Filed 3/13/08 Emanuele v. Bisno CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JOHN T. EMANUELE et al., Plaintiffs and Respondents, v. ROBERT H. BISNO et al., Defendants and Appellants.	A117913 (Alameda County Super. Ct. No. RG05247811)

A jury found in favor of respondents John T. Emanuele and others on their fraud complaint. The trial court denied motions for judgments notwithstanding the verdict and for new trial filed by appellants Robert H. Bisno and others. Now, Bisno appeals, challenging the sufficiency of evidence supporting the awards of compensatory damages and compound prejudgment interest.[1] We deny Emanuele's motion to dismiss this appeal and affirm the judgment.

I. FACTS

By 1985, appellant Robert H. Bisno served as chief executive officer of a California corporation—appellant Trans-Action Financial Corporation (TAFC). Appellant James C. Coxeter was an officer of that corporation. In 1985, Robert Bisno, Coxeter and TAFC formed two limited partnerships in California—appellants Trans-Action Commercial Investors Ltd. (TACI) and Trans-Action Commercial

[1] In the opening brief, Bisno raised a third issue which has since been abandoned.

Mortgage Investors Ltd. (TACMI). Robert Bisno, Coxeter and TAFC were the general partners of TACI and TACMI. In April 1986, Robert Bisno misappropriated $470,000 of TACMI funds to purchase a personal residence.

According to the TACI and TACMI promotional literature, their purpose was to purchase improved commercial real property in downtown Berkeley. TACMI was to purchase the land and TACI would purchase the improvements on the site. TACMI would lease the site to TACI and loan money to that limited partnership so that TACI could renovate the property and generate the income that it needed. From this income, TACI was to make lease and loan payments to TACMI, which would make quarterly cash distributions to its limited partners. TAFC would hold a promissory note from TACI and TACMI on the commercial property. The general partners—Robert Bisno, Coxeter and TAFC—were also allowed to syndicate the TACI and TACMI partnerships and raise substantial funds, to be used in accordance with the terms of a private placement memorandum.

TACMI was to offer 180 limited partnership units generating nearly $10 million and TACI was to offer 90 such units raising more than $5 million. The promotional literature and private placement memorandum about these investments contained numerous representations that proved to be false and omitted some material facts, including that Robert Bisno had already misappropriated TACMI funds.

In 1986 and 1987, various persons including respondents John Emanuele, Eric Bancroft, Mitchell and Rae Goldenberg, Floyd Lindquist, Harold Lynge, Joseph Nimidoff, Rosalie Ohre, Steve and Lily Tanimura, and John and Liselotte Wells purchased units in the TACMI limited partnership. They were ignorant of the concealed facts and relied on the material misrepresentations made by Bisno.[2]

---

[2] The appellants are Robert H. Bisno, James C. Coxeter, TAFC, TACMI and TACI. For convenience, we refer to them collectively as Bisno.

By 1996, Dolores Staudenraus—another purchaser of a TACMI unit—discovered the fraud and filed suit against Bisno for damages. In 1997, TACI and TACMI filed for bankruptcy and the Staudenraus action was removed to federal bankruptcy court, where it remained for many years. In May 2005, certification of the class in the Staudenraus action was denied.[3]

In December 2005, several plaintiffs—including respondent Joseph Nimidoff—filed the action underlying this appeal. In January 2006, the first amended complaint for damages was filed, alleging a fraud cause of action against Bisno, Coxeter, TAFC, TACMI and TACI. By this time, respondents John Emanuele, Mitchell and Rae Goldenberg, Harold Lynge, Steve and Lily Tanimura and John and Liselotte Wells had joined as plaintiffs. Eric Bancroft, Floyd Lindquist and Rosalie Ohre had also filed their own complaint for damages in a separate action against Bisno. (*Bancroft v. Bisno*, Super. Ct. No. RG06252362; see also *Bailey v. Bisno*, Super. Ct. No. RG06252359.)[4] The first amended complaint alleged that Bisno fraudulently induced each of the plaintiffs into purchasing TACMI limited partnership units and that together with other plaintiffs, they suffered $8.5 million in damages. The plaintiffs sought general and special damages, punitive damages, attorney fees, costs and other relief that the trial court deemed appropriate.

In January 2006, TAFC removed this action to bankruptcy court, but in April 2006, it was remanded back to state court. Bisno demurred to the complaint, but the

---

[3] The statute of limitations on the current action was tolled during the pendency of the Staudenraus action.

[4] The eight surviving respondents are John Emanuele, Mitchell Goldenberg, Floyd Lindquist, Harold Lynge, Joseph Nimidoff, Rosalie Ohre, Lily Tanimura and John Wells. All are more than 70 years old such that this appeal warrants a mandatory calendar preference. (See Code Civ. Proc., § 36, subd. (a).) One of the other plaintiffs at trial—Rae Goldenberg—died in October 2006 before the matter came to trial. Her interest in the underlying matter was awarded to her spouse, Mitchell Goldenberg. Two other respondents—Steve Tanimura and Eric Bancroft—obtained judgment in their favor but have since died. For convenience, we refer to the respondents collectively as Emanuele.

trial court overruled the demurrer, finding that the Emanuele fraud claims were not waived or released in the bankruptcy proceeding. In June 2006, the various complaints were consolidated into a single action. In July 2006, Bisno answered the consolidated complaints. In October 2006, Bisno moved for summary judgment, arguing inter alia that the action was barred by the statute of limitations. The motion was denied in November 2006.

The matter went to a jury, which rendered in January 2007 special verdicts in favor of Emanuele,[5] awarding them compensatory damages of $251,325.[6] The jury's total award of compound prejudgment interest—computed as of the date of the jury's verdict—exceeded $1.15 million in the February 2007 judgments.[7]

Bisno moved for judgment notwithstanding the verdict, arguing that Emanuele failed to prove the value of their limited partnership interests and/or failed to prove a reasonable basis for calculating damages. Bisno also moved for a new trial, claiming that the trial court erred as a matter of law in its calculation of prejudgment interest. (See Code Civ. Proc., § 657, subd. 7; see also Civ. Code, § 3288.) Both motions were denied in April 2007. Notice of entry of judgment in favor of Emanuele was filed later that month.

II. COMPENSATORY DAMAGES

First, Bisno contends that the compensatory damages aspect of the judgment was not supported by competent evidence of out-of-pocket losses. They argue that Emanuele's experts admitted that they did not take the value of the underlying

---

[5] According to Bisno, the Emanuele plaintiffs—a subset of a larger group of plaintiffs—were granted a trial preference because of their age. Trial of the claims of the other plaintiffs is yet to be conducted, although an appeal from a judgment before trial in this matter is also pending.

[6] We note that the jury appears to have deducted the payments actually made by the limited partnership to Emanuele from their damages.

[7] In January 2008, the trial court approved Bisno's undertaking on appeal in this matter.

partnership assets—the Berkeley commercial real estate and the right to collect lease payments generated by use of that property—into consideration when determining their opinion of the measure of the investors' compensatory damages. Instead, the experts found that a limited partnership investment was worthless if the general partner had previously committed an illegal act. On appeal, Bisno argues that the premise that the limited partnership had zero market value is flawed, rendering the experts' opinions of valuation worthless, speculative, and lacking the substantial evidence to support the jury's verdict.

One who is defrauded in the purchase or sale of property is entitled to recover the difference between the actual value of that with which the defrauded party parted and the actual value of that received. (Civ. Code, § 3343; see *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1240; *Bagdasarian v. Gragnon* (1948) 31 Cal.2d 744, 762 [this statute as exclusive measure of damages for real estate fraud]; see also Johns, Cal. Damages (5th ed. 1996) Law and Proof, § 8.5(a), pp. 8-7 to 8-8.) A real property's actual value for purposes of calculating fraud damages within the meaning of Civil Code section 3343 is market value. (*Bagdasarian v. Gragnon, supra,* at p. 760; see *Colgan v. Leatherman Tool Group, Inc.* (2006) 135 Cal.App.4th 663, 675.) The measure of fraud damages is the difference between the consideration paid for the property and its market value. (*Bagdasarian v. Gragnon, supra,* at p. 761.)

In fraud cases, the value of the item is normally determined by the price at which it could be sold if the characteristics that affect its value were known to a potential purchaser. (*Bagdasarian v. Gragnon, supra,* 31 Cal.2d at p. 753.) Damages for fraud are measured as of the date of the fraudulent transaction. (*McCue v. Bruce Enterprises, Inc.* (1964) 228 Cal.App.2d 21, 31; *Graf v. Sumpter* (1962) 207 Cal.App.2d 391, 393; see Johns, Cal. Damages*, supra,* Law and Proof, § 8.5(a), at pp. 8-7 to 8-8.) Market value implies a sale on the open market, with a reasonable time to find a knowledgeable purchaser. (See *Sacramento etc. R. R. Co. v. Heilbron* (1909) 156 Cal. 408, 409; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 141-142.) The plaintiffs have the burden of

proving the facts entitling them to recover these damages. (*Nece v. Bennett* (1963) 212 Cal.App.2d 494, 497.)

An expert's opinion of market value is worth no more than the facts and reasoning on which it is based. Thus, an expert opinion rendered without any reasoned explanation of why the underlying facts lead to the expert's ultimate conclusion has no evidentiary value. (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 308; *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564.) The opinion cannot be based on assumptions that are unsupported by the record, on matters that are not reasonably relied on by other experts, or on speculative, remote or conjectural factors. (*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) Such evidence cannot rise to the level of substantial evidence that may support a judgment. (*In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1504; *Pacific Gas & Electric Co. v. Zuckerman, supra,* 189 Cal.App.3d at p. 1135.)

In this matter, Emanuele's experts offered opinion testimony that limited partnership units were "virtually worthless" and had "no value" at the time that Emanuele purchased them. They told the jury what facts led them to this conclusion—specifically, that if it was known that one of the general partners had already misappropriated partnership funds, no rational buyer would purchase the limited partnership units. Once it was known that a general partner had engaged in fraud, it raised the specter that that partner was acting for his or her own benefit rather than the benefit of the partnership. At the time that Emanuele invested in this limited partnership, there were many other investment opportunities in which to invest. They told the jury that the value of the underlying partnership assets such as the land and buildings it owned was immaterial to their conclusion about the market value of the limited partnership units.

We disregard expert opinion evidence of valuation if the underlying facts on which the expert relied are inherently unbelievable. (See *Board of Supervisors v. Archer* (1971) 18 Cal.App.3d 717, 723-724.) However, contrary to Bisno's

arguments on appeal, the claim of zero value does not strike us as unbelievable in the context of this case. (See, e.g., *Buist v. C. Dudley DeVelbiss Corp.* (1960) 182 Cal.App.2d 325, 333-335 [damages properly based on finding that real estate was worthless and entire purchase price was market value].) We are satisfied that Emanuele's experts relied on facts that an expert could reasonably rely on to form an opinion of the market value of the limited partnership units if the misappropriation had been disclosed rather than concealed. As Emanuele's experts' valuation opinions were grounded in reason, we find that they were properly admitted into evidence at trial[8] and constitute substantial evidence in support of the jury's verdict.[9]

III. COMPOUND PREJUDGMENT INTEREST

Bisno also contends that the compound prejudgment interest aspect of the judgment must be reversed for lack of evidence that Emanuele suffered a loss of compound prejudgment interest. On appeal, Bisno asserts that there was no evidence at trial that Emanuele ever had or lost any compound interest investment opportunity at the time of the limited partnership investment. Thus, they reason, there is no factual basis to support the jury's award of compound prejudgment interest.

Bisno's argument that Emanuele offered no proof at trial that any of them had or lost other investments opportunities that would have afforded them compound interest is, in essence, a legal argument that such evidence was a necessary prerequisite to a proper award of compound prejudgment interest. However, in the trial court discussions leading to the instructions on the steps that the jury had to take in order to determine whether to award compound prejudgment interest, Bisno never

---

[8] An expert's opinion evidence is admissible if the trial court finds, in the exercise of its discretion, that there is a reasonable basis for that opinion. The trial court did not abuse its discretion in admitting this evidence. (*Lockheed Litigation Cases, supra,* 115 Cal.App.4th at p. 564; see Evid. Code, § 801, subd. (b).)

[9] Emanuele argues inter alia that we have the authority to choose not to address the merits of this sufficiency of evidence issue, because Bisno failed to offer a complete recitation of the relevant facts in the appellants' opening brief. As we opt to address the merits of Bisno's claim, we need not address this question.

raised this issue. In fact, Bisno asserted that the question of whether to award simple interest or compound interest was solely a matter for the jury's discretion. It would be unjust to permit a party to change its position at trial and to adopt a new theory on appeal. An appellate court has discretion to preclude a party from doing so on estoppel grounds. (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874.) We choose to exercise that discretion to bar consideration of Bisno's claim of error on appeal—whether the jury could award compound prejudgment interest without evidence that Emanuele lost an investment opportunity that would have resulted in compound prejudgment interest—because it took a contrary position in the trial court by agreeing that the issue of compound prejudgment interest was completely for the jury to decide in its discretion.

Bisno also expressly agreed to the jury instruction that the trial court gave—advising the jury that it had to determine whether Emanuele was entitled to damages at all before determining whether to award interest on those damages; to apply interest at a rate of 7 percent if interest was awarded; and to determine whether any interest awarded should be simple or compound. (See *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166; see also *Jentick v. Pacific Gas & Elec. Co.* (1941) 18 Cal.2d 117, 121.) Under the doctrine of invited error, if a party's conduct induces the commission of an alleged error, that party is estopped from asserting that error as grounds for reversal on appeal. (*Redevelopment Agency v. City of Berkeley, supra,* 80 Cal.App.3d at p. 166; see *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212.) In the case before us, Bisno's agreement to the jury instruction that the trial court gave precludes it from now arguing that the instruction given was, of necessity, incomplete and incorrect. As we find that any error committed with regard to this issue was induced by Bisno's express agreement to the instruction given, the doctrine of invited error bars them from raising this issue on appeal. (See *USLIFE Savings & Loan Assn. v. National Surety Corp.* (1981) 115 Cal.App.3d 336, 347; see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 383, pp. 434-435.)

IV. MOTION TO DISMISS

Finally, we note that Emanuele filed a motion to dismiss this appeal as patently frivolous, in part because they assert that Bisno has failed to provide a fair summary of the trial court evidence in their opening brief. Bisno opposed the motion. We ruled that this motion and opposition should be determined along with the merits of this appeal.

When it appears to a reviewing court that an appeal is frivolous or taken solely for delay, we may add to the costs on appeal such damages as may be just. (See Code Civ. Proc., § 907.) An appeal is frivolous either when prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it is indisputably without merit—when any reasonable attorney would agree that the appeal is totally and completely meritless. (*Computer Prepared Accounts, Inc. v. Katz* (1991) 235 Cal.App.3d 428, 435.) Having considered the issues presented on appeal, we find that they are not so meritless as to render the appeal frivolous. Thus, we deny the motion to dismiss this appeal.

Emanuele's motion to dismiss the appeal as frivolous is denied. The judgment is affirmed.

_____
Reardon, Acting P.J.

We concur:

_____
Sepulveda, J.

_____
Rivera, J.