COURT OF APPEAL - 4TH DIST DIV 3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MERI NISHIUCHI,	
Plaintiff and Respondent,	G049903
v.	(Super. Ct. No. 30-2012-00542308)
DARWIN TING et al.,	O P I N I O N
Defendants and Appellants.	

Appeal from a judgment of the Superior Court of Orange County, Derek W. Hunt, Judge. Affirmed.

Burns & Moss, George S. Burns, and Victoria E. Moss for Defendants and Appellants.

Brad Nakase; William A. Cohan and Gabriel Cohan for Plaintiff and Respondent.

*   *   *

Defendants Darwin Ting and Kuei-Mei Ting appeal from the judgment in favor of plaintiff Meri Nishiuchi, acting on behalf of Atia Co., LP, a limited partnership (the Partnership), in this derivative action for breach of fiduciary duty and an accounting.[1] Defendants contend (1) plaintiff's breach of fiduciary duty claim was barred by the statute of limitations, and (2) insufficient evidence supports the court's finding defendants received a $3.6 million "kickback" on the sale of a shopping center owned by the Partnership. We disagree and affirm the judgment.

FACTS

Since the formation of the Partnership in 1996, defendants (a married couple) have been its sole general partners.[2] Defendants never made any capital contributions to the Partnership. Rather, it was 100 percent capitalized by the family patriarch, Chin-Chih Hsieh, known to his family as the "Chairman." Defendants and the limited partners of the Partnership are members of the Chairman's family (some of them through marriage, including Darwin).[3] Kuei-Mei is Meri's elder sister; they are daughters of the Chairman.

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[1] We refer to Darwin Ting and Kuei-Mei Ting collectively as "defendants" and individually by their first names. We refer to Meri Nishiuchi in her capacity as the derivative plaintiff as "plaintiff." We refer to her individually by her first name, and to Meri and her husband as the Nishiuchis. We mean no disrespect.

The judgment specified the Partnership itself would recover around $9.1 million from Darwin.

[2] References to the Partnership include other entities owned by it.

[3] The Chairman also owned businesses in Taiwan and Japan, which were run, respectively, by one of his sons and a son-in-law.

At a 1998 family gathering, the Chairman announced that Darwin was responsible for managing the Partnership's business and for consulting with the Chairman once or twice a year. As of 1998, Meri owned about 5 percent of the Partnership.

The Partnership owned real estate, including four shopping centers in southern California. One of these was Canyon Point shopping center in Rowland Heights which the Partnership bought in 1990.[4]

The Partnership also held title to a house on Liane Lane in Santa Ana (the Liane house), where defendants lived and which also served as the Partnership's headquarters. In 1999, with the Chairman's knowledge, Darwin transferred the Liane house to himself for no consideration.

In 2000, Meri received a 1999 Schedule K-1 tax form from the Partnership that reported she had received a distribution of property other than money of around $42,250, which caused her husband to be suspicious, since Meri had never received such a distribution. Her husband was concerned about Meri's potential liability.

In March 2003, Meri's husband requested, on Meri's behalf, from Darwin and from the Partnership's accountant, copies of the Partnership's financial reports and its partnership agreement. The Chairman instructed Darwin not to "give anything to the partner."

In May 2003, Meri's husband wrote the Chairman's son Chien Min Hsieh. In that correspondence, Meri's husband said he was "relieved" that the Partnership was under the Chairman's "strict control" and that Meri, as "a limited partner," had no "rights or duties." Meri's husband said the accountant had explained that the distribution of nonmonetary property on the 1999 schedule K-1 tax form was a typographical error and in fact reflected a withdrawal of money. Meri's husband was therefore no longer

[4] In the record, Canyon Point is variously called Canyon Point Plaza, Canyon Point Marketplace, and Canyon Point shopping center.

concerned that Meri might become liable for half of the Partnership's liabilities due to "'a withdrawal of assets other than money' prohibited by law."

In November 2003, the Chairman and four of the Partnership's other partners (*not* including Meri) signed a document confirming the Liane house "will belong to Darwin Ting and Darwin Ting will assume the loan."

From 2005 forward, the Partnership distributed over $12 million to the limited partners.

From 2005 through 2012, defendants took loans amounting to $11,383,088 from the Partnership. At the time of trial, defendants owed the Partnership $1,390,000 (not including interest) for unpaid loans.

Also from 2005 through 2012, credit card charges were incurred as reflected in trial exhibit 211. These included unauthorized personal expenditures. For example, someone had "used the company credit card to go to" a beauty salon, to take a cruise disembarking in Helsinki, and for lunch or one green at the Pelican Hill Golf Club.

In 2006, the Nishiuchis went to the county recorder's office and saw a recorded deed transferring the Liane house to Darwin.

In 2007, defendants paid themselves a bonus of $1,510,000 that was not authorized by the limited partners.

In 2009, shortly after the Chairman's death, Meri wrote her siblings that, because their father had died intestate, the division of his property to his heirs should, in fairness, take into account any "special benefit" a person received while the Chairman was alive.

In 2010 and 2011, defendants used Partnership funds to pay for fixtures and improvements for their family bakery which was a tenant at the Canyon Point shopping center. Darwin's son-in-law Michael Lee signed a lease for the bakery to do business at Canyon Point, but defendants did not collect rent for the bakery.

On February 2, 2012, Meri filed an individual complaint against the Partnership, defendants, and others for breach of fiduciary duty and other causes of action. On July 3, 2012, plaintiff filed a derivative action on the Partnership's behalf for breach of fiduciary duty and other causes of action against defendants and others.[5]

On appeal, defendants challenge only the evidentiary support for the court's finding they received a kickback in the sale of the Canyon Point shopping center. We discuss the facts concerning the Canyon Point sale in more detail in the Discussion part of this opinion.

The Five Breaches Alleged in the Derivative Complaint

Plaintiff's operative derivative complaint alleged defendants breached their fiduciary duties between 1996 and 2012. The complaint alleged Darwin had "stonewalled discovery" by, among other things, asserting that "[m]ost, if not all, of the records prior to 2008 [had] been either *destroyed*, *misplaced* or *lost.*"

Inter alia, the complaint alleged five distinct episodes of defendants' breaching their fiduciary duties (the Five Breaches). First, since 2003, defendants had used the Partnership's credit cards at stores and other establishments to pay their personal expenses of $330,000.

Second, each year from 1997 to 2012, defendants had paid themselves an unauthorized annual management fee of $108,000 for managing Canyon Point.

Third, defendants spent at least $50,000 of the Partnership's funds for tenant improvements for a bakery at Canyon Point called "Eat Cake," owned and managed by Darwin, his daughter Patricia Ting, and Patricia's husband Michael Lee. Under a 10-year lease for Eat Cake, commencing June 1, 2010, there was no increase in rent for 10 years, while all the other tenants' rents increased every

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[5] Other named defendants were dismissed prior to trial.

year. On June 12, 2011, defendants transferred $5,000 of the Partnership's funds to Eat Cake for no apparent reason.

Fourth, around February 2011, defendants agreed to sell Canyon Point to buyers Yong Zhang and Qing Liang for around $31 million, but instead, around six months later, sold them a corresponding partnership interest for $27 million — $4.1 million less than the original contract price for Canyon Point. Defendants also sold their individual partnership interest for $4.1 million, thereby receiving a kickback of $4.1 million for arranging the sale.

Fifth, on April 13, 2012, defendants transferred $2 million dollars from the Partnership's bank account into a secret Partnership bank account, from which defendants withdrew a net misappropriation of around $1,286,175.

Defendants' Statute of Limitations Defense

The parties do not dispute that defendants' answer to the operative derivative complaint asserted the affirmative defense of the statute of limitations as to the entire complaint.

The Bench Trial

The case went to trial on two causes of action — breach of fiduciary duty and for an accounting.

The court appointed Mosier & Co., Inc. as a special referee and expert witness. Mosier & Co.'s employees were business and management expert Robert P. Mosier and accountant Craig Collins.[6] The court asked the referee "to explain the intricacies of keeping a long account, to identify discrepancies, if any, in the [Partnership] accounts kept by the fiduciary defendants, and to identify disgorgement

[6] We refer to Mosier & Co., Inc., and Robert Mosier as "Mosier."

recommendations to the court, if appropriate." Prior to trial the parties stipulated the referee's examination would be confined to the accounting period from 2005 to 2012 because the Partnership's records were unreliable for years before 2005.

"Mosier rendered several reports on his findings and was the first witness at the trial." Mosier's third supplement to the preliminary report to the court stated, inter alia: "*New Insight into* [*Darwin*] *Ting*: In the latest round of data presentation by the Parties, the Expert focused on the credibility and character of [Darwin] in his role as [general partner of the Partnership]. The Expert observes that in many instances, [Darwin] has testimony under oath that states one thing, and then when confronted with clear evidence to the contrary, [Darwin] 'reconsiders' his position and then amends it with a variety of excuses. The number of examples presented by the Plaintiff is noteworthy. In at least one transaction, there is evidence that [Darwin] invented explanations and numbers that later proved to be misleading and/or erroneous. Aside from [Darwin's] decision not to follow the mandates of the [Partnership] agreement, there is considerable evidence that [Darwin] used the cash in [the Partnership] as his personal bank account taking without authority from the [Partnership] Agreement as follows: (a) [Darwin] took over one hundred undocumented loans, interest free, worth over $10 million (all but a million dollars was paid back) between 2005 and 2012; and (b) he paid many of his personal expenses with [the Partnership's] funds including credit card charges."

The court bifurcated the trial into two phases. The first phase focused on liability, i.e., whether defendants breached their fiduciary duty to the Partnership. The second phase focused on damages, i.e., the amount to be disgorged back to the Partnership by defendants as a result of the court's earlier liability findings. As to each phase, the court issued its ruling in a detailed written minute order.

At the end of phase one (liability), in an August 15, 2013 minute order, the court found that, under defendants' direction, the Partnership made distributions in violation of the Partnership agreement and the Corporations Code. The court found sufficient evidence to show defendants committed the Five Breaches.[7] We discuss the court's ruling on defendants' statute of limitations defense in the Discussion section of this opinion.

At the end of phase two (damages), the court entered a judgment against defendants for disgorgement of $6,620,179,[8] comprised of (1) $3.6 million for defendants' receipt of a kickback in the sale of Canyon Point; (2) $150,000 for defendants' misuse of the Partnership's credit cards; (3) $1,510,000 for the Partnership's payment of improper compensation to defendants; (4) $1,390,000 owed by defendants to the Partnership for unpaid loans; and (5) $125,000 for defendants' use of the Partnership's funds to pay tenant improvements and rent for the Eat Cake bakery.

DISCUSSION

Statute of Limitations

Essentially, defendants contend Meri's discovery in 2003, or in 2006 at the latest, "that 'something was wrong' at" the Partnership constituted notice to her of the Five Breaches for purposes of triggering the four-year statute of limitations.

In its phase one minute order, the court ruled: "*Notice*. Defendants' . . . position is that there was hardly a time when the representative derivative plaintiff, [Meri], did not know what was going on under [defendants'] management. As defendants' counsel put it during his closing argument, this is analogous to the

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[7] Inter alia, the court found there "was no separate management agreement covering the partnership and no other provision for salary, management fees, bonus, or other consideration to the managing partners."

[8] The court also awarded plaintiff prejudgment interest of $2,399,854 and costs of $118,562, for a total award of $9,138,595.

'cockroach in the soup,' meaning presumably that you don't need more than one such cockroach to know that there is something seriously wrong in the kitchen. . . ." "The 'cockroach' argument is . . . both extrapolative and inferential. Plaintiff's trial case was composed of deceptions in respect to numerous discrete items. Hence, even if [Meri] had reason to know that the partnership deeded the Liane Lane house to [defendants] in 2001 . . . , it is not intuitive that 10 years later she would have also suspected (a) [Darwin's] surreptitious treatment in 2011 of the sale price for the Canyon Plaza shopping center to a third party or (b) his equally undisclosed decision in 2007 to distribute himself a $1.5 million 'bonus.' A defendant asserting an affirmative defense by and large has the burden of proof on that defense and this court determines that the 'notice' argument implied by the 'cockroach' image was inadequate to the task."[9] The

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[9] The following colloquy between the court and defense counsel during phase one of the trial elucidates defendants' "'cockroach in the soup'" theory:

"The Court: Isn't it possible that a notice of one of these items would not constitute a notice of all? In other words, . . . wouldn't I be obliged to go through the list and ask for the first time that Meri . . . had notice of, say, the daughter's rent . . . ? [¶] . . . I'm just asking whether or not it is the case that being put on notice of one item of behavior is to be put on notice of all."

"Mr. Burns: No, Your Honor. The law . . . is very clear that . . . '*You only have to find one cockroach in your soup*.' . . .

"The Court: I take it that's not from the Court of Appeal.

"Mr. Burns: Once the plaintiff suspects someone has done something wrong, the statute runs. That is from the Court of Appeal and it's consistent going back to *PacTel*, going back to *Badola* [sic], that is California law."

"The Court: Let's say . . . I misused the credit card flagrantly. I'm buying jewelry for my girlfriend . . . . I bring her to a party, I introduce my girlfriend to the other limited partners: '*This is my girlfriend; I got her an apartment down the street. This is her jewelry. And by the way, you guys, I got it on a credit card*.' [¶] Time passes. Three years pass, four years. Nobody sues. Can I now misuse the credit card in all subsequent years because everybody knew that I had an instinct to misuse the credit card?"

"Mr. Burns: Yes.

"The Court: Do I get a free pass on all future credit card misuse?

"Mr. Burns: Yes, because it's the same thing.

"The Court: To the end of my life?

court noted that the Canyon Point kickback and the Eat Cake expenditures "occurred well within any conventional statute of limitations period."

In *Aryeh v. Canon Business Solutions*, *Inc*. (2013) 55 Cal.4th 1185, 1191 (*Aryeh*) our Supreme Court summarized the law governing limitations periods. The statute of limitations begins running "from the moment a claim accrues." (*Ibid.*) A "'cause of action accrues "when [it] is complete with all of its elements" — those elements being wrongdoing, harm, and causation.' [Citations.] This is the 'last element' accrual rule: ordinarily, the statute of limitations runs from 'the occurrence of the last element essential to the cause of action.'" (*Ibid.*)

In the interests of equity, "exceptions to and modifications of" this rule may alter "either the initial accrual of a claim, the subsequent running of the limitations period, or both." (*Aryeh*, *supra*, 55 Cal.4th at p. 1192.) Three of these doctrines are relevant here. First, the *discovery rule* "'postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action.'" (*Ibid.*) Second, the *continuing violation* doctrine "aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them." (*Ibid.*) Third, under the theory of *continuous accrual*, "a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period." (*Ibid.*)

On appeal, defendants reprise their "'cockroach in the soup'" theory, although they do not expressly use that metaphor nor do they cite, as support for that theory, *PacTel*, one of the two cases they relied on below for the cockroach analogy.[10]

"Mr. Burns: Yes. This is not a car accident statute of limitations, where there is a certain event that happens. This is investors suspicious of their manager and . . . they are therefore charged with what they could have learned. . . ."

[10] Defense counsel did not state the full case names and citations below. The

The essential premise of the theory is that breach of fiduciary duty is a unique, continuing tort whose statute of limitations runs from the very first discoverable act. In their view, plaintiff has stated only *one* cause of action for breach of fiduciary duty against them — despite the many and varied ways in which defendants breached their duty over the years, and despite the operative complaint's specific allegations of the Five Breaches. Defendants conclude this lone cause of action accrued once plaintiff suffered harm, or at the latest, once Meri became suspicious of any wrongdoing on defendants' part. In their view, as soon as four years passed after Meri first suspected wrongdoing, defendants gained the freedom to breach their fiduciary duties with impunity, forever shielded by the statute of limitations.

To support their position, defendants mischaracterize this court's decision in *Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 740 (*Vaca*). Defendants summarize *Vaca* as follows: "[I]n *Vaca* . . . , this court specifically rejected application of a 'continuing wrong' theory to a claim for breach of fiduciary duty. Rather, once plaintiff has suffered 'appreciable harm', the statute begins to run. Simply because the defendant continues to commit related tortious conduct does not toll or restart the statute."[11]

Vaca does not support defendant's position. In *Vaca*, the plaintiff mother (acting on behalf of her minor children) sued the defendant lenders in 2009. (*Vaca*, *supra*, 198 Cal.App.4th at p. 740.) Her estranged husband had created false credit

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reporter's transcript's apparent phonetic spelling of "*Badola*" might refer to *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118 (*Bedolla*).

[11] Defendants' position is clear, and they do not hesitate to repeat it several times in their appellate briefs: "[T]he statute of limitations commences on a claim for breach of fiduciary duty once plaintiff is on notice of suspicious actions by the defendants, and is not restarted merely because defendants commit further wrongful conduct." Although plaintiff's "alleged damages may have increased over time, . . . this additional alleged harm did not restart the statute of limitations every time [defendants] made transfers of funds or property to themselves or their interests."

histories for their children and obtained fraudulent mortgages from the defendant lenders in the children's names to purchase houses in 2000 and 2001. (*Id.* at pp. 740-741.) In 2005, the plaintiff had successfully sued the husband and his mother for the fraudulent transactions. (*Id.* at p. 741.) In the 2009 action, the trial court found the plaintiff's claims against the defendant lenders were time-barred. (*Id.* at p. 743.) We affirmed (*id.* at p. 747) because the plaintiff had *not* alleged the defendant lenders did "anything wrong after making the fraudulent mortgage loans in 2000 and 2001." (*Id.* at pp. 744-745.) Thus, defendants have misread *Vaca:* The defendant lenders there did *not* continue to commit tortious conduct after their wrongful acts in 2000 and 2001.

Defendants' "cockroach" theory misstates the law. "'The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach.'" (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604.) Where "'damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. [Citation.] "Mere threat of future harm, not yet realized, is not enough."'" (*Id.* at p. 604.) "'A breach of a professional duty causing only nominal damages, speculative harm, or the threat of future harm that is not yet realized does not suffice.'" (*Ibid.*)

The doctrine of *continuous accrual* demonstrates that, even in the case of a recurring obligation, discrete claims can be independently actionable. "Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation: 'When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.' [Citation.] Because each new breach of such an obligation provides all the elements of a claim — wrongdoing, harm, and causation [citation] — each may be treated as an independently actionable wrong with its own time limit for recovery." (*Aryeh*, *supra*, 55 Cal.4th at p. 1199.) It is "long settled [law] that separate, recurring invasions of the same right can each trigger their own statute of limitations." (*Id.* at p. 1198.) Indeed, the theory of continuous accrual "is a response to the inequities that would arise if the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct; parties engaged in long-standing misfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing misfeasance." (*Ibid.*) The continuous accrual doctrine, however, "'effectively limits the amount of retroactive relief a plaintiff or petitioner can obtain to the benefits or obligations which came due within the limitations period.'" (*Id.* at p. 1199.)

In contrast, the *continuing violation* theory applies to injuries resulting from "a series of small harms, any one of which may not be actionable on its own," such that the victim may be unable "to identify with certainty when harm has occurred or has risen to a level sufficient to warrant action." (*Aryeh*, *supra*, 55 Cal.4th at pp. 1197-1198.) The rule does *not* apply to "discrete, independently actionable alleged wrongs." (*Id.* at p. 1198.) The doctrine "aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them" (*id*. at p. 1192), and "render[ing] an entire course of conduct actionable" (*id*. at p. 1199).

Here, defendants acknowledge (in order to argue the *continuing violation* doctrine does not apply) that plaintiff seeks recovery for "'a series of discrete, independently actionable alleged wrongs,'" quoting *Aryeh*, *supra*, 55 Cal.4th at page 1198.

Because the statute of limitations for breach of fiduciary duty is four years (Code Civ. Proc., § 343; *Thomson v. Canyon*, *supra*, 198 Cal.App.4th at p. 606) and plaintiff filed its action in 2012, three of the Five Breaches are clearly *not* time-barred, since they are discrete, independently actionable wrongs that accrued (in the traditional sense) after 2008. The Eat Cake improvements and free rent occurred in 2011, and the Canyon Point kickback took place in 2010 and 2011. As to unpaid loans, Darwin's response to an interrogatory admitted defendants took loans of more than $3.6 million from the Partnership in 2012, and repaid only around $1.5 million that year.[12]

The last two of the Five Breaches — i.e., defendants' misuse of the Partnership's credit cards and defendants' improper compensation — involved recurring violations that spanned years going back to 2005. We therefore examine whether these last two of the Five Breaches are time-barred due to the alleged notice to Meri of defendants' wrongdoing in 2003 (or 2006 at the latest).

We conclude these last two series of breaches are not time-barred. As we shall discuss, under the discovery rule, substantial evidence supports the court's finding plaintiff's discovery in 2006 of the Liane house transfer did not constitute inquiry notice to her of all of defendants' other breaches of fiduciary duty. Nor was plaintiff placed on such notice in 2003.

Defendants assert plaintiff was on inquiry notice as early as 2003, when Meri's husband requested copies of the Partnership's financial records and Partnership agreement, and no later than 2006, when Meri learned of the Liane house transfer. They assert that when Darwin refused to provide Meri's husband with the company's financial records in 2003, Meri reasonably should have suspected there was a problem and therefore she is charged with notice of everything she could have learned had she compelled Darwin to provide her with the requested documents. Defendants argue Meri's husband's receipt of reassurances from her brother Chien Min Hsieh and accountant Hou J. Yen in the 2003 correspondence is irrelevant, claiming that "[o]nce plaintiff is on notice that something is wrong, that bell cannot be 'unrung,' as she cannot trust any claimed assurances." Similarly, defendants argue Meri's discovery in 2006 that

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[12] Although defendants alternately loaned and borrowed money from the Partnership between 2005 to 2012, the amount of net unpaid loans made in 2012 was greater than the court's award of $1,390,000 to plaintiff for unpaid loans.

defendants had transferred the Liane house to themselves should have caused her to "'further investigate' [Darwin's] management."

Defendants' argument amounts to a further extension of their "cockroach" theory. Their theory would compel limited partners and beneficiaries to remain hyper vigilant against possible wrongdoing by their fiduciary. In fact, the opposite is true. "Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion [citation] and do not give rise to a duty of inquiry [citation]." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 201-202.) A fiduciary is required by law to render full and fair disclosure to a client or beneficiary. (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-189.) "[S]trict adherence to the date of injury rule . . . would encourage wrongdoers to mislead their fiduciary to delay bringing suit." (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 827.) The discovery rule "is particularly appropriate when the defendant maintains custody and control of a plaintiff's property or interests." (*Ibid.*)[13]

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[13] Defendants rely on *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 684-685 (*Peregrine*), and *Bedolla*, *supra*, 52 Cal.App.3d at page 132 for the proposition that the statute of limitations begins to run when a disgruntled investor becomes suspicious and is therefore on notice that the defendant has "'done something wrong to them.'" *Peregrine*, however, involved the statute of limitations for professional malpractice, which requires suit to be brought within one year of plaintiff's receiving inquiry notice of the defendant's wrongful act or omission. (*Peregrine*, at p. 682.) The investor plaintiffs there, based in part on publicly filed reports, did "not deny that they knew or should have known of [the defendant law firm's] wrongdoing more than one year before they filed suit." (*Id*. at p. 684.) The defendant law firm had represented the fiduciary perpetrators of a large Ponzi scheme. (*Id*. at pp. 665, 682.) Over one year before the plaintiffs filed their complaint against the defendant law firm, the Securities Exchange Commission and three investors had filed separate suits against the perpetrator fiduciaries. (*Id*. at pp. 667, 682, 668.)

Similarly, *Bedolla* involved a limited partnership's suit against an accounting firm filed nine years after some limited partners had previously filed a class action suit against the fiduciary managers of the partnership for fraud and breach of fiduciary duty. (*Bedolla*, *supra*, 52 Cal.App.3d at pp. 123-125.) The court instructed the jurors, who were to decide the factual question of the statute of limitations, that the

"There are no hard and fast rules for determining what facts or circumstances will compel inquiry by the injured party and render him chargeable with knowledge. [Citation.] It is a question for the trier of fact." (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 597.) As early as 1917, our Supreme Court stated, "Whether a party has notice of 'circumstances sufficient to put a prudent man upon inquiry as to a particular fact,' and whether 'by prosecuting such inquiry, he might have learned such fact' [citation], are themselves questions of fact . . . ." (*Northwestern Portland Cement Co. v. Atlantic Portland Cement Co.* (1917) 174 Cal. 308, 312.) These factual questions become issues of law only if "'reasonable minds can draw only one conclusion from the evidence.'" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320; *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637.)

Substantial evidence supports the court's finding Meri's discovery in 2006 of the Liane house transfer did not put her on notice of other breaches by defendants of their fiduciary duties. The Liane house was a piece of real estate of particular

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partnership bore the burden to prove it lacked inquiry notice of "the material facts" before 1961. (*Id.* at p. 125.) The jury found the partnership's suit against the accounting firm was barred by the statute of limitations. (*Ibid.*) Abundant substantial evidence supported this finding, including that around the time of the limited partners' earlier lawsuit against the fiduciary managers, i.e., 1960 (*id*. at p. 124), the limited partners' investigation revealed accounting irregularities and an accounting partner's purchase of real estate from the fiduciary managers (*id*. at pp. 132-133). Most significantly, in 1960, the limited partners' attorney had attempted to remove the defendant firm as accountants for the partnership and to have a receiver appointed. (*Id.* at p. 133.)

Thus, in both *Peregrine* and *Bedolla*, the plaintiffs were likely to have known material facts based on earlier lawsuits brought against the fiduciary perpetrators of fraudulent investment schemes. And while both opinions refer generally to inquiry notice of the defendant's "'wrongdoing'" (*Peregrine*, *supra*, 133 Cal.App.4th at p. 685) or "*alleged wrongful conduct*" (*Bedolla*, *supra*, 52 Cal.App.3d at p. 126), neither articulates or even suggests the proposition for which defendants cite them, i.e., that inquiry notice of a particular wrongful act or omission triggers the running of the statute of limitations for separate or future wrongs.

significance to defendants. They had lived in the home as their residence for years and used it as the Partnership's headquarters. In 2006, before Meri learned of the Liane house transfer, she was aware of defendants' claim to it, since she discussed the matter with the Chairman, who said he had not yet decided what to do with the property. That defendants ultimately transferred the disputed real estate to themselves did not constitute inquiry notice of other wrongdoing.

As to Meri's husband's suspicions in 2003, the reassurances he was given by both Meri's brother and the Partnership's accountant constitute substantial evidence the Nishiuchis were *not* put on inquiry notice in 2003 of defendants' past, present, and future wrongdoing.

In sum, the court properly ruled plaintiff's claims at issue here were not time-barred.[14]

Substantial Evidence of Canyon Point Kickback

Defendants contend the evidence is insufficient to support the court's award of \$3.6 million to plaintiff based on Darwin's receipt of a kickback in the Canyon Point sale.

Testimony on the Kickback Issue

1. Bruce Wong

Bruce Wong testified at trial. In 2011, he phoned Darwin to ask whether he would be interested in selling the Canyon Point shopping center. Darwin met at

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[14] The statute of limitations was also tolled by the continuing violation doctrine as to defendants' continuous misuse of the Partnership's credit cards, which included charges at places like Starbucks and Whole Foods, i.e., presumably small purchases. The continuous accrual doctrine is applicable to defendants' improper compensation, but that rule does not toll the statute of limitations for plaintiff's claims for improper compensation predating July 2008. (*Aryeh*, *supra*, 55 Cal.4th at p. 1199.)

McDonald's with Wong and real estate agents Kathleen Lek and Ray Cai to talk about it. Darwin said he wanted to sell Canyon Point for more than $30 million. Darwin said he wanted a commission for himself of a couple million dollars under the table (i.e., off the record).

2. Real Estate Agents Lek and Cai

Lek testified that at the McDonald's meeting, Darwin said he wanted a purchase price of $40 million, then changed it to $38 million. Darwin said he wanted $1 million to $2 million "cash from the buyer under the table." At the next meeting, Darwin mentioned the $1 million to $2 million should be wired to Taiwan. At a meeting at Darwin's house, Darwin and the prospective buyer, Andy Yong Zhang, asked Lek and Cai to step outside and leave Darwin and Zhang alone and to phone them in about half an hour.

Cai testified that at the McDonald's meeting, Darwin talked about a purchase price of between $38 million to $42 million. Darwin asked Cai whether Cai's client (an all cash buyer) could "pay . . . outside of escrow for at least one or two million," so the payment would not be reflected in the contract. Cai responded that he could not help set up such an arrangement because it would be illegal and would jeopardize his broker's license; Lek made the same statement. Darwin offered to increase the sales commission to Cai and Lek to 3 percent if they paid him a 1 percent referral fee; Cai and Lek agreed to bring that up with Cai's broker.

Cai explained he had met Zhang in 2010 when he sold Zhang a residence. Cai, Lek, and Zhang met with Darwin at Darwin's house on Liane Lane. Prior to this meeting, Darwin had been insisting he wanted $33 million. But at Darwin's house, Darwin asked Cai and Lek to step out so that Darwin and Zhang could speak privately. After about 30 minutes, Cai and Lek returned to learn that Darwin and Zhang had reached an agreement. Cai wrote an offer by Zhang to buy the Canyon Place shopping center for $31.1 million in cash with no contingencies. The property was to be sold "as is."

Cai was subsequently "shocked" to learn the transaction had been cancelled, but escrow was still open and no one had signed cancellation papers. The escrow officer informed Cai that, pursuant to an agreement between Darwin and Zhang, Zhang now owned the Partnership, thereby acquiring ownership of Canyon Point.

Cai further testified that in 2010, Citigroup made a loan on the Canyon Point property with a reserve of about $200,000 for environmental remediation.

3. Darwin

Darwin testified that, after he entered into the purchase agreement with Zhang, Zhang said he would only pay $27.5 million based on a 2010 appraisal of the property valuing it at $27.1 million. According to Darwin, he and Zhang then entered into an escrow amendment reducing the purchase price based on environmental remediation that would be required, including $1.8 million for a dry cleaner tenant's pollution, $1 million for parking lots and resurfacing, $1.5 million for underground repairs and upgrades, and $200,000 for a vacant unit. Zhang came up with these numbers. In March 2012, Darwin gave his daughter $2 million, which she used to buy some rental properties from Zhang.

4. Mosier

Mosier testified he concluded defendants should repay the Partnership $2 million based on the reduction in the purchase price for Canyon Point. He conceded his conclusion was "speculative," as opposed to being "based on hard numbers," but then recounted evidence in the record supporting his conclusion: "[F]or reasons unexplained, Mr. Zhang took it upon himself to identify a number of line items that justified the reduction from the 31 million down to the 27 million that had nothing to do with anything, I believe based on the testimony. [¶] And then we know that the sale of the real estate was changed . . . to the sale of the partnership. [(Trial exhibit 16 was a purchase agreement dated August 15, 2011, whereby Zhang and his wife bought the Partnership's ownership interest in U.N.T. ATIA Co. II, a subsidiary partnership entity which owned Canyon Point.)] [¶] And probably the most troubling of the testimony . . . was that of the brokers who disclosed that [Darwin] was looking for a 2 million-dollar rebate in this transaction, 2 million dollars back to him. [¶] And then remarkably, . . . a couple of days just after the final payment is made, [Darwin] gives the 2 million dollars to his daughter Patricia, who — in turn — gives the 2 million dollars back to Mr. Zhang in exchange for 3 condos and 1 house." Defendants had admitted to Mosier that the remediation numbers were used for the purpose of justifying the price reduction. When defense counsel asked Mosier how much Zhang had paid Darwin "as a secret rebate," Mosier replied, "I don't know that amount," but said he (Mosier) "was concerned about the number of dots [he] was able to connect in close proximity that raised it to a high level of suspicion."

5. *The Court's Ruling*

The court found Darwin "took a kickback and that the partnership (and its members) were obviously damaged to the extent he did." Noting that Zhang originally offered $31.1 million for Canyon Point in February 2011, but paid only $27.5 million in August 2011, the court found "by weight and strong probability of logical inference that this price change is explained by [Darwin] having taken a kickback." The court found Mosier, in his testimony, had used the word "speculation" and "inference" interchangeably and that Mosier, who is not an attorney, had based his conclusions "on both the indirect evidence he had seen and his prior experience in similar situations." The court found the testimony by Cai, Lek, and Wong was "persuasive." The court also found further evidence of the kickback in Darwin's "acquiescence to undocumented reasons put forth by Mr. Zhang for radical price reductions" and in the "apparent sweetheart relationship developed between [Darwin's] family and the buyer concerning both a Ting family-owned bakery in the center and the simultaneous purchase by [Darwin's] daughter of some Pasadena property owned by Mr. Zhang." The court also noted Darwin "was not called back to testify in phase 2 at all." The court noted that although defendants pointed to plaintiff's failure to call Zhang "as a corroborating trial witness to acknowledge having paid the kickback," defendants had also chosen not to call Zhang.

The court ordered defendants to disgorge $3.6 million for taking the kickback based on the following findings and observations made by the court. "[K]ickbacks are almost by definition surreptitious and so how to measure the loss is a separate problem. [¶] The only concrete figures available were the February $31.1 million offer price and the September $27.5 million closing price, producing a $3.6 million delta. Against this, in phase 2 the referee/expert estimated a $1.1 million mitigation in [Darwin's] favor based on more or less undefined advantages which he achieved for the [Partnership] over the years. But he also testified that the alleged $3+ million discount for future parking lot upgrades, environmental remediation, etc. was unsubstantiated. [¶] Such being the case, the court determines that it can only rely on the two hard figures above and therefore orders the defendants to disgorge the entire differential — i.e., $3.6 million — to the [Partnership] for redistribution under the partnership agreement."

Substantial Evidence Supports the Award

Our power "'"begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .'" (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, abrogated by statute on another point as recognized in *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668.) An "'expert's opinion may not be based "on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors . . . ."'" (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770.)

Here, the court's factual findings are supported by abundant substantial evidence, including Mosier's conclusions, which were properly based on reasonable inferences supported by the record. (*Pacific Gas & Elecric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) The court properly awarded a $3.6 million disgorgement to the Partnership for Darwin's receipt of a kickback from the Canyon Point buyer.

DISPOSITION

The judgment is affirmed. Plaintiff shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.