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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SHARON BREGMAN, AS TRUSTEE OF THE SHARON LYNN BREGMAN TRUST, Plaintiff and Appellant, v. ROBERT EBINER et al., Defendants/Cross Complainants and Respondents.	B264024 (Los Angeles County Super. Ct. No. KC064469)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan T. Oki, Judge. Reversed.

Law Office of Brown & Brown and Lee Brown for Plaintiff and Appellant.

Law Office of Driskell & Gordon and Robert L. Driskell for Defendants/Cross-Complainants and Respondents.

INTRODUCTION

Sharon Bregman sued Robert Ebiner and Michael Ebiner alleging, among other claims, breach of a partnership agreement. Robert Ebiner filed a cross-complaint, alleging breach of duty and seeking dissolution of the partnership. After trial to the court, the court found that no partnership existed, and denied relief on both complaints. Bregman appealed; Ebiner did not. Because the trial court improperly ignored the judicial admissions made by both parties, we reverse the judgment and remand for a new trial on Bregman's complaint.

FACTUAL AND PROCEDURAL HISTORY

Robert Ebiner and Bernard Bregman, Sharon Bregman's father, formed a partnership in 1977 to manage a piece of commercial real property in which each held a fifty percent ownership. They operated the partnership until Bernard Bregman's death in 1991; after proceedings in the probate court, Sharon Bregman became the owner of her father's interest in the property. From 1991 forward, Ebiner and Sharon Bregman (hereinafter "Bregman") managed the property as a partnership, with Ebiner being responsible for legal matters, and Bregman responsible for accounting matters. For many years, regular partnership meetings took place; all distributions were equal between the two.

In 2011, concerned that the property was not being well-managed, Bregman took steps to obtain information about the management issues. In August, 2012, she sued Ebiner, along with his son Michael, who had served as property manager, alleging five causes of action for negligence, fraud and an accounting (against Michael and Ebiner), and breach of partnership agreement and breach of fiduciary duties (against Ebiner).

Ebiner and Michael answered the unverified complaint with a general denial, and Ebiner filed a cross-complaint, alleging a single cause of action for dissolution of the partnership. He later amended that cross-complaint to include causes of action for breach of fiduciary duty, negligence, and dissolution, all claims relying on the existence of a partnership with Bregman. All parties filed general denials to the operative pleadings.

The matter was tried to the court, beginning on October 20, 2014, and ultimately concluding, after delays, on December 9, 2014. Both parties submitted closing arguments in writing to the court; the court prepared a tentative decision, to which objections were filed, and prepared a statement of decision. The court entered judgment on April 1, 2015, for Ebiner and his son Michael on the complaint, and for Bergman on the cross-complaint, awarding costs to the Ebiners. Bregman appealed.

Pleadings Concerning Partnership Issues

In her complaint, Bregman alleged an oral agreement between herself and Ebiner, after the death of her father, to continue the partnership on the same terms and conditions as the partnership between Bernard Bregman and Ebiner. Ebiner continued to perform the legal work for the partnership, and Bregman hired and paid accountants to perform the accounting functions. In her Fourth and Fifth Causes of Action, Bregman alleged Ebiner had breached the partnership agreement, and violated his fiduciary duties as her partner.

In his cross-complaint, Ebiner alleged "Prior to January 1, 2000, Cross-Complainant and Cross-Defendant entered into an oral partnership agreement. . . ." Ebiner amended the cross-complaint in July, 2013, alleging that Bregman, "as a partner in the partnership" had fiduciary duties to Ebiner, and the obligation to perform accounting work for the partnership, but failed to perform her duties as partner.

Prior to trial, both parties filed motions in limine. Neither party asserted that the partnership did not exist, but instead continued to pursue issues arising out of their partnership. All parties filed written briefs prior to trial. Bregman continued to contend that she had become Ebiner's partner in 1991. Ebiner maintained Bregman had succeeded to her father's role in the partnership, and made references to "the partnership" throughout the brief.

For example, Ebiner asserted in defense of Bregman's negligence claims: "there is no role for an ordinary Negligence action in a partnership context." In his discussion of damages, he relied expressly on decisions that he asserted the partners had made, and concluded "Ms. Bregman, the

partner responsible for the accounting/financial function, is as much responsible as is Robert Ebiner."

In none of these documents did either Ebiner or Bregman indicate that they believed there was no partnership, or that there was any question in that regard to be resolved. Neither indicated to the court that he or she was seeking to amend the pleadings, or to request relief other than that sought in the complaint or the cross-complaint.

During the trial, 11 witnesses testified.[1] Ebiner's testimony was consistent with the pleadings. For example, he testified that he was an owner of a half interest in the general partnership; that issues concerning tenants were made by the two partners; that whenever there was a partnership meeting he and Sharon Bregman would "brainstorm" concerning matters on the table.

All of this testimony was given prior to December 8, 2014. On that date, Wallace, an expert retained by Ebiner, testified to his belief that the partnership did not exist because there had been a unilateral mistake by Ebiner, based on representations by Bregman or her attorney. Wallace testified that he had been retained as an expert[2] and had reviewed documents and testimony; he admitted that he had never spoken to Ebiner or reviewed his deposition, nor was he familiar with Ebiner's testimony at trial.[3]

The next day, Ebiner returned to the witness stand; at this time he testified specifically as to the reason that he believed Sharon was to be his partner:

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[1] Much of the testimony pertained to the actual management of the property; in light of the disposition, it is not relevant to our determination.

[2] The record indicates the Ebiners had designated Wallace as an expert on August 13, 2014, almost four months before this testimony and one month before Ebiner filed his trial brief that asserted the existence of the partnership. The record also indicates that the document, Ex. 342, on which Wallace relied, had been discussed in the deposition of Bregman's lawyer, which was taken in July 2014.

[3] Wallace's testimony was the first indication that Ebiner was challenging the existence of the partnership.

"Q. And tell me about the manner when you first learned that it was being contemplated or had been achieved that Sharon was to become your partner?
A. Sometime before the final order of distribution or petition for distribution, I was informed that Sharon was going to receive the real property.
Q. And is that the basis of your belief that Sharon was to be your partner?
A. Yes."[4]

The parties submitted their closing arguments in writing. Bregman continued to assert that there was a partnership and argued for relief on that basis. In their reply to the argument on the complaint, the Ebiners asserted, for the first time in any pleading, that an agreement to form a partnership should not be inferred from the conduct of the parties because Bregman, or her lawyer, was responsible for a mistake of fact causing that conduct. In his brief on the cross-complaint, Ebiner asserted, without any reference to legal authority, that an agreement to form a partnership was a prerequisite for partnership formation. Ebiner sought leave to amend his pleadings, but that request was solely for a partition of the real property interest; he requested no other relief from his pleadings.

The court thereafter filed a tentative decision, indicating its intention to find that no partnership had been formed. Bregman filed objections, asserting that the court's tentative was both contrary to the facts alleged in the pleadings, and contrary to the manner in which the case had been

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[4] The only testimony alleging mistake was that of Ebiner's expert Wallace, who made clear he had never spoke to Ebiner. Wallace appeared to rely for his conclusion on a probate document (Ex. 342) by which Bregman was awarded her interest in the real property, but not the prior partnership between her father and Ebiner. Ebiner's testimony, which followed this assertion by the expert, confirmed that Ebiner's understanding of the situation was in fact consistent with that document awarding Bregman the interest in the real property, but inconsistent with the facts set forth by Wallace as the basis for his opinion that there was no partnership. Wallace's opinion also disregarded Corporation Code, section 16202, that clarifies that a partnership can be formed even where the parties do not intend to form a partnership.

presented at trial. Bregman also drew the court's attention to the fact that Ebiner had made no request to amend or to seek rescission of the agreement that his pleadings alleged.

In his response, Ebiner argued that any surprise was the fault of Bregman; he did not seek to amend the pleadings to conform to proof, nor to seek relief from the effect of his allegations in his cross-complaint that he had orally agreed to form a partnership with Bregman.

The court filed a Statement of Decision, finding no partnership based on the mutual mistake of the parties. The court granted judgment for Ebiner on the complaint, and for Bregman on the cross-complaint. With respect to Michael Ebiner, the court found no negligence.[5]

DISCUSSION

The Court Erred in Concluding No Partnership Was Formed

The trial court based its determination on the conclusion that no partnership had been formed between Bregman and Ebiner, because both parties were operating under a mistaken understanding of the situation. To the extent this is a factual conclusion, we review the finding for substantial evidence, and independently review any related legal conclusion. "Under the general rules applicable to a trial court's statement of decision, an appellate court independently reviews questions of law and applies the substantial evidence standard to findings of fact." (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513; see *M&F Fishing, Inc. v. Sea-Pac Ins.*

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[5] Because the court determined that no partnership existed, it did not discuss or resolve the issue of whether any damages arose from the claims related to the partnership. Although Respondent asserts that the finding of no negligence by Michael Ebiner precludes the finding of damages on any cause of action, the trial court did not conclude that there was an absence of evidence of damages on the partnership issues, and did not address the claim in the Third Cause of Action that an accounting was necessary to determine damages arising from the breach of fiduciary duties by Robert Bregman. On this record, we decline the invitation of Respondent to independently determine in the first instance that no damages could be proved were such an accounting permitted.

Managers, Inc. (2012) 202 Cal.App.4th 1509, 1519, fn. 12.) Here, however, the court was barred as a matter of law from considering the testimony on which it relied, and, as a result, there was no basis in either law or fact for the finding.

A. Ebiner Made a Binding Judicial Admission

Bregman asserts that Ebiner had admitted an oral partnership agreement, and had never sought relief from that admission. Bregman is correct; Ebiner affirmatively alleged in his cross-complaint, and confirmed in his on-going litigation of the case, an oral partnership agreement. A binding judicial admission may be made in a pleading. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746 [fact is established by pleading are "conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against his or her."]; see also *Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 448.)

B. Ebiner Did Not Establish a Basis For Relief from His Admissions

Ebiner argues that the court had the discretion to relieve him from his admissions, relying primarily on *24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199. In that case, a plaintiff was permitted, on summary judgment, to introduce countervailing evidence to contradict an admission in her pleading that individual defendants were acting within the course and scope of their employment.

Notwithstanding the fact that Ebiner at no time asked the court to be relieved from his own admissions, *24 Hour Fitness* does not control this situation. There, the court was concerned only with procedures related to summary judgment, not trial. Indeed, in the primary case on which the *24 Hour Fitness* decision relied, *Bahan v. Kurland* (1979) 98 Cal.App.3d 808, the court expressly stated that the permission to allow the consideration of such evidence was particularly appropriate "when the action has been only recently instituted so that an amendment of the pleadings to correct the mistaken conclusion would likely be permitted by the court upon proper

application." The court advised plaintiff to seek leave to amend. (*Id*. at pp. 812-813.) Ebiner asserts *Bahan* is particularly applicable here.

We disagree. First, Ebiner cites no authority that parties may introduce evidence contradicting their judicial admissions at trial when, as was expressly not the case in *Bahan*, the parties are not at the beginning of their investigation and analysis, but rather, as here, at the very last moment before a decision is to be rendered. In addition, while the *Bahan* court warned the plaintiff of the importance of amendment to continue to make the assertions on which it relied to avoid summary judgment, Ebiner neither attempted such an amendment when he sought leave to amend at the trial court, nor did he suggest in his briefing to this court that he could have done so.

Moreover, Ebiner ignores established law governing a party's attempt to avoid his own admissions at trial. In *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264 (*Valerio*), the trial court found that no contract existed between the parties; the Court of Appeal reversed, holding defendant there to his admission that the contract existed.

In *Valerio*, defendant admitted the existence of the contract in his answer to the cross-complaint for breach of contract, and in his responses to requests for admission. Seven months before trial, however, defendant filed a trial management conference statement, in which he asserted that he had not intentionally signed the contract, and therefore that no contract existed. He did not however, move to dismiss the breach of contract claim, or to amend his answers to the cross complaint and the requests for admission. (*Id*. at p. 1268.) Defendant instead argued that the trial court could consider an explanation as to evidence contradicting the admissions, and that the trial court was not obligated to bind the defendant to those admissions. The trial court accepted his arguments, noting that plaintiff had been on notice of the change in position since the trial management conference.

The Court of Appeal reversed: "The law on this topic is well settled by venerable authority. Because an admission in the pleadings forbids the consideration of contrary evidence, any discussion of such evidence is irrelevant and immaterial. (*Braverman v. Rosenthal* (1951) 102 Cal.App.2d 30, 32.) "'When a trial is had by the Court without a jury, a fact admitted by

the pleadings should be treated as 'found.' . . . If the court does find adversely to the admission, such finding should be disregarded in determining the question whether the proper conclusion of law was drawn from the facts found and admitted by the pleadings. . . . In such case the facts alleged must be assumed to exist. Any finding adverse to the admitted facts drops from the record, and any legal conclusion which is not upheld by the admitted facts is erroneous.' [Citations.] (*Welch v. Alcott* (1921) 185 Cal. 731, 754.)" (*Valerio, supra,* 103 Cal.App.4th at p. 1271.)

While Valerio had argued that the court could avoid what he viewed as an unjust result, the court rejected his argument. "An admission in a pleading is *conclusive* on the pleader. (4 Witkin, Cal. Procedure, *supra,* Pleading, § 415, p. 512.) He cannot offer contrary evidence *unless permitted to amend,* and a judgment may rest in whole or in part upon the admission without proof of the fact. (*Ibid.,* italics added.) While a court has inherent power to relieve a party from the effects of judicial admissions by amendment to the pleadings (Code Civ. Proc., § 473), Valerio never sought to amend his answer to the cross-complaint." (*Valerio, supra,* 103 Cal.App.4th at p. 1272.) The court concluded that "informal notification to the opposing party of a change in case theory does not obviate the conclusive effect of judicial admissions." (*Id*. at p. 1274.)

We find no reason to depart from the reasoning of *Valerio*. Indeed, the facts here are more egregious. This is not a case where a party admitted an allegation in his answer, but rather a case in which the party who seeks not to be bound affirmatively alleged in his own cross-complaint, and sought relief on the basis of, the exact oral agreement that he now denies existed. Ebiner never sought to be relieved from his admission by amending his cross-complaint, even though he did seek at the end of the trial to make a different amendment. Ebiner also never notified Bregman of his change in position, informally or otherwise; in fact he changed his position without notice at the last moment of the trial. Reversal is required, as the only evidence supporting the court's conclusion must be disregarded.[6]

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[6] Even were the evidence supporting a finding of mutual mistake properly before the court, Ebiner has never sought to assert that the

As the trial court recognized, its determination that there was no partnership affected every claim in the complaint and cross complaint except for the First Cause of Action for Negligence as to Michael Ebiner. While Bregman appealed from the judgment, she has made no argument supporting a claim of error in the court's determination that Michael was not negligent. Accordingly, she has waived that claim. (See *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary."]; *Interinsurance Exchange v. Collins* (1994) 30 Cal.App.4th 1445, 1448 ["[P]arties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's issue as waived."].)

DISPOSITION

The judgment and the award of costs are reversed. The order on the First Cause of Action finding that Michael Ebiner was not negligent is affirmed. The order for Bregman on the cross-complaint is affirmed. Bregman is to recover her costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J. SEGAL, J.

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agreement to enter the partnership should be rescinded. Neither his cross-complaint, nor his arguments at the trial court or on appeal, provide a record that would support such a claim. Ebiner has never alleged or shown one critical element in obtaining rescission based on mistake: that enforcement of the agreement would be unconscionable. (See *Donovan v. RRL Corp.* (2001) 26 Cal.4th 261, 281-282.)