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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

VARTAN YARALIAN, Plaintiff and Respondent, v. JAMES FASTOVSKY, Defendant and Appellant.	B290481 (Los Angeles County Super. Ct. No. BC596936)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara A. Meiers, Judge. Affirmed.

Chamberlin & Keaster, Robert W. Keaster and Allan J. Favish for Defendant and Appellant.

Law Offices of Yui Voronin and Yui Voronin for Plaintiff and Respondent.

James Fastovsky (appellant) appeals from a judgment entered after a court trial awarding Vartan Yaralian (respondent) $144,602 on respondent's cause of action against appellant for breach of agreement. We find that substantial evidence supports the trial court's factual findings regarding the nature of the agreement between the parties. We further find that the monetary award was supported by the evidence and appropriately awarded under the cause of action alleged. Thus, we affirm the judgment.

FACTUAL BACKGROUND

In 2006, respondent had been an employee at appellant's accounting firm Friedman, Minsk, Cole & Fastovsky (the firm) for about 10 years. At that time, he decided he wanted to leave the firm or establish a different relationship with the firm. This led to discussions between appellant and respondent, including the exchange of proposals regarding respondent potentially obtaining an interest in the firm. At the time, the firm had two partners, appellant and Brian Morgan (Morgan). Despite the exchange of proposals, the parties did not reach a definitive or complete agreement in 2006. Specifically, there was no "'meeting of the minds' on all of the material terms of the arrangement." There was no evidence that the final proposal was formally accepted by either party, nor was there extrinsic evidence to assist the court in determining "what it was that was being acquired or given up, by either side."

Respondent continued working at the firm in some capacity until November 2013. Although the parties referred to respondent as a "partner" of the firm, the evidence did not

support the existence of a partnership.[1] There was no partnership agreement, and the purported partners did not share equally in management or decision-making of the business. There was no voting on any important issues, such as the ownership, rights to and distribution of partnership assets. The trial court found that the evidence showed that appellant "was actually running his own business and contracting with others to provide services to his accounting clients in return for whatever he chose to pay them."[2]

In November 2013, respondent decided to leave the firm and work for himself. At that time, the parties affirmed an agreement that they had discussed in 2006 for the sale of a customer list from the firm to respondent. Respondent was to pay $900,000 over the course of 10 years for the entire customer list, or the entire book of business of the firm. When he decided to leave in November 2013, he had paid 35 percent. The trial court found that in 2013, "in keeping with the 2006 sale of

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[1] Appellant disputes on appeal the trial court's finding that the firm was not a partnership and appellant and respondent were not partners. The facts in this section reflect the facts as found by the trial court.

[2] The trial court found that appellant's failure to provide a clear partnership agreement was a purposeful omission designed to intentionally obscure respondent's rights. Appellant's approach to his business "left . . . entrants into the business, such as [respondent], in the position of having no clear rights in or to the firm or its assets as [appellant] clearly knew would be the case in light of his previous disputes with earlier 'partners' where 'rights' had apparently been left sufficiently unclear as to permit for [*sic*] years of disputed payments."

customers, [respondent] having then paid 35% of the $900,000 total which he was obligated to pay for the entire list, he was . . . entitled to receive 35% of the customers on the original 2006 customer list." This agreement was then carried out by the parties, with a resulting dispute over whether or not respondent received customers representing a full 35 percent of the list. Thus, the 2013 agreement between the parties was a "clarification and re-adoption" of the agreement proposed, but not finalized, in 2006.

Respondent paid $315,000 (35 percent) of the $900,000 client pool, as valued at the time he first negotiated his change of relationship with the firm. However, he only retained $219,384 worth of clients upon his departure from the firm. Therefore, he believed he was entitled to $95,616. The parties disputed whether, for the purposes of determining respondent's 35 percent allocation of accounting clients, the firm's clients included the clients that respondent brought to the firm. Respondent asserted that the clients he brought into the firm should not count as accounting clients for the purposes of the calculation. Appellant asserted that they should.

PROCEDURAL HISTORY

On October 7, 2015, respondent filed his complaint against appellant and K.G. Holdings, Inc. On July 12, 2016, respondent filed his first amended complaint, and on September 29, 2016, respondent filed the operative second amended complaint (SAC) against appellant and K.G. Holdings.[3] The SAC included allegations for breach of agreement, promissory estoppel, and conversion. Respondent alleged that he had the option to

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[3] K.G. Holdings was later dismissed from the case and is not a party to this appeal.

purchase, over a 10-year period, 100 percent of the firm's then existing clients and equipment for a price of $925,000. Respondent alleged that he paid the sum of $92,500 for a 10 percent ownership interest in the firm's pool of existing clients in 2006, and has since paid $323,750, representing $315,000 for the clients and $8,750 for equipment.

On October 31, 2016, appellant filed his demurrer to the SAC. On January 13, 2017, the trial court entered an order sustaining appellant's demurrer as to respondent's conversion and promissory estoppel causes of action. After the demurrer was sustained as to those two causes of action, a single cause of action for breach of agreement remained viable. On February 2, 2107, appellant filed an answer to the SAC.

On July 17, 2017, appellant filed a motion for summary judgment with supporting documents. Appellant's motion was premised on the statute of limitations found in Corporations Code section 16701.[4] On December 27, 2017, after the motion was fully briefed, the trial court entered an order denying the motion. The matter proceeded to a court trial, which commenced on January 26, 2018.

On March 8, 2018, the trial court issued its tentative written decision in favor of respondent. The court held that there was no partnership agreement between the parties. However, an

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[4] Corporations Code section 16701 provides, in pertinent part, "A dissociated partner may maintain an action against the partnership . . . to determine the buyout price of that partner's interest . . . within 120 days after the partnership has tendered payment or an offer to pay or within one year after written demand for payment if no payment or offer to pay is tendered." (Corp. Code, § 16701, subd. (h)(i).)

agreement existed for the sale of clients. Appellant owed respondent $95,616 for the difference between the amount respondent paid and the value of clients respondent received, plus $48,986 for a return of respondent's salary that appellant withheld in a purported capital account, for a total award to respondent of $144,602. On March 19, 2018, appellant filed objections to the statement of decision. The trial court denied the objections on April 24, 2018. On April 27, 2018, the court filed its judgment in favor of respondent in the amount of $144,602.

On May 3, 2018, respondent filed notice of entry of judgment. On June 5, 2018, appellant filed his notice of appeal.

DISCUSSION

I. Standards of review

The trial court's factual findings are reviewed for substantial evidence. Under this standard, "'"any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision. [Citations.]'. . ."' [Citations.]" (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102 (*Tribeca*).) We consider all evidence in the light most favorable to the prevailing party, and do not reweigh evidence or credibility determinations. (*Ibid.*)

On pure questions of law, we exercise independent, or de novo review. Under this standard, we give no deference to the trial court's ruling or the reasons for its ruling. (*Jackpot Harvesting Co., Inc. v. Superior Court* (2018) 26 Cal.App.5th 125, 142.)[5]

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[5] Respondent points out that appellant has not presented a complete record on appeal, and asks that we resolve the appeal against appellant for this reason. (*Foust v. San Jose*

II. The trial court was permitted to determine the nature of the agreement between the parties

Appellant's main argument is that the trial court was not permitted to reach the conclusion that no partnership existed due to respondent's judicial admissions that he was a partner with appellant in an accounting partnership.

Judicial admissions may be made in a pleading, by stipulation during trial, or by response to requests for admission. (*Myers v. Trendwest Resorts, Inc.* (2009) 178 Cal.App.4th 735, 746 (*Myers*).) Facts established by judicial admissions ""are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her." [Citations.]"' (*Ibid.*) However, legal theories and conclusions, as well as mixed questions of law and fact may not be considered judicial admissions. (*Stroud v. Tunzi* (2008) 160 Cal.App.4th 377, 384.) "'Although admissions are dispositive in most cases, a trial court retains discretion to determine their scope and effect. . . .' [Citation.]" (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1273 (*Valerio*).)

> "'An admission of a fact may be misleading. In those cases in which the court determines that an admission may be susceptible of different meanings, the court must use its discretion to determine the scope and effect of the admission so that it accurately reflects what facts are admitted in the light of other evidence.' [Citation.] Further, '[t]he court must have

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Construction Co., Inc. (2011) 198 Cal.App.4th 181, 187.) While the record is incomplete, it is sufficient for a review of the issues on appeal, therefore we decline to rule in favor of respondent on this point.

> discretion to admit evidence to elucidate and explain an admission, because the admission of a fact does not always reflect the party's reasonable understanding of that fact.' [Citation.]"

(*Valerio, supra*, 103 Cal.App.4th at p. 1273.)

Appellant points to several places in the record where respondent admitted to being appellant's partner in a partnership. This included requests for admission as well as a joint stipulation of facts filed by the parties for trial.[6] Despite these admissions, we agree that the trial court was permitted to determine the question of whether a partnership existed between the parties.

> "'The question of the existence of a partnership depends primarily upon the intention of the parties ascertained from the terms of the agreement and from the surrounding circumstances. [Citations.] Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in

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[6] Appellant also points out that respondent admitted to being appellant's partner in pleadings related to appellant's summary judgment motion, as well as respondent's separate statement of undisputed material facts. However, facts asserted in documents supporting motions for, or oppositions to, summary judgment do not constitute judicial admissions. This is because the summary judgment process can require a party to submit to facts the party believes he or she can disprove. (*Myers, supra*, 178 Cal.App.4th at p. 748.) Similarly, appellant's references to respondent's testimony, declarations, and other evidence where respondent referred to himself as a partner with appellant do not constitute judicial admissions of legal partnership status.

> the profits and losses and in the management of the business. [Citations.] . . .' [Citation.]"

(*Eng v. Brown* (2018) 21 Cal.App.5th 675, 694.)

The existence of a partnership is determined "'from the nature of the relation'" of the parties, not the "'name which the parties have given to it,'" although "'some weight must be given to the language of the parties themselves. [Citations.] . . .' [Citation.]" (*Eng v. Brown, supra*, 21 Cal.App.5th at p. 694.)

In this matter, the trial court determined that respondent's admissions were "lay opinions," and that the court was required to determine whether the underlying factual elements of a partnership existed under California law. In other words, while it considered the name which the parties had given their relationship, it did not consider that title to be conclusive as to the "nature of the relation" between the parties. (*Eng v. Brown, supra*, 21 Cal.App.5th at p. 694.) Thus, respondent's admissions were admissions as to the name the parties applied to their arrangement, but not to the underlying facts that establish the existence of a partnership under California law.

The trial court acted within its authority in considering evidence to "elucidate and explain" respondent's admissions that he was appellant's partner. (*Valerio, supra*, 103 Cal.App.4th at p. 1273.) After considering the nature of the parties' relationship, the trial court determined that respondent's admission did not "'reflect [a] reasonable understanding'" of the terms partner and partnership. (*Ibid.*) Essentially, the parties had "mislabeled" their relationship as a partnership.

Appellant points to *Valerio* as an example of a case in which a party was bound by his judicial admissions, made in

pleadings and requests for admission. In *Valerio*, a party admitted the existence of a written contract, which "had the effect of establishing the truth of the existence of the written contract." (*Valerio, supra*, 103 Cal.App.4th at p. 1271.) The party never sought to amend his pleadings or responses. Because he "failed to take the necessary procedural steps to remove his judicial admissions," he was bound by those admissions. (*Id.* at p. 1274.) However, the court specifically noted that "there was no ambiguity" in the party's responses. Thus, "there was no reason for the court to interpret the admission in order to resolve an ambiguity" or determine the party's "reasonable understanding of the facts." (*Id.* at p. 1273.)[7] Here, in contrast, the trial court was permitted to interpret respondent's use of the word "partner" to determine whether it reflected the existence of a legitimate partnership under California law.

Appellant argues that the trial court was not permitted to adopt findings in conflict with the parties' joint stipulation of facts, which stated that respondent was a partner in the firm and referred to the firm as a "partnership." In support of this argument, appellant cites *Steele v. Steele* (1955) 132 Cal.App.2d 301, 303-304 (*Steele*), which relied on legal precedent suggesting that "'the court may not adopt findings in conflict with stipulated

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[7] *Uhrich v. State Farm Fire & Casualty Co.* (2003) 109 Cal.App.4th 598 presented a similar situation. An individual sued her psychiatrist's insurer, contending there was coverage for her psychiatrist's wrongful acts against her. The individual admitted in her declaration that her psychiatrist's actions against her were "'deviant, criminal'" acts, as opposed to merely negligent acts, which would trigger her psychiatrist's insurance coverage. (*Id.* at p. 611). Under the circumstances, there was no need to resolve any ambiguity in her declaration.

facts.'" In *Steele,* a marital dissolution action, the parties entered into a stipulation in open court as to the nature of residential property. The parties stipulated that "one-half interest was the separate property of the wife, and . . . the trial court could determine the character of the other one-half interest." (*Id.* at p. 303.) The appellate court rejected the husband's argument that the trial court should have ignored the stipulation. However, in *Steele*, there was no question as to the scope or meaning of the stipulation. Both the plaintiff and the defendant were present at the time the stipulation was made, "'they each had the stipulation explained to them by the Court and . . . they each announced their satisfaction with and acceptance of the stipulation.'" (*Id.* at p. 304.) In contrast, there is no evidence in this matter that respondent understood the legal requirements of a partnership or the scope of his rights as a partner in a partnership. The term "partner" may carry different meanings, and is often used outside the context of a legal partnership.[8] The trial court was entitled to interpret the term "partner" in the stipulation in a layperson's sense of the word. (See, e.g., *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391 [latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning of contractual language].)

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[8] Respondent pointed out to the trial court that, in addition to many uses that are irrelevant here, the term partner may be used colloquially as a similar term to the words associate or colleague.

III. The trial court's determination that there was no partnership was supported by substantial evidence

Substantial evidence supported the trial court's decision that no partnership existed. Appellant's supposed partners "had no equal rights in management or decision-making for the business." There was no voting on any important issues. Further, it was appellant alone who unilaterally determined what was going to be paid to an individual for the surrender of that individual's supposed partnership interest.[9] With regard to the agreement to sell all or some of the assets of the firm to respondent, there was no evidence that Morgan was included in these discussions, even though no single partner can agree to the sale of partnership assets. There was also no evidence that the dissociation of partners ever resulted in an accounting or dissolution of the firm. These facts support the trial court's conclusion that "the firm has at all times been no one's business other than [appellant's] . . . operated under the premise that it is 'his business,' that he can acquire and sell its assets as he alone sees fit, that he can compensate those providing services to 'his

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[9] In support of his argument that respondent admitted that he was appellant's partner, appellant points to a settlement demand that respondent sent to appellant on September 2, 2014. The letter in fact supports the trial court's conclusion that there was no true partnership between the parties. While acknowledging that over eight months previously, the parties "effectively severed the partnership," the letter confirms that there was no agreement as to financial terms of the separation. The letter further suggests that, as the trial court noted, appellant maintained sole decision-making authority as to the financial terms of any separation.

clients' as he deems appropriate, and can take any actions upon any dissociation with no guidance or input other than his own."

IV. There is a legal and factual basis for the awards

Appellant takes issue with the trial court's monetary award for various reasons. The total award of $144,602 represented a combination of two sums: (1) $95,616, representing the financial shortfall between the sum of money respondent paid for clients and the value of clients he received; and (2) $48,986, representing a return of money that appellant had withheld from respondent in a purported "capital account."

Appellant's arguments begin with the correct assertion that there was only one cause of action that went to trial -- the cause of action for breach of agreement.[10] First, he argues that because the trial court found that there was no express contract, and no implied contract, the court had no basis for its $144,602 award on the cause of action for breach of agreement.

Appellant selectively reads the decision. It is accurate that the trial court found that, at the time that respondent began working with appellant in 2006, there was no meeting of the minds as to either a purchase of clients or a partnership agreement. However, the trial court found that "all of this changed in 2013," when respondent decided to exit the firm. At that time, the parties agreed that, "[respondent] having then paid 35% of the $900,000 total which he was obligated to pay for the entire list, he was . . . entitled to receive 35% of the customers on the original 2006 customer list." It was this "clarification and re-adoption" of the 2006 negotiations that constituted the agreement

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[10] The trial court sustained appellant's demurrers to respondent's causes of action for promissory estoppel and conversion.

that the trial court enforced. Thus, a careful reading of the decision shows that the trial court did find an agreement to purchase the client list, albeit a retroactive agreement consummated at the time respondent decided to sever his working relationship with appellant.

In short, after hearing all of the evidence, the trial court credited respondent's evidence and testimony that he paid $315,000 towards the purchase of customers and only received approximately $219,000 worth of customers, resulting in a $95,616 shortfall.[11] Thus, the trial court awarded respondent $95,616. In addition, having determined that the relationship between the parties was not that of traditional partners in a partnership, the court ordered that respondent should be paid the sum of $48,986[12] which consisted of salary owed to respondent that appellant was holding in a purported capital account, for a total award of $144,602.

Appellant takes issue with the trial court's decision that the client list respondent was purchasing did not include clients respondent brought to the firm. Appellant argues that the court's decision was erroneous for two reasons: first, the court's finding that there was no contract precluded a determination on the specifics of the agreement; and second, respondent's admissions

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[11] The $384 discrepancy in the written decision between the amount respondent sought for the shortfall and the numbers provided is consistent with the parties' joint stipulation of facts, which explains respondent's contention that he only retained $219,384 worth of clients.

[12] Appellant contends that this was an error, and the true amount respondent sought was $48,896. However, the record is unclear as to whether appellant sought to correct the judgment.

required a finding that respondent was a partner, therefore he was only entitled to a winding up of partnership accounts.

As to appellant's first argument, as set forth above, appellant misstates the record, as the trial court did find an enforceable agreement between the parties after respondent made his decision to leave the firm. Having found that such an agreement existed, the court was required to determine the specifics of that agreement. Appellant points out that there was conflicting evidence on this point, illustrating the parties' differing views on the scope of clients included in the client list. Exhibit 108, the exhibit upon which the court relied, was prepared by respondent. Appellant points out that exhibit 142, drafted by appellant, reflected appellant's perspective. The trial court was required to weigh the evidence on the parties' competing perspectives and reach a determination as to the scope of the parties' agreement. (*Esbensen v. Userware Internat., Inc.* (1992) 11 Cal.App.4th 631, 640 [fact finder must "determine the exact nature of the oral agreement" between the parties].) Because there is substantial evidence in the record supporting the trial court's decision on this point, we must view such evidence in the light most favorable to the prevailing party. (*Tribeca, supra*, 239 Cal.App.4th at p. 1102.) We do not reweigh evidence or credibility determinations. (*Ibid.*)[13]

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[13] Because we have previously determined that substantial evidence supported the trial court's decision that appellant and respondent were not partners under California partnership law, we decline to address appellant's second argument on this point. We also decline to address appellant's arguments that the $48,896 capital account balance should have been reduced by the appropriate debits after the winding up of the partnership. We

Appellant next argues that the sole remaining cause of action at the time of trial for breach of agreement did not seek a return of respondent's capital account value, therefore there was no basis for the $48,986 award. However, as to the first cause of action for breach of agreement, the SAC specifically sought not only the $95,616 difference on the customer purchase but "an accounting of all sums received by [appellant] . . . for work performed . . . and a pro rata share of such receivable," and "such other and further relief as the court may deem just and proper." Having determined the nature of the agreement between appellant and respondent did not constitute a partnership agreement, the trial court acted within its power to award respondent the $48,986 in respondent's purported capital account as salary wrongly withheld.[14] This award was "just and proper" given the court's conclusion that the agreement between the parties was not a partnership agreement.[15]

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defer to the trial court's factual determination that no partnership existed.

[14] The court explained that the "capital account" consisted of "deductions from earnings and specifically money already earned." In light of its finding that there was no partnership, the court held that appellant was liable to respondent for the salary respondent earned which was withheld in the capital account.

[15] The trial court explained that, having "maintained throughout the trial that the parties before this court had a partnership," appellant was "estopped from objecting to [respondent] receiving" the salary withheld in the purported capital account. In other words, appellant's theory of the case was that a partnership agreement existed, and he provided supporting evidence and advanced this position throughout the

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT

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litigation. Thus, he was not prejudiced by any lack of an opportunity to fully litigate the question of whether a partnership existed, and whether a capital account was properly withheld. Nor could he justifiably claim that the amount awarded was improper under the breach of agreement cause of action, considering the trial court's decision as to the nature of the agreement.