditor claims against Hillel's estate until after Code of Civil Procedure section 366.2's one-year limitations period had expired precludes the Corman Brothers from collecting on their creditor claims and continuing with their legal malpractice claim. According to the Corman Brothers, however, because Rafael failed to formally notify them of the administration of Hillel's estate as required by Probate Code section 9050, the one-year statute of limitations never began to run. Thus, the Corman Brothers contend, they can proceed with their creditor claims in the probate case as well as their legal malpractice claim in the attorney fee case.

Although Rafael admittedly failed to provide notice pursuant to Probate Code section 9050, no case has held that an executor's failure to so notify a creditor fails to trigger or somehow extends Civil Procedure section 366.2's one-year limitations period. Indeed, although the Probate Code contemplates that an executor may fail to notify an estate's creditors—and thus, under certain circumstances, allows creditors to file late claims after such a failure—"the late-claim remedy is barred if the Code of Civil Procedure section 366.2 one-year limitations period has expired."

(Interinsurance Exchange v. Narula (1995) 33 Cal.App.4th 1140, 1146; see Prob. Code, § 9103, subds. (a)(1) & (f).)

Here, it is undisputed that the Corman Brothers did not file their creditor claims in the probate case until July 12, 2016, more than a year after Hillel's death on

May 27, 2015. Furthermore, by October 28, 2015, the Corman Brothers had learned of the administration of Hillel's estate when Rafael told the Corman Brothers they had to file a creditor's claim in the probate case if they wanted to proceed against Hillel as a cross-defendant in the attorney fee case.⁸ Thus, after October 28, 2015, the Corman Brothers had 60 days in which to file their creditor claims. (Prob. Code, § 9103, subd. (a)(1).) As noted above, their claims, now due by December 28, 2015, were not filed until July 12, 2016—six months after this deadline had passed and more than a month after the maximum one-year limitations period set out in Code of Civil Procedure section 366.2 had expired. Applying a de novo standard of review, (*Dacey v. Taraday* (2011) 196 Cal.App.4th 962, 979), we agree with the trial court and hold that the Corman Brothers' creditor claims are time-barred.

II. The Corman Brothers' Arguments on Appeal

A. *Actual Knowledge*

According to the Corman Brothers, the trial court erred in denying their petition to file a late creditor claim because they never received formal notice of the administration of Hillel's estate and thus the deadline to file a creditor claim was never actually triggered. The Corman Brothers first note that constructive knowledge acquired through a newspaper publication is insufficient to provide notice of the

⁸ The Corman Brothers dispute whether they (as opposed to their attorneys) had actual knowledge of the administration of the estate. We address this claim below.

administration of an estate, see *Tulsa Professional Collection Services v. Pope* (1988) 485 U.S. 478, 489–491, as was their actual knowledge of Hillel’s death. (See *Clark v. Kerby* (1992) 4 Cal.App.4th 1505, 1514.)

However, the Corman Brothers further contend that Rafael has never demonstrated that they—as opposed to their attorneys—had actual knowledge that administration of the estate had begun. In so arguing, the Corman Brothers correctly note that Probate Code section 9103 was amended in 1997, removing language that allowed an attorney’s actual knowledge of the administration of an estate to suffice for a creditor’s actual knowledge.⁹ As discussed above, on October 28, 2015, Rafael emailed a reply to the Corman Brothers’ attorney, stating that the Corman Brothers were responsible for the delay in the attorney fee case because they had not yet filed a creditor claim in the probate matter. Thus, Rafael’s reply did more than simply note that administration of the estate had begun—it warned that affirmative action needed to be taken. The Corman Brothers

⁹ Although, in general, an attorney’s knowledge is imputed to his client, (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1231), such knowledge is not imputed where actual knowledge is required. (*Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 828 & fn. 7, 829.)

do not allege that their attorney failed to convey this clearly important message to them.¹⁰

Assuming that by October 28, 2015, the Corman Brothers knew they needed to file creditor claims in the probate case, Rafael's failure to comply with Probate Code section 9050 would not excuse their failure to file their claims. In *Venturi v. Taylor* (1995) 35 Cal.App.4th 16 (*Venturi*), a creditor argued that the time limits were not triggered because the administrators of the estate "failed to serve him with notice of administration of the decedent's estate as required by section 9050."¹¹ (*Id.* at p. 20.) The

¹⁰ Although the Corman Brothers opposed the motion, they also filed their creditor claims that same day. However, a review of the civil docket shows that the trial court continued the hearing set on July 12, 2016, on this matter. Thus, the Corman Brothers could not have learned about the expired creditor claim deadline in open court. Unless their attorney filed their creditor claims on his own accord, without authorization from his clients, it seems clear that counsel has kept the Corman Brothers informed of developments in the case throughout the pendency of this action.

¹¹ An attorney for the decedent's estate contacted the creditor after finding several promissory notes from the creditor to the decedent in the decedent's home. The creditor then hired an attorney who contacted the estate's attorney and requested that a copy of the letters of administration be sent to him, along with a copy of any will or petition to probate a will. (*Venturi, supra*, 35 Cal.App.4th 16, 18–19.) The estate's attorney subsequently notified the creditor's

creditor further argued that “[c]onsequently, a petition to allow filing of a late claim was unnecessary because the time for him to file a claim never expired.” (*Id.* at p. 22.) The court in *Venturi* found that a creditor with actual notice of the administration of the estate could not avoid the timing requirements of the Probate Code simply because the administrators did not provide notice in the manner required by statute. The court held that actual knowledge was sufficient to trigger the duty to file a timely claim. (*Id.* at p. 26.) The creditor “had actual knowledge of the pendency of the estate proceeding and fell within the class of creditors contemplated by section 9103, subdivision (a). He was required to file a petition for leave to file a late claim and did not do so.” (*Ibid.*)

In *Venturi*, *supra*, 35 Cal.App.4th 16, rather than directly notify the creditor, the estate notified the creditor’s attorney that administration of the estate had begun. As the Corman Brothers correctly note, when *Venturi* was handed down in 1995, an attorney’s knowledge could still serve as the source of actual knowledge that triggered the deadline for filing a late claim. Once Probate Code section 9103 was revised in 1997, that was no longer the case. Thus, if we find that the Corman Brothers did *not* have actual knowledge of the estate’s administration—or perhaps did not have such

attorney that administration of the estate had begun, although he admittedly failed to send a formal notice pursuant to Probate Code section 9050. (*Id.* at pp. 19, 22.)

knowledge until July 12, 2016, the day they finally filed their creditor claims—then *Venturi* is inapposite.

Nevertheless, we need not resolve the issue because, as discussed below, the 1997 revision to Probate Code section 9103 is relevant only when evaluating whether a late claim was filed within the requisite 60-day period after the creditor acquired actual knowledge of the estate’s administration. It has no relevance where, as here, the claim was filed after the one-year deadline set out in Code of Civil Procedure section 366.2 had expired.

B. *Code of Civil Procedure Section 366.2*

The Probate Code sections at issue here repeatedly warn creditors that, regardless of any allowances provided to creditors, the time provided in section 366.2 of the Code of Civil Procedure cannot be extended. (See Prob. Code, §§ 9100, subd. (a)(2), (c), 9103, subd. (f).) Under section 366.2, the one-year limitations period is tolled only in limited circumstances as specified in the statute, including filing a timely claim against the estate. (See Code Civ. Proc., § 366.2, subd. (b)(2).) Because this one-year statute of limitations “applies to all debts of the decedent regardless of whom the claims are brought against,” (*Levine v. Levine* (2002) 102 Cal.App.4th 1256, 1265), and the Corman Brothers did not file their creditor claims before the deadline had expired, their claims are now time-barred.

“[T]he overall intent of the Legislature in enacting Code of Civil Procedure former section 353 [now section 366.2] was to protect decedents’ estates from [creditors’]

stale claims.” (*Dawes v. Rich* (1997) 60 Cal.App.4th 24, 34, fn. 4; see Cal. Law Rev. Com., Recommendation Relating to Notice to Creditors in Estate Administration (Dec. 1989) 20 Cal. Law Revision Com. Rep. (1990) pp. 507, 512–513.) “[T]he drafters of former Code of Civil Procedure section 353 and current Code of Civil Procedure section 366.2 believed the limitation period the statute imposes serves ‘the strong public policies of expeditious estate administration and security of title for distributees, and is consistent with the concept that a creditor has some obligation to keep informed of the status of the debtor.’ (Recommendation Relating to Notice to Creditors in Estate Administration, *supra*, 20 Cal. Law Revision Com. Rep. (1990) p. 512.)” (*Dawes*, at p. 34.)

To that end, Code of Civil Procedure section 366.2’s one-year statute of limitations will be applied even if the time period lapses before estate administration has even begun. (See *Bradley v. Breen* (1999) 73 Cal.App.4th 798, 805–806 [§ 366.2 applies when “impossible” to assert claims against estate within one-year period]; *Levine v. Levine*, *supra*, 102 Cal.App.4th at p. 1265 [§ 366.2 applies where no proceeding to administer estate was initiated and there was no notice to creditors].)¹² Thus, although Rafael’s failure to

¹² In *Levine v. Levine*, *supra*, 102 Cal.App.4th 1256, the beneficiaries of a trust sued the trust’s successor trustee for breach of fiduciary duty more than one year after the original trustee’s death. The beneficiaries argued that Code of Civil Procedure section 366.2 did not apply because there was no estate administration or statutory notice to creditors.

provide statutory notice of the estate's administration under Probate Code section 9050 gave the Corman Brothers an extended opportunity to file creditor claims, they still had no later than one year from Hillel's death in which to file their claims. Their failure to do so means the claims are now time-barred under Code of Civil Procedure section 366.2.

C. *The Legal Malpractice Cross-Complaint*

In the alternative, the Corman Brothers contend that filing a legal malpractice cross-complaint in the attorney fee case three months after Hillel's death tolled Code of Civil Procedure section 366.2's statute of limitations. They are incorrect.

Under Code of Civil Procedure section 366.2, subdivision (a), "[i]f a person against whom an action may be brought . . . dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply." This one-year limitations period is tolled only in limited circumstances, including filing a

The court rejected the argument based on a plain reading of section 366.2 as well as the public policy underlying the statute. (*Id.* at pp. 1262–1264.) As noted by Rafael, the holding in *Levine* in the trust context is similar to that of *Venturi*, *supra*, 35 Cal.App.4th 16 in the probate context—namely, lack of statutory notice to creditors, or even the lack of actual knowledge of the estate's administration, will not toll section 366.2's one-year limitations period.

timely claim against the estate. (See Code Civ. Proc., § 366.2, subd. (b)(2).)

Although the Corman Brothers did commence an action within one year of Hillel's death by filing a cross-complaint in their civil suit, they first had to file the claim in probate court so that the claim could be rejected in whole or in part. (See Prob. Code, § 9351.) They did not comply with this Probate Code requirement and thus did not file a timely claim against the estate within the meaning of Code of Civil Procedure section 366.2, subdivision (b)(2). "[A]lthough the pleadings do in their way provide an announcement of the amount and nature of the claim," (*Satterfield v. Garmire* (1967) 65 Cal.2d 638, 642), '[t]he statutory requirement of presentation of a claim is not satisfied by service of summons and complaint in a lawsuit.' (*Ibid.*)

In other words, "there must be . . . a demand against the estate for payment which has its own independent existence as a 'proceeding' before the probate court and does not have to be gleaned from some other proceeding involving either the decedent in his lifetime or the administration of his estate." (*Nathanson v. Superior Court* (1974) 12 Cal.3d 355, 366.)¹³ The Corman Brothers' failure to file such a claim in probate court allowed Code of Civil Procedure section 366.2's one-year limitations period to run unabated.

¹³ See *Wood v. Brown* (1974) 39 Cal.App.3d 232; *Heywood v. Municipal Court* (1988) 198 Cal.App.3d 1438; *Dobler v. Arluk Medical Center Industrial Group, Inc.* (2001) 89 Cal.App.4th 530.)

Although filed in probate court, the creditor's claim was untimely. Although timely, the malpractice claim was not filed in probate court. Thus, neither can save the Corman Brothers here.

D. *Equitable Estoppel*

For the first time on appeal, the Corman Brothers argue that even if their claim is time-barred, Rafael cannot assert the a statute of limitations defense based on the doctrine of equitable estoppel.

“ ‘Equitable estoppel, . . . also called estoppel by conduct, is simply stated. “Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it.” ’ ”
(*Campbell v. Scripps Bank* (2000) 78 Cal.App.4th 1328, 1334, fn. 3.) “ ‘The doctrine is defensive in nature only, and “operates to prevent one [party] from taking an unfair advantage of another.” [Citation.] Whether there is an estoppel is chiefly a question of fact. [Citation.] There must be (1) a representation or concealment of material facts (2) made with knowledge, actual or virtual, of the facts, (3) to a party ignorant, actually and permissibly, of the truth, (4) with the intent, actual or virtual, that the latter act upon it, and (5) the party must have been induced to act upon it.’ ”
(*Ibid.*)

However, the existence of estoppel is a factual question to be determined in the first instance by the trial court.

(*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 531.) At no time below did the Corman Brothers invoke the doctrine of equitable estoppel as a means of precluding Rafael from asserting a statute of limitations defense. Had they done so, evidence on the issue could have been presented. The Corman Brothers are therefore precluded from invoking the doctrine of equitable estoppel for the first time on appeal. (See *ibid.*; *California Teachers' Assn. v. Governing Board* (1983) 145 Cal.App.3d 735, 746.)

DISPOSITION

The petition is denied. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.