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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

SHASHIKANT JOGANI, Plaintiff, Appellant and Respondent, v. HARESH JOGANI et al., Defendants, Respondents and Appellants.	B222561, consol. w/ B228875 (Los Angeles County Super. Ct. No. BC290553)

APPEAL from orders of the Superior Court of Los Angeles County. Yvette M. Palazuelos, Judge. Affirmed in part and reversed in part.

Reed Smith, Margaret Grignon, Wendy S. Albers, Zareh A. Jaltorossian; Krane & Smith and Samuel Krane for Plaintiff, Appellant and Respondent.

Howard Rice Nemerovski Canady Falk & Rabkin, Jerome B. Falk, Jr., Steven L. Mayer, Shaudy Danaye-Elmi, Sara J. Eisenberg; Arnold & Porter and Jerome B. Falk, Jr., for Defendants, Respondents and Appellants.

This is our fourth examination of what began as a contract dispute between plaintiff Shashikant Jogani and his four brothers over real estate interests. Jogani alleged he and his brothers entered into an oral agreement pursuant to which the brothers were to provide capital to purchase real property that he would identify, acquire and manage. Once the brothers recouped their investment plus a percentage, Jogani would receive 50 percent of the equity of the partnership's holdings. Over the next seven years the business was highly successful, but when Jogani's brothers refused to pay him half of the profits he brought this lawsuit against them, other family members, and six family-owned real estate holding companies, alleging causes of action for, among other things, fraud, breach of contract and quantum meruit, and seeking approximately $250 million.

After years of law and motion practice, one appeal, and voluntary dismissal of all defendants except one brother, a nephew and the holding companies, the trial court granted summary adjudication against Jogani on all causes of action except quantum meruit. Proceeding to trial on that cause of action, the trial court excluded evidence of the oral agreement by which Jogani claimed a 50 percent equity interest in defendants' real property holdings and instructed the jury that plaintiff could recover only the reasonable value of his services.

The jury concluded the reasonable value of Jogani's services was $475,000 per year, multiplied by seven years, or $3,325,000. In further deliberations, one member of the jury informed the others that real estate agents customarily receive a 6 percent commission on sales and that persons who acquire real property for others customarily receive an additional 6 percent finder's fee. The jury then concluded Jogani was entitled to 12 percent of the $488 million purchase price of defendants' real property holdings. Adding a onetime "interest" award of 10 percent to compensate him for delayed payment, the jury returned special verdicts awarding Jogani a total of over $65 million.

Defendants moved for new trial and judgment notwithstanding the verdict. Although they accepted the jury's conclusion that Jogani was entitled to $475,000 per year as the reasonable value of his services (a figure their own expert had offered), defendants argued no evidence supported the further award of approximately 22 percent

of the purchase price of their holdings. The trial court agreed. Finding the jury committed misconduct by considering matters outside the evidence, the court granted defendants' motion for new trial and denied their motion for judgment notwithstanding the verdict.

Each side appeals. Jogani challenges the trial court's orders and instructions that limited the scope of trial at the outset, including orders summarily adjudicating several causes of action and excluding evidence. He also contends the court erred in granting defendants' motion for new trial. Defendants contend the court erred in denying their motion for judgment notwithstanding the verdict.

We conclude the trial court properly granted defendants' motion for new trial and denied their motion for judgment notwithstanding the verdict, and properly granted the nephew's motion for summary adjudication, but erred in granting the remaining brother's motion for summary adjudication.

BACKGROUND

A. The Complaint

Jogani alleged that in 1979 he began investing in residential apartment properties in and around Los Angeles County, and in 10 years owned properties having a fair market value of $375 million and a net equity of $100 million. His fortunes then reversed when the Northridge earthquake and a severe downturn in the real estate industry caused him to face several defaults, foreclosures and lawsuits. In 1995, Jogani and two of his brothers, Haresh and Rajesh Jogani, who acted both for themselves and as agents of their brothers Chetan and Sailesh Jogani, negotiated and entered into an oral general partnership agreement. Pursuant to the agreement, Jogani would transfer his interest in several troubled residential apartment properties to the partnership, identify and acquire new properties on behalf of the partnership, and manage the partnership's portfolio. The brothers would provide capital to acquire the properties and pay Jogani 50 percent of all profits once they recouped their investment plus a 12 percent return.

Six corporations would hold the real estate Jogani transferred or acquired: J.K. Properties, H.K. Realty, Commonwealth Investment, Gilu Investments Limited, Mooreport Holdings Limited, and Hansa Investments (the holding companies). Jogani transferred his troubled properties and other assets to the holding companies and his brothers provided capital to acquire additional properties.

During the next seven years the enterprise thrived solely as a result of Jogani's efforts. The holding companies acquired title to hundreds of apartment buildings having a market value in excess of $1 billion and net equity of around $550 million, and generating a monthly income of approximately $2 million. Jogani received little or no compensation, but his brothers repeatedly affirmed and ratified the partnership agreement and Haresh, acting for himself and as the brothers' agent, distributed $4.8 million to the partnership, $2.4 million of which went to Jogani. Jogani's brothers recouped their investment plus 12 percent—in excess of $70 million—by November 2001, at which time Jogani's contingent promotional interest, now worth approximately $225 million, became vested and due.

Rather than acknowledge Jogani's interest, Haresh, on behalf of himself and the partnership, removed Jogani from management of the real estate portfolio and sought repayment of the $2.4 million that had been distributed.

In February 2003, Jogani filed this action against his brothers, the holding companies, K.H. Jogani (Haresh's wife), and Pinkal Jogani (Sailesh's son). Only Haresh, Pinkal, and the holding companies made appearances. Jogani filed a second amended complaint (the complaint) in 2003, alleging causes of action for breach of contract, breach of fiduciary duty, fraud, conspiracy to commit fraud (against Pinkal only), dissolution of partnership, quantum meruit, unjust enrichment, and constructive trust. He sought at least $250 million in damages, dissolution of the partnership, an accounting, injunctive relief, institution of a constructive trust, appointment of a receiver to manage the partnership portfolio, and any other relief the court deemed proper.

In July 2004 and February 2005, Chetan, Rajesh, Sailesh and K.H. Jogani were dismissed from the action.

B. Judgment Debtor Proceedings

Jogani was himself a defendant in lawsuits arising from his earlier business pursuits, resulting in several judgments against him and institution of judgment debtor proceedings. The following facts are taken from our opinion on the first appeal in this action ("Shashi" refers to Jogani):

"By the mid-1990's, the equity in Shashi's real estate holdings had fallen from $100 million to a negative $50 to $70 million. There were several lawsuits against him, brought by tenants, creditors, employees, and an insurance company. By 1998, many creditors had obtained judgments against him.

"At his deposition in this case, taken in April and May 2004, Shashi testified he became a general partner in the Partnership when it was formed in April 1995, as did his brothers. Since April 1995, Shashi continuously has been a part owner of the Partnership, which owns the real estate acquired from him as well as the properties subsequently purchased as a result of his consulting work. The real estate was nominally held by the Holding companies, such as J.K. Properties and H.K. Realty. Since April 1995, Shashi has also continuously been a part owner of the holding companies. Haresh supervised the operations of the Partnership and the holding companies on behalf of the other brothers. If Haresh had tried to sell J.K. Properties at any point, Shashi would have filed suit based on his 50 percent ownership interest in the Partnership, which owned J.K. Properties.

"In May 1997, the plaintiff in *Cappucci v. Jogani* (Super. Ct. L.A. County, 1996, No. BC143725) (*Cappucci*) secured a judgment against Shashi of around $639,000. The plaintiff questioned Shashi at a judgment debtor examination held on February 23, 1998, and March 9, 1998, at the county courthouse.

"At the judgment debtor exam, Shashi was asked to identify 'any entity in which you've ever owned any interest.' He did not mention the Partnership or the Partnership Entities. He specifically stated he did not have 'any interest' in J.K. Properties or H.K. Realty. Shashi testified that none of his family members owned any real property with him, nor did they own any real property with an entity in which he held an interest.

When asked if he was presently a party to 'any kind' of contract or agreement, he answered, 'No.' Shashi was also asked, 'Are you involved in any joint ventures.' He replied, 'I wish, no.' He later testified in this case that he believed 'joint venture' is 'the same as Partnership.'

"After the judgment debtor exam, the plaintiff in *Cappucci* did not attempt to reach any interests Shashi had in the Partnership or the [holding companies], and she settled for $50,000. More specifically, one of the [holding companies] purchased the $639,000 judgment for that sum.

"In or about 1996, the plaintiff in *Weyerhauser Financial Investments v. Jogani* (Super. Ct. L.A. County, 1996, No. BC143926) (*Weyerhauser*) obtained a judgment against Shashi for about $644,000. In connection with *Weyerhauser*, Shashi was questioned at a judgment debtor examination conducted on March 23, 1998, and April 13, 1998, at the county courthouse.

"At the exam, Shashi was asked if he was 'currently a partner in any partnership.' He said he was a 1 percent limited partner in four or five limited partnerships. He identified each by name. He did not mention the Partnership. Shashi testified that Haresh was the owner or a part owner of J.K. Properties and H.K. Realty. When asked, '[D]o you have any interest . . . in any companies that are owned directly or indirectly by Haresh Jogani,' Shashi replied, 'Absolutely not. Absolutely not.' In response to the question, 'Do you have any interest in re-acquiring any of the properties that were purchased by any company that Mr. Haresh Jogani controls,' Shashi said, 'No.'

"After the exam, the plaintiff in *Weyerhauser* did not make any effort to reach Partnership-related assets and accepted $50,000 for the $644,000 judgment. Haresh sent the settlement money to Shashi's attorney and charged it to the partnership.

"The plaintiffs in *Cappucci* and *Weyerhauser* were not alone. A plaintiff in a third action obtained multiple judgments against Shashi totaling around $696,000 and settled for $50,000. In a fourth case, the plaintiff recovered a judgment of $878,000 and accepted $62,000.

"At the judgment debtor exams in *Cappucci* and *Weyerhauser*, Shashi believed that the questions were addressed to what he owned as of that time—in his words, 'something' the judgment creditors could 'put [their] hands on.' He did not believe the questions covered a future or contingent interest, in part because he thought it had no present value. Shashi did not think he had an ownership interest in the Partnership in 1998 because he was not entitled to his 50 percent share until his brothers had recouped their investment plus a 12 percent return—which did not happen until three years later. Shashi had been advised by counsel before the debtor exams that his interest in the Partnership had not 'vested,' so 'you don't have a present ownership of anything.' But the attorney also said Shashi was presently a partner in the Partnership and a party to the Partnership Agreement. Shashi had some control over when his Partnership interest vested because he alone controlled the Partnership's investment strategy.

"As Shashi testified at his deposition, the 'contingent' nature of his interest in the Partnership allowed his brothers to obtain loans for which he could not qualify. Based on past experience, certain financial institutions did not want to loan money to a company in which Shashi owned an interest. Haresh was able to obtain loans through the [holding companies] and related companies because Shashi did not have a 'present' ownership interest in the borrowing entity; he was only a consultant.

"According to Shashi's personal attorney, in 1995, Haresh wanted to continue Shashi's real estate business and to have Shashi control it but 'didn't want the appearance of Shashi having an interest that creditors could attack.' Haresh was actively involved in creating and structuring the Partnership and the [holding companies]. Haresh also approved of 'everything that was done regarding satisfaction of judgments and buying judgments.' Shashi and Haresh believed that if a lender knew about the existence of the Partnership, the [holding companies] might have difficulty obtaining loans." (*Jogani v. Jogani* (2006) 141 Cal.App.4th 158, 166-168 (*Jogani I*).)

C. First Motion for Summary Judgment

Relying on Jogani's judgment debtor testimony, defendants brought two successive summary judgment motions. In the first, they argued the doctrine of judicial

estoppel prevented Jogani from claiming in this case that which he had denied under oath in the judgment debtor examinations. He thus could not claim an interest in any real estate partnership. The trial court agreed, and granted summary judgment on the ground that judicial estoppel barred the lawsuit.

We reversed. We acknowledged that Jogani had "taken totally inconsistent positions in separate judicial proceedings. In the *1998* judgment debtor examinations, he testified to the effect that, as of that time, he was not a partner in the Partnership, did not have or own 'any interest' in the holding companies, did not own any real property with family members, and was not a party to any kind of agreement. At his 2004 deposition in this case, Shashi testified in essence that since *1995*, he continuously has been a general partner in the partnership, has had an ownership interest in the holding companies, has been a part owner—with his brothers—of the partnership's real properties, and has been a party to the partnership agreement. And, according to the deposition, if Haresh had tried to sell one of the holding companies at any time *after 1995*, Shashi would have filed suit based on his interest in that entity. [¶] Nor were these inconsistencies the result of ignorance or mistake on Shashi's part. [Citation.] At the 1998 debtor exams, when Shashi's assets were at stake, he denied any and all interests, including membership and ownership, in the partnership, the holding companies, and the entities' real estate holdings. In 2004, when he stood to gain $250 million, Shashi testified in deposition that his interests, membership, and ownership dated back to 1995, three years before the debtor exams." (*Jogani I*, *supra*, 141 Cal.App.4th at pp. 171-172.) We concluded the inconsistencies were deliberate. (*Id*. at p. 172.)

We nevertheless held that judicial estoppel did not apply, because no "judge or referee considered or resolved any objection, dispute, or claim in connection with the [debtor] exams. The transcripts [did] not show that a judge or referee said anything or that anything was said to a judge or referee. The exams were conducted by counsel for the judgment creditors. No orders were issued. [And d]efendants [did] not assert that a transcript of the testimony was lodged or filed with the courts that ordered the exams. [¶] Because the courts in the judgment debtor proceedings did not consider the substance of

Shashi's testimony, much less adopt it or accept it as true, his allegations and deposition testimony in this action 'introduce[d] no "risk of inconsistent court *determinations*," . . . and thus pose[d] little threat to judicial integrity.' [Citation.] The outcome in this action [could not] possibly create '"the perception that either the first or the second court was misled"' [citation], given that the first courts did not rely on the testimony at all." (*Jogani I*, *supra*, 141 Cal.App.4th at p. 174, fn. & italics omitted.)

D. Second Motion for Summary Judgment

In 2007 defendants again moved for summary judgment or in the alternative summary adjudication, this time arguing that the rule set forth in *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20-22, which prevents a party from avoiding summary judgment by presenting evidence that contradicts admissions made during discovery, barred Jogani from offering evidence that would contradict his 1998 judgment debtor testimony. Relying in part on the *D'Amico* rule, the trial court granted summary adjudication on all causes of action but quantum meruit and unjust enrichment.

In later mandate proceedings we concluded Jogani's unjust enrichment and quantum meruit claims were duplicative. (*Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911 (*Jogani II*).)

E. Pretrial Rulings

The case then proceeded solely in quantum meruit.

During discovery, Jogani's expert, Samuel K. Freshman, testified the reasonable value of Jogani's services to J.K. Properties was $222,866,089, equal to 50 percent of the net value of the real estate owned by J.K. Properties, H.K. Realty, and Hansa Investments. Freshman opined Jogani was entitled to this amount whether he acted in partnership with Haresh or merely as a consultant to the investment companies, because without his efforts the real estate would not have been obtained. He based his opinion on his overall experience, which he documented by producing several agreements establishing limited partnerships, tenancies in common, and other forms of group investment where non-active investors would provide capital and each party's profit participation was specifically negotiated and spelled out. When asked what the value of

Jogani's services would have been had the real estate portfolio decreased in value rather than increased, Freshman testified Jogani would have been entitled to no compensation.

Prior to trial, defendants filed motions in limine to exclude evidence and argument regarding: (1) any partnership agreement; (2) any other agreement between Jogani and Haresh; (3) the increase in value of any of defendants' real estate holdings; and (5) any disbursement to Haresh by other defendants or any of the holding companies. Defendants argued existence of a partnership or any other agreement between Jogani and Haresh was irrelevant to Jogani's quantum meruit claim, as was evidence of any profit realized by Haresh or the holding companies, as quantum meruit damages are measured only by the market value of services performed, not by any agreement for the services nor by gain defendants realize as a result of them. The trial court granted defendants' motions, but later modified the ruling by permitting Jogani to introduce evidence regarding the increase in value of defendants' property and disbursements to Haresh. It instructed the jury that the evidence could be used only to show Jogani provided value to defendants, not to calculate the proper measure of recovery.

Defendants also moved in limine to exclude Mr. Freshman as a witness, arguing his opinion that the reasonable value of Jogani's services to J.K. Properties was $222,866,089 was based on improper assumptions and a misunderstanding of quantum meruit. The court granted this motion insofar as Freshman's opinion was based on existence of an agreement between Jogani and Haresh, but after an Evidence Code section 402 hearing it denied the motion insofar as the opinion was based on Freshman's general experience.

F. Trial

At trial, Freshman testified the reasonable value of Jogani's services was between $50 million and $350 million. Defendants' expert testified the reasonable value was between $150,000 and $558,333 per year, or a total value of up to $3,908,331 for seven years of work. The trial court instructed the jury that in calculating the reasonable value of Jogani's services it should consider the reasonable value of what it would have cost defendants to obtain those services from another person.

By special verdict, the jury found Haresh, Gilu Investments Limited, and Mooreport Holdings Limited were not liable in quantum meruit because Jogani provided no services for their benefit. It found J.K. Properties, H.K. Realty, Commonwealth Investment, and Hansa Investments were indebted to Jogani in the aggregate sum of $65,618,000 based on their share of the real estate held, which had a purchase price of approximately $488 million. Post-verdict interviews and juror declarations revealed the jury arrived at the damages figure in part based on one juror's extra-record statement that both a real estate broker and any person who acts as a "finder" are customarily entitled to 6 percent of the purchase price of any property bought. The jury thus calculated Jogani's damages by multiplying a yearly wage of $475,000 by seven, plus 6 percent of $488 million, twice, plus 10 percent "interest."

G. Post-Trial Rulings

On December 29, 2009, J.K. Properties, H.K. Realty, Hansa and Commonwealth moved for judgment notwithstanding the verdict, requesting that the court award Jogani $3,325,000 ($475,000 per year multiplied by seven years), less the $2.4 million already disbursed. The court denied the motion. Defendants also moved for a new trial on the ground of jury misconduct, which the court granted.[1]

DISCUSSION

I. Motion for New Trial

The trial court granted the motion of defendants J.K. Properties, H.K. Realty, Hansa Investments and Commonwealth Investments for a new trial, finding jurors engaged in misconduct by "consult[ing] inappropriate extrinsic evidence in making their award, and appl[ying] an inapplicable measure of damages in reaching their verdict," which "directly impacted the outcome of the trial and resulted in a significant judgment against" the moving defendants.

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[1] We later issued a peremptory writ ordering the trial court to enter judgment in favor of the defendants who prevailed at trial. (*Jogani v. Superior Court* (July 28, 2010, B224398 [nonpub. opn].)

A. Background

1. Pertinent Trial Proceedings

As noted, during discovery Samuel Freshman, Jogani's expert, had testified the reasonable value of Jogani's services was properly calculated as a percentage of the net value of the real estate owned by J.K. Properties, H.K. Realty and Hansa Investments. The trial court granted in part defendants' motion to exclude this opinion, ruling he could testify only as to the reasonable compensation due a person who performed services such as those performed by Jogani, and could not base his opinion on the existence of any profit sharing agreement. Freshman indicated he well understood the permissible scope of his trial testimony.

At trial, Freshman testified that assuming no partnership or profit sharing agreement existed, the reasonable value of real estate acquisition services Jogani performed for defendants was between $50 million and $350 million.

When asked how he arrived at such a large range, Freshman responded, "it involves a decision as to what the actual appreciation was." Defendants' counsel objected to the response, and it was stricken and Freshman was again admonished that compensation could not be based on the appreciation of defendants' real estate portfolio. Freshman then testified his opinion was that "in custom and practice in the industry, under these circumstances, the range would be 20 percent to 70 percent of—" The court intervened and again ordered the response stricken. When asked what would support a valuation of $50 million, Freshman testified, "it's 12 percent, I think." Defendants' objection was again sustained. Questioning ended with Freshman never further explaining how he derived his figures.

Defendants' expert ultimately opined the reasonable value of Jogani's services was $475,000 per year.

At the close of evidence, the jury was instructed as follows: "The measure of recovery in quantum meruit is the reasonable value of the services rendered provided they were of direct benefit to the defendant. [¶] In calculating the reasonable value of any services that . . . Jogani provided, you shall consider the reasonable value of what it

would have cost the Defendants to obtain the services [Jogani] provided from another person. [¶] You must not calculate the reasonable value of any services rendered by [Jogani] by any increase in the value of the Defendants' real estate that may have resulted from [Jogani's] services."

2. Defendants' Motion for New Trial

As stated, the jury returned a special verdict for Jogani in the amount of approximately $65 million. After the verdict, J.K. Properties, H.K. Realty, Hansa Investments and Commonwealth Investments moved for a new trial on the grounds that the jury committed misconduct by considering outside evidence to arrive at its damages award, the award was excessive, Jogani's counsel committed misconduct, and the trial court erred in permitting Freshman to testify at trial. In support of the motion, defendants offered the declarations of three jurors.

In the first, David O'Donnell, who did not vote in favor of the verdict, declared the jury agreed an annual reasonable compensation would be $475,000 for seven years, for a total of $3,325,000. During further deliberations, O'Donnell stated, "[a] juror explained that the customary real estate broker's commission is 6 %. [The jury] agreed to and did award [Jogani] a 6 % commission based on the total cost of the properties acquired by each of the Defendant owned companies . . . . To arrive at this portion of our award they carefully reviewed the evidence which provided us with the actual purchase prices of the properties to which they applied and obtained the 6% commission." Furthermore, "[a] juror explained how finder's fees or exclusivity fees are customary for services rendered and they concluded that a finders or exclusivity fee was appropriate . . . ." The jury "also calculated and awarded interest on our award to compensate [Jogani] for the delay in getting payment." In an addendum to his declaration, O'Donnell stated the jury "looked at the Julian document for guidance on how to determine payment."

The reference to "Julian" documents apparently meant letters sent to Jogani in 1994 and 1995 by Rick Julian of Advanced Real Estate Services, Inc. In them, Julian offered to help extract Jogani from his financial difficulties by finding investors for some

of his properties, for a fee of 6 percent of any cash raised. Jogani admitted in the complaint that he rejected Julian's offer.

In nearly identical declarations, jurors Nina Van Dorn and Nelson Te, both of whom voted in favor of the verdict, confirmed that the jury accepted $475,000 per year as reasonable compensation for Jogani's services. They also declared juror "Crosland stated that an appropriate percentage to award was what a real estate brokerage fee would have been. She said that the standard brokerage fee was 6%. The jurors then reviewed one of the Julian letters and we saw that the brokerage commission referred to in that letter was 6%. The jurors then discussed the 6% brokerage fee number and agreed to and did award the Plaintiff a 6% commission as was explained by Ms. Crosland and seen in the Julian letter. The 6% number was applied to the total cost of the properties acquired by J.K., H.K., Hansa and Commonwealth.[] We totaled up the purchase price of those properties as being $488 million." Van Dorn and Te further declared that "[a] juror explained how finder's fees or exclusivity fees are customary for service rendered," and the jury "discussed and agreed to" award Jogani "an additional 6% of the purchase price" as a finders or exclusivity fee. Regarding interest, Vandorn and Te declared that juror "Crosland stated that the proper rate of interest is 10%," and the jury "discussed that and agreed to that number" and added it to the damages award.

Defendants argued the damages award should be reduced to $925,000, comprising $475,000 per year as calculated by their expert, offset by the $2.4 million Jogani had already been paid. They requested that the court condition denial of the new trial motion on Jogani's consent to this reduction. (Code Civ. Proc., § 662.5.)

In opposition to the motion for new trial, Jogani objected to the jurors' declarations on the ground that evidence concerning the mental processes by which a verdict is reached is inadmissible upon an inquiry into validity of the verdict. (Evid. Code, § 1150, subd. (a).) He argued substantial evidence supported the $65 million award, as it was within the $50 to $350 million range of compensation testified to by Freshman. He also argued the jury used the 6 percent fee sought by Rick Julian and the $2.4 million Haresh had paid to Jogani as "barometer[s] of fairness" to determine what

defendants would have had to pay someone to find the properties they purchased and obtain financing. Jogani implicitly declined defendants' offer to have the award reduced to $925,000.

In support of the opposition, Jogani offered the identical declarations of jurors Augusto Bisani, Adam Hodge, Tony Timmons and Ana Sarreal, each of whom stated the reasonable value of Jogani's management of defendants' properties on a day-to-day basis was $3,325,000, and the reasonable value of his services in finding the properties, obtaining financing, and rehabilitating them was 6 percent of the purchase price, similar to the 6 percent that had been sought by Rick Julian.

3. Trial Court's Ruling

The trial court overruled Jogani's objections to the jurors' declarations and found no evidence introduced at trial supported imposition of a 6 percent broker's or finder's fee or a 10 percent interest award. Accordingly, it found the jury "consulted inappropriate extrinsic evidence in making their award," which "directly impacted the outcome of the trial and resulted in a significant judgment against" the moving defendants. Finding juror misconduct and prejudice, the court declined to reach the other grounds for the new trial motion. It did, however, note that the addition of a 10 percent premium to the damages award for delay in payment was unreasonable on its face and "not properly within the realm of compensable damages in a quantum meruit claim." (Fn. omitted.)

B. Analysis

A verdict may be vacated and a new trial ordered when jury misconduct materially affects the substantial rights of a party. (Code Civ. Proc., § 657, subd. (2).) "Presentation to or reception by a jury of new evidence from sources outside the trial evidence constitutes misconduct. [Citation.] This includes expert opinions about issues in the case that are not based on the evidence. As the Supreme Court has explained, 'It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by

their life experiences, including their education and professional work. A juror, however, *should not discuss an opinion explicitly based on specialized information obtained from outside sources.* Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct.' [Citation.]" (*McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 263, italics added.)

The trial court may consider juror declarations in determining whether misconduct has occurred. (*People v. Hutchinson* (1969) 71 Cal.2d 342, 351 (*Hutchinson*); *Tramell v. McDonnell Douglas Corp*. (1984) 163 Cal.App.3d 157, 171.) "In considering a motion for new trial, the trial judge is entitled to reweigh the evidence, consider the credibility of the witnesses and draw reasonable inferences contrary to those accepted by the jury." (*Galindo v. Partenreederei M.S. Parma* (1974) 43 Cal.App.3d 294, 302.) "'[T]he trial court, in ruling on [a new trial] motion, sits . . . as an independent trier of fact.' [Citation.]" (*Lane v. Hughes Aircraft Co*. (2000) 22 Cal.4th 405, 412.)

"It is well settled that the granting of a motion for a new trial rests so completely within the discretion of the trial court that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. [Citations.] On appeal all presumptions are in favor of the order granting a new trial [citations], and the order will be affirmed if it may be sustained on any ground [citations], although the reviewing court might have ruled differently in the first instance." (*Brandelius v. City & County of S.F.* (1957) 47 Cal.2d 729, 733-734.) "'[A]ll intendments are in favor of the action taken by the lower court [and] the affidavits in behalf of the prevailing party are deemed not only to establish the facts directly stated therein, but all facts reasonably inferred from those stated.' [Citations.]" (*Tramell v. McDonnell Douglas Corp*., *supra*, 163 Cal.App.3d at p. 172.)

We first consider the admissibility of the declarations of jurors O'Donnell, Van Dorn and Te. Evidence Code section 1150 provides that "[u]pon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room,

of such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).) But "[n]o evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (*Ibid*.) Section 1150 thus distinguishes between proof of overt acts, which may be objectively observed, and "subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved." (*Hutchinson, supra*, 71 Cal.2d at p. 349.) Overt acts that may be proved by juror declaration "are those open to sight, hearing, and the other senses and thus subject to corroboration." (*Id*. at p. 350.) Overt acts include statements made to the jury by outside sources (*id*. at p. 351 [remarks made to the jury by a bailiff]), comments made by individual jurors (*Krouse v. Graham* (1977) 19 Cal.3d 59, 79-80 (*Krouse*)), and discussion among the jurors (*Tramell v. McDonnell Douglas Corp*., *supra,* 163 Cal.App.3d at p. 172). For example, in *Krouse,* four jurors declared several jurors had "commented" on their belief that the plaintiffs would have to pay attorney fees out of the total award. They "'considered'" this belief and "'determined'" to increase the award by 33 percent. (19 Cal.3d at pp. 79-80.) The Supreme Court concluded that if the jury was found to have discussed attorney fees and specifically agreed to include such fees in the verdict, the discussion and agreement would constitute "matters objectively verifiable, subject to corroboration, and thus conduct which would lie within the scope of [Evidence Code] section 1150." (*Id*. at p. 81)

Here, O'Donnell, Van Dorn and Te declared that some jurors made statements to the jury as a whole about commissions, fees and interest. These statements were overt acts open to sight and hearing, and were subject to corroboration and were in fact corroborated. The declarations as to the making of these statements were therefore admissible. Other statements in the declarations were inadmissible. For example, all three declarants opined that the statements about commissions and fees influenced the verdict. These statements purported to set forth the reasoning processes of the jurors, which can be neither corroborated nor disproved. They were thus inadmissible.

Jogani argues the declarations that some jurors made statements to the jury were inadmissible because the statements reflected *those jurors*' reasoning processes, and jurors are allowed to apply their life experiences to the questions under consideration. The argument has a superficial appeal but is ultimately without merit.

It is true that when jurors consider a matter they necessarily bring their life experiences to the table, and in jury room deliberations those experiences will invariably inform the discussion and often be stated outright, often in an effort to persuade other jurors to adopt the speaker's position. The policy favoring finality of verdicts prohibits overly severe restrictions on what jurors can say during deliberations. Otherwise, "all unsuccessful litigants, plaintiffs and defendants alike, [would canvass] jurors hereafter as a matter of policy, in the fond hope of discovering some forbidden element that may have inadvertently crept into jury discussions. Motions thereafter made on the basis of such discovery [would] seriously impede the expeditious administration of justice." (*Krouse, supra*, 19 Cal.3d at p. 85 [dis. opn. by Mosk, J.].) But if every statement made by a juror reflected *nothing more* than the speaker's mental processes as a matter of law, then Evidence Code section 1150's provision that evidence may be received as to statements made would never apply to statements made by jurors themselves. This result was squarely rejected by our Supreme Court in *Krouse*, which held that jury discussion and agreement could constitute objectively verifiable conduct within the meaning of section 1150. We reject it, too. Although a juror's statement to other jurors may reflect his or her mental processes, it may also be intended to advocate or inform, which would make it objectively verifiable conduct, evidence of which is admissible under section 1150. Portions of the declarations of O'Donnell, Van Dorn and Te were therefore admissible.

Having properly considered the declarations, the trial court was well within its discretion to determine that statements made by some jurors constituted misconduct. No evidence was offered at trial that a buyer's real estate agent customarily receives a 6 percent commission from the buyer on purchases totaling almost half a billion dollars. No evidence was presented that absent an agreement, one who acquires property for another is customarily entitled to a 6 percent finder's fee. And there was no evidence

setting forth a one-time fee, equal to a percentage of the purchase price, for delayed payment.

Jogani argues the fact the jury consulted the Julian letters constituted sufficient evidence to support the verdict. In them, Julian had offered to procure financing for 6 percent of the amount of financing obtained. Jogani argues the letters establish that 6 percent was a reasonable fee under the circumstances, a "barometer of fairness." The argument misses the point. The issue is whether the jury consulted outside evidence when juror Crosland informed her co-jurors about the standard 6 percent sales commission and 6 percent finder's fee. It indisputably did. That the outside evidence may have been corroborated by evidence adduced at trial goes to whether the misconduct was prejudicial, not whether it existed.

Prejudice is established where it appears that jury misconduct was "likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).) There is little question the misconduct here influenced the verdict improperly.

In quantum meruit, Jogani was entitled only to the reasonable value of his services, not an equity interest in the property he had acquired for defendants. (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 446.) Although the jury was instructed that Jogani could have no equity interest, it nevertheless awarded him an amount equal to 22 percent of defendants' holdings in addition to $475,000 per year for his services, which coincidentally was the same amount defendants' expert had testified was reasonable. Jogani was thus awarded almost $10 million per year for acquiring and managing defendants' property. To paraphrase *Maglica*, "People who work for businesses for a period of years and then walk away with $[65] million do so because they have acquired some *equity* in the business, not because $[65] million is the going rate for the services of even the most workaholic manager. In substance, . . . the jury [valued Jogani's] services as if [he] had made a sweetheart stock option deal—yet such a deal was precisely what the jury was instructed [he] did not make." (*Ibid.*)

Jogani argues $10 million per year was reasonable given the value of his services to defendants. Again, the point has superficial appeal, as Jogani appears to have made a lot of money for defendants. But whether by design or historical accident, "reasonable value" in quantum meruit is measured by the value of services *in the abstract*, not by reference to the benefit bestowed on the recipient of the services. (*Maglica v. Maglica*, *supra*, 66 Cal.App.4th at p. 446.) Jogani's expert failed to appreciate this point when he testified Jogani would have been entitled to no compensation had defendants' property holdings decreased in value rather than increased.

We have little trouble concluding the extraneous evidence was at least "likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).) The magnitude of the award, the jury's disregard of instructions regarding Jogani's equity interests, the coincidence between the jury's calculations and those of the defendants' expert, and the lack of any evidence in the record supporting the ultimate figure all indicate the award was grounded on a few jurors' improper statements.

Jogani argues that because substantial evidence supports the ultimate award, any jury misconduct was inconsequential. He argues there was evidence—the Julian letters, upon which the jury expressly relied—that a 6 percent finder's fee would constitute reasonable compensation. He further argues that Freshman's opinion that reasonable compensation would range between $50 and $350 million supported the verdict. We disagree that substantial evidence supported the ultimate award.

First, Freshman's testimony did not support the verdict. An "expert opinion is worth no more than the reasons upon which it rests." (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524.) Granted, an expert may base his opinion upon inadmissible matter, including factual propositions outside his personal knowledge, provided such matter is "of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (Evid. Code, § 801, subd. (b).) But here, Freshman expressly based his opinion on a matter upon which he was explicitly told he could *not* rely—Jogani's interest in defendants' property holdings. He indicated he understood the restriction but when asked how he had arrived at his opinion that

anywhere from $50 to $350 million would be reasonable compensation for seven years' work, he repeatedly referred to the "appreciation" of defendants' holdings and Jogani's entitlement to a "percentage" of their value. Although these responses were stricken, he offered no other basis for his opinion, so we may be fairly certain he grounded his opinion on this improper matter. An expert's opinion based on assumptions of fact that lack evidentiary support, or on other improper matter, has no evidentiary value. (*McGonnell v. Kaiser Gypsum Co*. (2002) 98 Cal.App.4th 1098, 1106.) "Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value . . . ." (*Jennings v. Palomar Pomerado Health Systems, Inc*. (2003) 114 Cal.App.4th 1108, 1117.)

Second, even if we accept that the jury relied on the Julian letters to confirm that Jogani was entitled to a 6 percent finder's fee, those letters supported only part of the improper award. The jury awarded an additional 6 percent commission and 10 percent interest. No evidence supported such awards.

The trial court was well within its discretion to conclude that jury misconduct materially affected defendants' substantial rights. (Code Civ. Proc., § 657, subd. (2).) Its decision to vacate the verdict thus cannot be overturned on appeal, and the matter must be retried.

II. Summary Adjudication of Jogani's Claims Against Haresh

The next question involves the scope of trial. Jogani contends the trial court improperly limited the trial by summarily adjudicating his causes of action against Haresh for breach of contract, breach of fiduciary duty, fraud, and dissolution of partnership. We agree.[2]

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[2] The trial court also granted summary adjudication of plaintiff's "cause of action" for constructive trust. As this is a remedy rather than cause of action (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1069), which remedy Jogani sought in his prayer for relief, the order summarily adjudicating it requires little discussion. We will construe defendants' summary judgment motion as a motion to have this cause of action stricken, and affirm the trial court's order as to it.

To obtain summary judgment a party must establish the merit of his case "as a matter of law" (Code Civ. Proc., § 437c, subd. (c)), i.e., that the available evidence raises no material issue that a trier of fact could resolve in favor of the party opposing the motion. The function of the motion is to cut through the pleadings to determine whether trial is necessary to resolve the dispute. (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 843; see *Caldwell v. Paramount Unified School Dist*. (1995) 41 Cal.App.4th 189, 201-203.) A moving defendant may establish a right to summary judgment by showing the plaintiff lacks evidence to sustain one or more elements of the cause of action pleaded. (Code Civ. Proc., § 437c, subd. (o)(2).) "Every meritorious motion thus rests on establishing two propositions: The opposing party is unable to present evidence in support of a specified fact, and that fact is essential to establish his cause of action or to overcome a defense. The first proposition may of course be established by uncontroverted affirmative proof that the specified fact does not exist, but it may also be established by showing that the opposing party bears the burden of proof with respect to the specified fact and that he has no evidence with which to carry that burden. In either case, once the first proposition is established—the unprovability of the specified fact—the only question presented is whether that fact is indeed vital to the opponent's case. This is a question of law for the court. If the answer is affirmative—if there is no way for the opposing party to prevail without the specified fact—the movant is entitled to judgment 'as a matter of law.'" (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 756.)

A plaintiff can defeat a defense motion for summary judgment by showing the defense evidence itself permits conflicting inferences as to the existence of the specified fact, by presenting evidence of the fact's existence, or by showing the fact is not essential to the lawsuit. (See Code Civ. Proc., § 437c, subds. (c), (p)(1); see *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

We independently review the trial court's decision, considering the admissible evidence offered in connection with the motion and the inferences that evidence reasonably supports. We liberally construe the evidence in support of the opposition and resolve doubts concerning the evidence in favor of the opposing party. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.)

By the time defendants moved for summary judgment for the second time, only Haresh, Pinkal and the holding companies remained as defendants. Jogani's other brothers had been dismissed, as had H.K., Haresh's wife. Plaintiff alleged breach of contract, breach of fiduciary duty and fraud against only Haresh, and conspiracy to defraud against only Pinkal.

A. Existence of a Contract

The first step in analyzing a motion for summary judgment is to identify the elements of the challenged causes of action. Jogani's linchpin cause of action was for breach of contract, the elements of which are the existence of a contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc*. (1990) 222 Cal.App.3d 1371, 1388.) Jogani alleged he and Haresh entered into an oral, five-person partnership agreement, which Haresh breached. He alleged the agreement created fiduciary duties, which Haresh also breached, and Haresh had no intention of honoring the terms of the agreement, which constituted fraud. Finally, Jogani alleged that Haresh and Pinkal conspired to induce him to enter into the agreement while at the same time planning to deprive him of its benefits, which constituted conspiracy. All causes of action except quantum meruit thus depended on the formation of the oral partnership agreement, and defendants' motion contested only this element. They were thus entitled to summary judgment if they demonstrated Jogani's inability to establish existence of the contract.

Defendants presented the declarations of each of the four brothers, Haresh, Rajesh, Sailesh and Chetan, who declared they never entered into any partnership agreement with Jogani. Haresh declared Jogani had been given no interest in any of the holding companies, and the other three brothers declared they themselves had no ownership

interest in the companies. As they had in *Jogani I*, defendants also relied on Jogani's own testimony at the judgment debtor examinations in *Cappucci* and *Weyerhauser*, wherein he had denied existence of any partnership with his brothers. Furthermore, they offered Jogani's discovery response, in which, when asked to identify any oral agreement involving him and his brothers, he stated only that the answer could be derived from documents already produced, or to be produced, in response to other discovery requests. Jogani had also admitted in discovery that he was party to no written or oral agreement in which any of the holding companies was also a party.

Defendants' evidence shifted the burden to Jogani to present rebutting evidence sufficient to establish a triable issue. To carry his burden Jogani offered his own declaration to the effect that Haresh had agreed to enter into the partnership with him. He also offered the declarations of Bhupesh Parikh, Prakash Patel and Chandrakant Shah, who stated that in the mid-1990's, Haresh had confirmed existence of the partnership to them.[3] Under the rule that declarations offered by the party opposing a motion for summary judgment are to be liberally construed, Jogani's showing sufficed to establish a triable issue of fact as to whether he had entered into an agreement with Haresh.

However, defendants managed to neutralize the probative potential of Jogani's evidence by raising three objections: Jogani's evidence was irrelevant, his declaration contravened the *D'Amico* rule, and the declarations of Parikh, Patel and Shah violated discovery rules. The trial court sustained the objections and granted defendants' motions to have the challenged evidence stricken. On appeal, defendants abandon the latter two objections. They now contend only that any evidence of an agreement to create a two-person partnership was irrelevant because the complaint alleged only a five-person partnership. We disagree.

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[3] Jogani offered several other documents to his opposition, including a spreadsheet of unknown origin purporting to set forth a partnership accounting and copies of several canceled checks and transfer notices indicating he had been paid $2.4 million by some of the real estate holding companies, a fact that was not in dispute. Defendants' objections to this evidence were properly sustained.

When defendants moved for summary judgment for the second time the only pertinent issue was whether Haresh had agreed to provide capital to Jogani and give him 50 percent of the profits realized as a result of the latter's acquisition and management of property owned by the holding companies. Whether that agreement created any partnership—whether comprising two or five members or a hundred—was itself irrelevant to Haresh's liability for breach of contract, breach of fiduciary duty or fraud. Whether Jogani's other brothers were also party to the agreement was equally irrelevant.

Defendants argued successfully below and maintain on appeal that the number and identity of any parties to the alleged partnership are "essential" terms that inform several "critical legal questions" that might arise under the Civil Code and the Uniform Partnership Act of 1994, Corporations Code section 16100 et seq. Such supposedly essential terms and critical legal questions include whether each party was capable of contracting and consented to the terms of the agreement (Civ. Code, § 1550, items (1) and (2)), what knowledge could be attributed to the partnership (Corp. Code, § 16102, subd. (f), who were the partnership's agents (*id*. at § 16301, subd. (1), what would constitute partner authorization (*id*. at § 16301, subd. (2)), whose wrongful acts could create partnership liability (*id*. at § 16305), who must contribute capital to the partnership and how profits would be divided (*id*. at § 16401, subd. (a)(1)), who would be charged with partnership losses (*id*. at § 16306, subd. (a) & 16401, subd. (a)(2)), and who could decide whether the partnership would be dissolved (*id*. at § 16801, subds. (1), (2)(A) & (2)(B)). None of these issues is relevant. Indeed, defendants make no effort to explain their relevance other than to assert that if the partnership comprised two rather than five members, Haresh would have had to provide all the capital investment. We fail to see how even that bears on any issue pertinent to Jogani's claim.

Defendants also objected below that Jogani's declaration was inadmissible under the *D'Amico* rule because it contradicted his testimony in the judgment debtor exams in *Cappucci* and *Weyerhauser*. Although they abandon the objection on appeal, we feel constrained to note that we dealt with this issue in *Jogani* I.

Neither the doctrine of judicial estoppel nor the *D'Amico* rule "'speaks to how a court should treat evidentiary materials that were *created as part of earlier litigation but did not become part of the record therein* . . . . Because, in such a case, *only the opposing party* stands the potential to be misled by newly concocted testimony, *not the court*, any sworn, prior inconsistent statements that do exist are properly raised on *cross-examination at trial* . . . .' [Citation.]" (141 Cal.App.4th at p. 178, some italics added.) Accordingly, defendants' objections to Jogani's declaration should have been overruled.

Defendants also objected that the declarations of Parikh, Patel and Shah were inadmissible because Jogani did not identify these witnesses when asked during discovery about individuals having knowledge of the partnership. The objection should have been overruled. Failure to identify evidence during discovery does not ordinarily justify exclusion of evidence absent a willful violation of an order for disclosure. (*Browne v. Turner Construction Co*. (2005) 127 Cal.App.4th 1334, 1349.) "[W]ithout a demonstration of 'discovery abuse,' there is no general prohibition against 'introducing previously undisclosed evidence in opposition to a summary judgment motion.' [Citation.]" (*Ibid*.)

The trial court therefore improperly disregarded Jogani's evidence. Because that evidence established the existence of a triable issue, the court's order granting summary adjudication of Jogani's breach of contract cause of action must be reversed. Furthermore, because the trial court concluded, and defendants maintain, that Jogani's causes of action for breach of fiduciary duty and fraud failed with the breach of contract cause of action, the order summarily adjudicating them must be reversed as well.

B. Conspiracy to Defraud

Jogani argues substantial evidence established the existence of a triable issue regarding his cause of action against Pinkal for conspiracy to defraud. He argues the evidence established "that Pinkal knew about the fraud Haresh intended to perpetrate, agreed to assist in the perpetration of that fraud by becoming the nominal owner of Hansa, and furthered that fraud by falsely denying the existence of the partnership and that Hansa was a partnership entity." We disagree.

In the complaint, Jogani alleged Pinkal conspired to defraud him "and deprive him of the benefits of the Partnership Agreement." Pinkal "committed numerous actions in furtherance" of the conspiracy, "repeatedly confirmed and otherwise ratified the Partnership Agreement," and made several misrepresentations described in paragraphs 53, 54 and 56 of the complaint. (Paragraphs 53, 54 and 56 described misrepresentations made only by Haresh and Rajesh, not Pinkal.)

Pinkal moved for summary judgment, arguing the misrepresentations described in the complaint were alleged to have been made only by Haresh, not him, and he could not have "confirmed" or "ratified" the partnership agreement because it was undisputed he was not party to it.

In opposition to the motion for summary judgment, Jogani argued Pinkal was the sole owner of Hansa Investments, falsely *denied* the existence of the partnership, and falsely claimed that Hansa Investments was an independent corporation. His evidence consisted solely of his own declaration that Pinkal was the sole shareholder of Hansa Investments (although Jogani exclusively controlled the company's actions) and had at some point "joined with Haresh to deny the existence of the Partnership and further the lie that Hansa is a totally independent corporation." No further detail about Pinkal's denial of the partnership was given. On the contrary, in their declarations, Parikh and Patel both stated Pinkal had confirmed the partnership.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 510-511.) "[T]ort liability arising from a conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*Id*. at p. 511.)

To meet his burden on summary judgment Jogani had to "set forth the specific facts showing that a triable issue of material fact exists" as to his fraud cause of action against Pinkal. (Code Civ. Proc., § 437c, subd. (p)(2).) Jogani failed to meet this burden. Even if Pinkal was the sole shareholder of Hansa Investments, Jogani admitted below and admits here that Pinkal took no role in the company's operations, which were managed exclusively by Jogani. And his vague declaration that at some unspecified time Pinkal "joined with Haresh to deny" the existence of the partnership to some unidentified person is not only nonspecific, it contradicts the complaint and undermines Jogani's theory that Pinkal conspired to induce him to enter into the partnership. Because Jogani presented no evidence that Pinkal knew about the fraud Haresh intended to perpetrate and agreed to assist in it, we conclude the trial court properly granted summary adjudication of the cause of action for conspiracy to defraud.

III. Defendants' Contention on Appeal

As noted above, in addition to their motion for new trial, which the trial court granted, J.K. Properties, H.K. Realty, Hansa and Commonwealth moved for judgment notwithstanding the verdict, seeking an order that Jogani receive no more than $3,325,000 on his quantum meruit claim, less the $2.4 million already disbursed. The trial court denied this motion. In their appeal, defendants contend the order granting their motion for new trial should be affirmed. In the alternative, they contend the order denying their motion for judgment notwithstanding the verdict should be reversed. Because we will affirm the order for a new trial (and reverse the order granting summary adjudication), defendants' motion for judgment notwithstanding the verdict is moot.

DISPOSITION

The order granting defendants' motion for new trial and denying their motion for judgment notwithstanding the verdict is affirmed. The order granting summary adjudication of plaintiff's causes of action for dissolution of partnership and constructive

trust is affirmed. Summary adjudication as to Haresh is otherwise reversed. Summary adjudication as to Pinkal Jogani is affirmed. All parties shall bear their own costs.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.