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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COLISEO HOUSING PARTNERSHIP, Plaintiff, Appellant and Cross-Respondent, v. POZ VILLAGE DEVELOPMENT, INC., Defendants, Respondents and Cross-Appellants.	B236713 (Los Angeles County Super. Ct. No. BC419577)

APPEAL from an order of the Superior Court of Los Angeles County, Michael C. Solner, Judge. Affirmed.

Reuben Raucher & Blum, Timothy D. Reuben, Stephen L. Raucher and K. Cannon Brooks, for Plaintiff, Appellant and Cross-Respondent.

Kennedy Kamrowski and J. Grant Kenney for Defendants, Respondents and Cross-Appellants.

I. INTRODUCTION

Plaintiff Coliseo Housing Partnership appeals from an August 18, 2011 judgment in favor of defendants POZ Village Development Inc. ("POZ") and The Bedford Group ("Bedford"). Plaintiff sought to cancel a promissory note payable to defendant POZ ("Developer's Note") and declaratory relief related to the note's validity. Plaintiff argues the trial court erred in ruling the cancellation claim was barred by the statute of limitations. In addition, plaintiff contends the Developer's Note was superseded by the amended partnership agreement's integration clause and thus void. Plaintiff also asserts the trial court erred in finding the Developer's Note was supported by consideration. Furthermore, plaintiff argues it was error to find the Developer's Note was enforceable given Bedford's admission that the note was the result of tax evasion. On cross-appeal, defendants argue they were entitled to costs as the prevailing party under Code of Civil Procedure section 1032. We find no error and affirm the judgment.

II. BACKGROUND

A. Original Partnership Agreement

Plaintiff is a limited partnership that was formed in December 1988 to develop and operate a 137 unit low-income housing project, which became known as the Gilbert Lindsay Manor. Plaintiff's general partners were United Housing Preservation Corporation ("United"), D&S Development Company and defendants Bedford and POZ.[1] The general partners and limited partner, Housing Preservation Partners, entered into Agreement of Limited Partnership of Coliseo Housing Partnership on December 16, 1988. The partners contemplated funding the project by putting in some equity and

[1] Bedford and POZ were general partners until 2006, when they were removed as general partners and became limited partners.

obtaining a $4,743,000 first mortgage and a Community Redevelopment Agency ("CRA") loan of $3,954,000.

Under the agreement, Bedford and D&S Development Company were responsible for the development and construction of the housing project. Bedford and POZ would develop and manage all advertising and public relations. POZ also would serve as a liaison between the partnership, the CRA, and the City of Los Angeles. United would advance the start-up costs of the development. In addition, United would maintain the partnership bank accounts and books and records, including the preparation of periodic financial statements and projections. Housing Preservation Partners, plaintiff's limited partner, agreed to contribute capital to the partnership and was responsible for selling limited partnership interests after completion of the project. Associated Financial Corporation ("AFC"), an affiliate of both United and limited partner Housing Preservation Partners, agreed to guarantee United and Housing Preservation Partners' contribution obligation. The general partners agreed to pay POZ and Bedford "a development incentive fee in such amount as agreed to by the Partners for their [role] in negotiations with the CRA, the lenders, the City of Los Angeles, the Department of Housing and Urban Development for a Section 8 contract and other development related functions."

At a breakfast meeting held on March 29, 1989, the general partners considered two options to fund the project development. They ultimately agreed Housing Preservation Partners would contribute five million dollars with AFC guaranteeing the capital contribution. Bedford and POZ would receive $500,000 in cash when the construction loan funded and promissory notes totaling $1,743,000.

On May 2, 1989, the general partners entered into the Surplus Cash Disposition Agreement. They agreed to pay POZ and Bedford a development incentive fee consisting of a $500,000 payment and $1,743,000 represented by two promissory notes, each in the amount of $871,500. One promissory note was payable to Bedford and the other note was payable to POZ. Both promissory notes were dated May 2, 1989 and carried an annual 10% interest rate.

On April 26, 1989, plaintiff entered into a Disposition and Development Agreement with the CRA to effectuate the redevelopment plan for the housing project. Under the agreement, the CRA was entitled to 50% of the residual receipts as repayment for its loan to plaintiff. In addition, the CRA was to receive another 10% of the residual receipts under a ground lease agreement with plaintiff dated May 15, 1990.

B. Amended Partnership Agreement

On May 1, 1990, the general partners entered into the Amended and Restated Agreement of Limited Partnership of Coliseo Housing Partnership ("Amended Partnership Agreement"). Section 1.16 of the Amended Partnership Agreement contains the following debt paydown reserve provision: "Debt Paydown Reserve" shall mean the amount (not to exceed $1,743,000) which is equal to the difference between $4,743,000 and the actual amount of the first mortgage on the Property. The Debt Paydown Reserve shall earn interest at the same rate as the first mortgage. All earned interest on the Debt Paydown Reserve will be paid on a monthly basis prior to the determination of Residual Receipts as defined in the [Disposition and Development Agreement]. Interest paid on the Debt Paydown Reserve shall be paid to POZ until it has achieved its Priority Return and return of its Capital Contributions and then shall be distributed to the other Partners in the same fashion as Net Cash in Section 5.02 below." Section 1.49 defines "Priority Return" as "Cash Distributions from Operations and Cash Distributions from Sales or Refinancing to POZ equal to a 10% compounded annual return on its total capital contributions, less any prior Cash Distributions from Operations and Cash Distributions from Sales or Refinancing."

In addition, the Amended Partnership Agreement contains a provision concerning general partners' loans under section 4.06. That section states: "[Except] for loans existing at the funding of the construction loan, no Partner may loan money to the Partnership without the written consent of a majority of the Management Board. Any loan by a Partner to the Partnership shall be separately entered on the books of the

Partnership, shall be upon terms as determined by a majority of the Management Board, and shall bear interest from the date of the loan until paid at the lesser of (a) one percent (1%) over the prime rate of the interest of Citicorp Bank, New York, in effect on the date of the loan (and from time to time adjusted); or (b) the maximum rate permitted by law for loans made in the State. Each such loan shall be evidence by a promissory note, or on book and records of the Partnership delivered to the lending Partner and executed in the name of the Partnership by the other Partners."

Furthermore, the Amended Partnership Agreement contains the following development incentive fee provision in section 6.03: "The Partnership will pay POZ the sum of Two Million Six Hundred Forty-Seven Thousand Six Hundred Dollars ($2,647,600) at the closing of the construction loan in consideration of POZ's efforts in the development of the Project, obtaining the necessary approvals and permits from the County of Los Angeles and the City of Los Angeles, arranging the loan commitment and necessary approvals from the CRA, the construction and permanent loans, payment of any and all brokerage fees, interfacing with local, federal and state agencies, and development oversight duties." POZ later assigned one-half of its development incentive fee and distribution under the priority return to Bedford in an instruction letter to plaintiff on May 25, 1990.

The Amended Partnership Agreement also contains an integration clause in section 14.13: "This Agreement constitutes the entire understanding and Agreement among the parties hereto with respect to the subject matter hereof, and there are no agreements, understandings, restrictions, representations or warranties among the parties other than those set forth herein or herein provided for. Following is a description of the other agreements entered into by and among the parties which are merged into and superseded by the agreement: [¶] 1. Surplus Cash Distribution Agreement, dated May 2, 1989; [¶] 2. Debt Paydown Reserve Agreement, dated May 2, 1989; [¶] 3. Promissory Notes to POZ and Bedford, dated May 2, 1989; [¶] 4. Contingency Fund Agreement, dated May 2, 1989; [¶] 5. Agreement (re: Broker Fees), dated May 2, 1989;

[¶] 6. Letter dated May 5, 1989 to Reverend Hardwick from AFC regarding management."

C. Complaint

On August 11, 2009, plaintiff sued POZ to cancel the promissory note in the amount of $1,743,000 payable to POZ (the "Developer's Note") based on the Amended Partnership Agreement's integration clause. In addition, plaintiff sought declaratory relief to resolve the parties' dispute concerning the Developer's Note. On October 27, 2009, plaintiff amended its complaint to add Bedford as a defendant on the declaratory cause of action because Bedford claimed a 50% interest on the Developer's Note. Plaintiff also added a cancellation claim based on forgery. On April 9, 2010, plaintiff filed a second amended complaint containing the same causes of action.

D. Summary Judgment

On February 5, 2010, plaintiff moved for summary judgment. Plaintiff argued the Developer's Note was voided by the Amended Partnership Agreement. The trial court denied the summary judgment motion on July 28, 2010. The trial court ruled: "The Court finds that a triable issue of material fact exists as to the proper interpretation of Section 14.13 of the Amended and Restated Partnership Agreement, specifically its reference to "Promissory Notes to POZ and Bedford, dated May 2, 1989." . . . It is not clear whether the challenged note . . . which is to POZ only, not POZ and Bedford, falls within the integration clause."

E. Trial Evidence

The trial court received trial exhibits and heard testimony from Max Perry, Richard Devine, Barry Richlin, Richard Tell, Reverend Joel B. Hardwick and Charles

Quarles.[2] In addition, there was testimony from Gordon Seaberg, an accountant with the CRA, and James E. Blanco, defendant's forensic handwriting expert. Plaintiff also submitted deposition testimony from Joseph Daniel Simms, an accountant who audited plaintiff's financial statements beginning in 1994.

Mr. Perry testified he has been an in-house attorney with AFC and its subsidiaries since 1983. AFC is the parent corporation of United, one of plaintiff's general partners. AFC buys and rehabilitates low-income housing properties. For the Gilbert Lindsay Manor, AFC applied and received tax credits from the California tax credit allocation committee. AFC then raised capital from investors who bought low-income housing tax credits generated by the housing project.

Mr. Perry testified he created plaintiff's partnership documents. He stated he first saw the Developer's Note in November 2005 when Mr. Quarles, Bedford's president, sent it to him by fax. The Developer's Note to POZ, dated May 2, 1989, in the amount of $1,743,000, carried an 8.501% annual interest rate. The Developer's Note specified the following payment to POZ: "Payments to be made monthly in accordance with Section 1.16 of the Amended and Restated Agreement of Limited Partnership of Coliseo Housing Partnership and the Debt Paydown Reserve Agreement referred to therein. Monthly payment in the amount of Twelve Thousand Dollars ($12,000). All payments shall be applied to interest and the balance to principal." The Developer's Note was signed by: Mr. Quarles, Bedford's president; Reverend J.B. Hardwick, board chairman of POZ; and Richard Tell, executive vice president of United.[3] Mr. Perry did not believe it was a valid note because it was dated May 2, 1989 and all notes from that date were superseded by the Amended Partnership Agreement. He testified the two prior promissory notes, each

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[2] We grant plaintiff's motion to correct the record based on typographical errors contained in the reporter's transcript.

[3] Mr. Tell could not recall whether he signed the Developer's Note. He testified he resigned from United in 1990. Mr. Tell stated he would not have had authority to sign on behalf of United after his resignation.

in the amount of $871,500, were converted to POZ's capital account. Mr. Perry was not aware of any other promissory note given to POZ and Bedford.

Mr. Perry admitted he investigated payments to POZ and Bedford after CRA sent a notice of default in 1996. POZ and Bedford paid themselves at least $342,000 ahead of CRA's loan. On March 25, 1996, the CRA sent plaintiff a notice of default because plaintiff's December 31, 1994 audited financial statements revealed a distribution of $66,000 to the partnership in 1994.

Mr. Perry spoke with Lawrence Penn, an accountant who provided accounting services to plaintiff, about the CRA default in 1996. On April 24, 1996, Mr. Penn wrote a letter to plaintiff's auditor, Mr. Simms, concerning the CRA dispute. Mr. Penn wrote: "The dispute with the CRA, in part, related to the interpretation of the first mortgage. Is it limited to the SAMCO loan regardless of the amount, or does the partnership loan of $1,743,000.00 also come in front of, and to be included in, the calculation of net distributable cash "residual receipts"? [¶] Please prepare an amortization schedule assuming that the SAMCO loan were in two parts, one for $3,000,000.00, and the other part $1,743,000.00, assuming same terms and interest rate on the second part as on the first part currently has." Mr. Perry testified the actual SAMCO loan was $3.5 million, not $3 million. He was not aware of a partnership loan for $1,743,000 and believed Mr. Penn's letter was incorrect. Mr. Perry stated in 1996 Mr. Quarles took the position that the Developer's Note had priority over the CRA loan because CRA had agreed its loan would be subordinate up to $4,743,000 under the Disposition and Development Agreement.

Mr. Seaberg, CRA's Director of Audit and Compliance, testified he sent Housing Preservation Associates, Inc. a letter on July 22, 2004 enclosing a review by CRA's outside auditor, Macias, Gini & Company. The auditors concluded plaintiff owed $195,677 to the CRA for loan and ground lease obligations prior to 1996. The April 28, 2004 audit review identified plaintiff's four long-term debts based on the auditor's review of debt agreements and plaintiff's audited financial statement from 1996 through 2003. Plaintiff had a first mortgage with SAMCO in the amount of $3,500,000. Plaintiff also

had a second mortgage with the CRA in the amount of $3,954,000 and a 50-year ground lease with the CRA. Finally, the audit review listed a note payable to the general partners. The audit review states: "This note, in the amount of $1,743,000 carries the same terms as the 1st mortgage and is subordinated to both the 1st and 2nd mortgage. Based on our review of the financial statements, no payments (principal or interest) were made to the General Partners on this note during the years ended December 31, 1996 through December 31, 2003." The audit review summarized interest expense on the first and second mortgages and the note, relying on plaintiff's financial statements. The audit review states: "The Partnership recognized $1,185,377 of interest expense and made no interest payments on the note payable to general partners." The interest expense summary in Attachment A of the audit review showed interest expense of $148,172 on the note to general partners for 1996 through 2003.

Mr. Seaberg's letter was attached to a letter from Mr. Perry to Mr. Quarles dated August 2, 2004. Mr. Perry wrote: "CRA recently completed an audit of the project for compliance with the CRA documentation. The auditors concluded that the partnership still owes the agency for loan and ground lease obligations. . . . [¶] If you recall, you, Larry Penn and I spent some time on these issues in 1996, and the CRA has now renewed its request for reimbursement. I believe that the CRA at that time disputed your right to payments made on your subordinated note. The partners have asked to forward Mr. Seaberg's letter to you and demand to be held harmless from CRA's demands." Mr. Perry testified he wrote "subordinated note" because that was what the CRA had said. He asserted it was a mistake. Mr. Perry stated: "I in 2004 wrote this letter because the CRA had demanded reimbursement for the money that was taken in 1996. Now, if they had said subordinated note in 2004, eight years later I just parroted what they said." He testified United later paid CRA $195,000. Mr. Perry acknowledged the Developer's Note was listed as a long-term liability but neither POZ nor Bedford made a demand on payment of the note.

Mr. Richlin was an accountant who prepared plaintiff's 1990-1991 and 1991-1992 financial statements. He later became Bedford's controller from 1996 through October

2009. The 1990-1991 and 1991-1992 financial statements identified "notes payable" in the amount of $1,743,000. "The notes payable are due to the general partners. They carry the same terms and amortization as the first mortgage." Mr. Richlin testified, "Notes payable is a generic term and could refer to one or more notes." In addition, plaintiff's 1993 financial statements prepared by the subsequent accountant, Amie Ursabia, referenced "notes payable" in the amount of $1,743,000.

Beginning in 1994, plaintiff's financial statements were prepared by Mr. Simms, an auditor employed by Habif, Arogeti & Wynne. The accounting firm was engaged by AFC to audit plaintiff's financial statements. Mr. Simms referred to a "note payable" to general partners in the amount of $1,743,000 in the 1995-1996 financial statements. But Mr. Simms stated he was only aware of two promissory notes dated May 2, 1989, each in the amount of $871,500, to Bedford and POZ.

A 1995 independent audit of plaintiff by KPMG Peat Marwick LLP conducted at the request of the CRA indentified a note payable to the general partners. The 1995 KPMG Peat Marwick audit report states: "Note Payable to General Partners [¶] At December 31, 1995, the balance of the note payable due to the general partners equaled $1,743,00. Such note carries the same terms and amortization as the first mortgage to SAMCO. As of December 31, 1995, accrued interest totaled $228,000. During 1995, $36,000 was paid for interest."

In 2004, Habif, Arogeti & Wynn removed the "note payable" reference from the 2003-2004 financial statements. The 2003-2004 financial statement states in part: "During 2004, it was discovered that the general partners notes totaling $1,743,000 were not valid notes and should never have been recorded on the books of the Partnership." Mr. Perry testified for 15 years, plaintiff's financial statements incorrectly referred to a note or notes payable to the general partners.

Reverend Hardwick, chairman of POZ's board and long-time pastor of Praises of Zion Church, testified POZ became involved in the housing project after he was contacted by Councilman Gilbert Lindsay. Reverend Hardwick stated the Developer's Note replaced the two prior promissory notes. He was not knowledgeable about the

financial details of the housing project. Instead, Reverend Hardwick focused: on getting the community to accept the housing project; renting out the apartment units; and managing the project.

Mr. Quarles testified AFC and United's capital contribution to the housing project was $5.2 million including $1,623,000 in equity required by the CRA and a promissory note of $1,743,000. Because Bedford and POZ were receiving promissory notes instead of cash, there was phantom income on the notes. To address this issue, the two promissory notes were combined and the new note was made payable only to POZ. POZ as a nonprofit corporation did not pay taxes on the phantom income.

Mr. Quarles stated the Developer's Note was signed in 1991, not May 2, 1989. But the Developer's Note was backdated to the date of the two previous notes because POZ and Bedford did not want to lose the interest that had accrued from 1989 to 1991. In addition, POZ and Bedford agreed to reduce the interest from 10% to 8.5% so it would be the same as the interest rate on the first mortgage. Because the partnership did not know what the first mortgage interest rate was until 1991, it was not until then that the parties signed the Developer's Note.

Mr. Quarles testified plaintiff issued the Developer's Note because United and AFC did not have the cash to pay Bedford and POZ. He explained: "The equity partners had to pay what I considered an entry fee, to be involved in the project. They were supposed to come in, with a minimum capital contribution of $5.2 million dollars. It was supposed to be all cash. And, because of what was alleged to be the shortage of cash, they provided some cash and the balance in a note. So, the consideration for the $5.2 million dollars was allowing them into the deal." Mr. Quarles testified the only payments on the note were the payments POZ and Bedford took in the amount of $342,000.

He admitted he signed a receipt of cash collateral and agreement dated August 2, 1990. That agreement states: "Coliseo Housing Partnership ("the Partnership") hereby acknowledges contribution in the sum of $700,000 by the limited partners . . . . This constitutes the final installment of the limited partners' capital contribution obligation

and total capital contribution of $5,200,000 pursuant to the Amended and Restated Agreement of Limited Partnership of the Partnership, dated as of May 1, 1990 . . . ."

In two declarations submitted in the case, Mr. Quarles stated the partnership agreed to pay POZ and Bedford a developer's fee pursuant to section 6.03 of the Amended Partnership Agreement. POZ and Bedford agreed to a deferral of a $1,743,000 developer's fee by accepting two promissory notes that later became a single promissory note issued to POZ.

F. Statement of Decision and Judgment

On December 10, 2010, the trial court issued its statement of decision. The court described the financing for the housing development and the promissory notes issued to POZ and Bedford. The trial court found: "Defendants Bedford and POZ were to be involved in the development of the project, and in return for their efforts, were to receive a development incentive fee, which was reflected in a document called a "Surplus Cash Disposition Agreement dated May 2, 1989 [Trial Exhibit 68]. Under the terms of that agreement, there were to be two promissory notes, each in the amount of $871,500, with one of the notes to be payable to Bedford and the other to be payable to POZ. The total development incentive fee to be paid to POZ and Bedford was listed as $2,243,000 and was broken down into a $500,000 cash payment and the remaining $1,743,000 was to be deferred in the form of the above mentioned promissory notes. A promissory note incorporating both notes was reflected in a document bearing the date of May 2, 1989, but, according to testimony at trial, may not have been created until 1991. This was signed by Charles Quarles on behalf of Bedford, Richard Tell on behalf of United Housing Preservation Corporation (although that was disputed by plaintiff and Mr. Tell at trial could not recall if he signed it) and by Reverend J.B. Hardwick on behalf of POZ. Interest on the note was to be $8.501% and payments were to be made in the amount of $12,000 per month."

Next, the trial court detailed the parties' arguments concerning the Developer's Note. The trial court wrote: "Plaintiff claims that this promissory note, if in fact it was executed on the date of the document, was superseded by the May 1, 1990 Amended and Restated Agreement of Limited Partnership [Trial Exhibit 73], which plaintiff alleges dispensed with any promissory notes for the development incentive fee. In paragraph 14.13 of said agreement, the parties agreed that the promissory notes payable to Poz and Bedford and dated May 2, 1989, were merged into and superseded by the agreement. Defendants allege that paragraph 4.06 of the agreement, dealing with general partner loans, allows for, and is the basis of the single note in the amount of $1,743,000 payable to Poz. In support of this, and explaining why said note would be payable to Poz only, Mr. Quarles testified at trial that Poz, unlike Bedford, was a non-profit and could receive phantom income and not have to pay taxes on it. Mr. Quarles, who holds an MBA from Harvard, was a credible, effective witness who was able to explain many of the details of this project in an intelligible, comprehensive manner. [¶] According to plaintiff, the fact that the May 1, 1990 agreement dispensed with existing promissory notes is borne out, at least in part, by the financial statements for the partnerships for 1989 and 1990 which contain no reference to the notes [Trial Exhibit 80]. However, financial statements for 1991, prepared by a different accountant, reflect notes (plural) payable in the amount of $1,743,000 [Trial Exhibit 85]. This figure was carried forward in subsequent financial statements."

The trial court found the Developer's Note was not forged. The court ruled: "The ultimate question is whether the note for $1,743,000 should be canceled, and, if so, for what reason? Plaintiff attempted to establish that the promissory note of May 2, 1989 [Trial Exhibit 36] bears the forged signature of Richard Tell, but the expert testimony on that issue was inconclusive, or at best established that in all likelihood the signature was that of Mr. Tell. There is no basis for cancelling the note on the basis of forgery. The weight of the evidence is that the note was indeed carried forward and the provisions of the Amended and Restated Agreement of Limited Partnership effective May 1, 1990 did

not extinguish the obligation. The financial statements through the years, with the exception of 1989 and possibly 1990, reveal the continued existence of the obligation."

In addition, the trial court ruled the action was barred by the statute of limitations. The trial court explained: "Plaintiff claims that the statute began to run in November, 2005, when Mr. Quarles sent a copy of the note to Max Perry. Prior to that time, plaintiff asserts, there was no indication that the note existed. Since the 2 notes had been canceled, and the amounts were changed to capital contributions, the argument goes, there would have been no need for the note to even exist. However, anyone looking at the financial statements would have been aware of it. For example, Trial Exhibit 97, a financial statement from [KPMG] for Coliseo for 1995 directly reflects the note for $1,743,000."

The trial court ruled in defendants' favor. "[P]laintiff has failed to carry its burden of proof that the note should be canceled. The note dated May 2, 1989 in the amount of $1,743,000 was not superseded by the May 1, 1990 Amended and Restatement Agreement of Limited Partnership of Coliseo Housing Partnership. The consideration given for the note was the involvement of Poz, through Rev. Hardwick's contacts, activities and tenant generation, and Bedford, through its assistance in the development and management of the project. It is the determination of the court that the note is valid, and Poz may seek to enforce it. [¶] Judgment is for defendants. Each side to bear its own costs."

Plaintiff objected to the statement of decision on several grounds including that the Developer's Note was an illegal instrument because it was used by Bedford to evade taxes. Defendants also objected to the statement of decision because they were not awarded costs as the prevailing parties. On February 23, 2011, the trial court overruled the parties' objections to the statement of decision. The trial court ruled: "[P]laintiff takes issue with the court's finding, arguing and including, inter alia, that there was evidence of tax evasion (as opposed to legal tax avoidance) and that the decision is unclear. The objections and argument thereon are without merit and are overruled. [¶] Defendants['] objection to the Statement of Decision is likewise overruled. Section 1032

of the Code of Civil Procedure allows the court discretion to allow costs or not allow costs when any party recovers other than monetary relief, as is the case here." The trial court later entered judgment in favor of defendants on August 18, 2011.

G. Plaintiff's Motion to Vacate Judgment and Motion for New Trial

On September 2, 2011 plaintiff moved to vacate the judgment and for a new trial. Both motions argued the Developer's Note was void and unenforceable because the purpose of the note was illegal tax evasion. In support of its motion, plaintiff submitted the declaration of J. Nicholson Thomas, a tax attorney from Gibson, Dunn & Crutcher, LLP. Mr. Thomas opined as an accrual basis taxpayer, Bedford was required to recognize interest accrued on the promissory note, regardless of whether such interest was actually received during the tax year. Mr. Thomas states: "I conclude that the IRS would likely find that the issuance of the Replacement Note solely in the name of POZ was transacted for no legitimate business or economic purpose apart from facilitating Bedford's attempt to avoid recognizing, and paying tax on, the phantom income generated by the Original Bedford Note by funneling the income through POZ, a non-profit entity."

In opposition to plaintiff's motions to vacate judgment and for a new trial, defendants submitted the declaration of Mr. Quarles. In the declaration, he explained how Bedford's auditors treated the Developer's Note. Mr. Quarles stated: "In 1991 when the two notes of $871,500 each were combined into a single note of $1,743,000, I did say that it was done for the purpose to avoid Phantom Income on the interest; however, after the notes were combined, and I discussed this idea with our independent auditors, I was informed that since the note was already on Bedford's balance sheet and had been properly taken into income and that the prior years['] interest income had already been recognized, both on Bedford's financial statements and income tax returns, although no interest payments had been paid. . . . I was informed that combining the notes would not be the proper way of handling the Phantom Income issue. However,

since the notes had already been combined, we did not unwind and separate the notes. . . . [D]espite the considerations to avoid the tax consequences of Phantom Income by combining the two notes, it was irrelevant, because the initial interest on the prior note (prior to the combination) had already been recognized and accounted for properly and Bedford's auditors would not allow the questionability of the collectability of the interest on Bedford's 50% share of the combined note to be recognized without an associated deferred income account associated with the note."

On October 13, 2011, the trial court denied plaintiff's motions to vacate judgment and for new trial. On October 17, 2011, plaintiff filed a notice of appeal. Defendants filed their cross-appeal on October 27, 2011.

III. DISCUSSION

A. Statute of Limitations

The statute of limitations, which operates as an affirmative defense, prescribes the period beyond which a plaintiff may not bring a cause of action. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806; accord *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 395-396.) Once a cause of action accrues, the plaintiff must bring a claim within the limitations period. (*Fox v. Ethicon Endo-Surgery, Inc., supra,* 35 Cal.4th at p. 806; Code Civ. Proc. § 312 ["Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute"].) The determination of the accrual of a cause of action is a question of fact. (*Fox v. Ethicon Endo-Surgery, Inc., supra,* 35 Cal.4th at p. 810; *Bookout v. State ex rel. Dept. of Transportation* (2010) 186 Cal.App.4th 1478, 1484.) We defer to the trial court's factual findings if supported by substantial evidence. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) But if the facts are undisputed, application of the statute of limitations is a matter

of law and subject to de novo review. *(Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191; *Internat. Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611-612.)

Civil Code section 3412 permits the cancellation of a written instrument. Section 3412 provides: "A written instrument, in respect to which there is reasonable apprehension that if left outstanding may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." The statute of limitations on a cause of action for cancellation is governed by the four-year limitations period under Code of Civil Procedure section 343.[4] (*Moss v. Moss* (1942) 20 Cal.2d 640; 645; *Robertson v. Superior Court* (2001) 90 Cal.App.4th 1319, 1326; *Zakaessian v. Zakaessian* (1945) 70 Cal.App.2d 721, 725; see also *Banks v. Marshall* (1863) 23 Cal.223 [four-year statute of limitations on promissory note].)

"The limitations period for declaratory relief claims depends on 'the right or obligation sought to be enforced, and the [statute of limitations's] application generally follows its application to actions for damages or injunction on the same rights or obligations.'" (*Ginsberg v. Gamson* (2012) 205 Cal.App.4th 873, 883 quoting *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 821.) Plaintiff's declaratory relief claims seek resolution of the validity of the Developer's Note based on alleged forgery, lack of consideration, and whether the note was superseded by the Amended Partnership Agreement. These are the same bases for plaintiff's cancellation claim. Thus, we apply the four-year statute of limitations under Code of Civil Procedure section 343 to the declaratory relief claims.

Plaintiff contends the four-year statute of limitations on the cancellation claim did not accrue until November 21, 2005 when Mr. Quarles sent Mr. Perry a copy of the Developer's Note. Plaintiff argues the trial court erred in finding the statute of

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[4] Code of Civil Procedure section 343 provides: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

limitations began to run before defendants made any demand on the Developer's Note relying on *Garver v. Brace* (1996) 47 Cal.App.4th 995, 999. Plaintiff's reliance is misplaced.

In *Garver v. Brace*, the buyers signed a promissory note containing a prepayment fee clause payable to the sellers in 1989. (47 Cal.App.4th at p. 998.) In November 1993, the buyers sold the property and prepaid the note incurring a prepayment fee of $184,000. (*Id.* at p. 999.) The buyers filed a lawsuit on May 1994 seeking restitution of the prepayment fee. (*Ibid.*) The appellate court held the statute of limitations on the buyers' cause of action did not run until the sellers demanded the prepayment fee. (*Id.* at p. 1000.) The *Garver* court reasoned: "The buyers were not required to pay the prepayment fee until the sellers demanded it. That is the date upon which the buyers suffered appreciable and actual harm and, therefore, the date on which their cause of action to challenge the validity of the prepayment fee clause accrued." (*Id.* at pp. 1000-1001.)

In *Garver v. Brace*, the prepayment provision only triggered when the buyers prepaid the promissory note. Thus, the buyers' cause of action did not accrue until the sellers demanded the prepayment fee. *Garver v. Brace* is distinguishable from the present case.

Here, plaintiff seeks to cancel the entire promissory note, filing its first complaint on August 11, 2009. But the date upon which plaintiff suffered appreciable and actual harm, and therefore, the date their cancellation claim accrued arose when defendants first took interest payments on the Developer's Note in the 1990s.

Substantial evidence supports the trial court's finding that the cancellation and declaratory relief claims accrued before August 2005. From 1991 through 2003, plaintiff's financial statements reflected a $1,743,000 "note" or "notes" payable to the general partners. A 1995 independent audit of plaintiff by KPMG Peat Marwick LLP conducted at the request of the CRA identified a note payable to the general partners. An audit conducted by Macias Gini & Company for the CRA-- which reviewed plaintiff's audited financial statements from 1996 through 2003-- referenced a note, in the

amount of $1,743,000 that carried the same terms as the first mortgage and was subordinated to both the first and second mortgage. Also, Mr. Perry admitted in 1996 he investigated payments to defendants after the CRA sent a notice of default because defendants had paid themselves $342,000. Furthermore, in 2004, plaintiff's auditor Habif, Arogeti & Wynn, LLP, determined the general partner notes were not valid and removed them from plaintiff's financial statements. Substantial evidence supports the finding that plaintiff was aware of the Developer' Note and suffered appreciable and actual harm more than four years before plaintiff filed its complaint. Based on the foregoing evidence, we conclude plaintiff's cancellation and declaratory relief claims are barred by the four-year statute of limitations under Code of Civil Procedure section 343.

Because plaintiff's claims are barred, we declined to discuss whether the Developer's Note was superseded by the Amended Partnership Agreement. In addition, we find no need to address plaintiff's argument concerning lack of consideration for the Developer's Note. We also decline to discuss plaintiff's contention that the Developer's Note is unenforceable because of alleged tax evasion.

B. Award of Costs

Code of Civil Procedure section 1032, subdivision (a)(4) provides: "'Prevailing party' includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against the defendant. When any party recovers other than monetary relief and in situations other than as specified, the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not and, if allowed may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under Section 1034." We review for abuse of discretion the trial court's determination of the prevailing party and its award of fees and costs. (*Goodman v.*

Lozano (2010) 47 Cal.4th 1327, 1332; *Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 Cal.App.4th 847, 856.)

Defendants argue they were entitled to costs as the prevailing party under Code of Civil Procedure section 1032, subdivision (a)(4). But defendants did not recover any monetary relief. Thus the award of costs was discretionary, not mandatory. Section 1032, subdivision (a)(4) permits the trial court to allow or not allow costs at its discretion "when any party recovers other than monetary relief." We find no clear abuse of discretion and miscarriage of justice as to warrant reversal. (*Heller v. Pillsbury Madison & Sutro* (1996) 50 Cal.App.4th 1367, 1395.)

IV. DISPOSITION

We affirm the judgment. Plaintiff Coliseo Housing Partnership and defendants POZ Village Development Inc. and The Bedford Group are to bear their own appeal costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

O'NEILL, J.*

We concur:

TURNER, P. J.

KRIEGLER, J.

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* Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.