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Breach of Fiduciary Duty A \$2,382,445

For the plaintiff:	L.A. Superior Central
Kurt L. Schmalz	Hon. Melinda Ann
For the defendant:	Johnson, retired, JAMS
Gary Brown	

RESULT DATE: March 6, 2011

Paul Devore, MMAD Properties LLC v. Robert Assil, Van Owen Holdings LLC (1200043364) 11-JV_1330

FURTHER DESCRIPTION: Joint Venture Agreement**ARBITRATION:** \$2,382,445**ATTORNEY:** Claimant - Kurt L. Schmalz (Lurie, Zepeda, Schmalz & Hogan, Beverly Hills). Respondent - Gary Brown (Law Offices of Gary Brown, Pasadena).**TECHNICAL:** Claimant - Coral Hansen, CPA, CFE, accounting, Los Angeles; Noble R. Tucker, Jr., appraisal, Murrieta. Respondent - Anthony Bonenfant, CPA, accounting, Encino.

FACTS: In December 2003, Paul Devore, an electrical contractor, and Robert Assil, a real estate developer, entered into a written agreement in which Devore would identify real properties and Assil would decide whether he wanted to purchase them. If Assil purchased a property, Assil would pay Devore one-half of the net profits from the sale of the property. Pursuant to this agreement, Assil and Devore acquired three properties; two parcels of land in Riverside County and an apartment complex in West Hollywood.

Under the agreement, if Assil agreed to purchase a property, he would provide the acquisition costs, secure any necessary financing, arrange for payments of ongoing expenses, control the property, including decisions regarding sale (except that Assil had to meaningfully consult with Devore on such decisions). The agreement stated that if the parties could not reach an agreement on whether to sell a property, either party had the right to buy out the other. If the parties could not agree on a buy-out between them, then the parties would have to sell the property.

Under the agreement, if a property were sold to a third party, any mortgage would be paid and Assil would be reimbursed for any acquisition cost contributed and any other costs incurred except that Assil, or any of his companies, was prohibited from receiving any salary or compensation with respect to the properties. Devore had the right to inspect records regarding the costs and expenses of the ventures. After Assil's costs on each property were paid after a third-party sale, Devore and Assil would split what was left over on a 50-50 basis. Although not specifically in the agreement, Devore (or his LLC) was added as a co-owner on each property with Assil (or his LLC). Following acquisition of the three properties, the two men had trouble agreeing on developing the properties and Devore demanded that the properties be sold.

On the West Hollywood apartments, which Assil purchased for \$1.92 million in 2006, Assil received an offer to purchase the property for \$2.7 million in 2007, but ignored it, despite Devore insisting that the offer be accepted. Assil received numerous offers to buy a 3.2-acre parcel in Riverside (Tequesquite property), which Assil acquired in 2004 for \$1.1 million.

In 2006, Assil and Devore accepted an offer from a developer (Mayans) to buy the Tequesquite property for \$4 million. During the escrow period and before Mayan's feasibility period ended, Mayan's asked that the purchase price be reduced from \$4 million to \$3 million because its due diligence revealed that fewer units could be built on the property. Eventually, Mayans offered to close the sale with a price reduction to \$3.4 million, but Assil refused, insisting in July 2008 that \$3.8 million was his bottom line. Again, Devore implored Assil to accept the \$3.4 million offer because the sale would generate a \$2.3 million profit and the real estate market in Riverside was rapidly cooling off. When Assil would not lower his price below \$3.8 million, Mayans bailed out of the escrow and cancelled the deal. The other Riverside property (Arlington property) which Assil and Devore acquired for \$900,000 in 2005, received several lucrative offers and was in escrow for \$2.54 million in October 2005 to a buyer who eventually dropped out of the deal after Assil decline to extend the buyer's feasibility period. Ultimately, the three properties dropped in value to the point where their sale would not generate any net profits to distribute. During the time the parties were trying to sell the properties Assil became upset with Devore and stopped paying on the mortgage on the Tequesquite property. The Tequesquite property went into foreclosure and Devore had to start making payments on the mortgage to stop the foreclosure, even though the agreement required Assil to make those payments. Assil also stopped paying property taxes on the three properties, despite the agreement requiring him to do so, and unpaid property taxes on the properties exceed a total of \$400,000. Assil also allowed the City of Riverside to place thousands of dollars of liens on the Riverside properties for weed abatement and destruction of dangerous and dilapidated buildings. With regard to the Tequesquite property, Assil's failure to pay the mortgage caused a foreclosure sale to be set not long after Mayans offered to buy that property for \$3.4 million and generate a \$1.3 million profit for Devore and Assil. Devore paid more than \$73,000 to reinstate the loan just before the sale. The evidence showed that Assil, in conjunction with the owner of the loan and foreclosure trustee, attempted to use a third party to buy the note and foreclosure out Devore's interest in the property. However, Devore reinstated the loan and the third party purchaser did not materialize. Assil demanded that Devore start making payments on the properties, even though the agreement required Assil to make those payments, and began to allege that Devore had misled Assil and induced him to buy the Tequesquite and Harper properties.

In November 2007, Devore filed suit against Assil and Van Owen, Assil's LLC, for violation of joint venture agreement, breach of fiduciary duty, fraud, partition and accounting.

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Assil cross-complained against Devore and Devore's LLC, MMAD Properties, for dissolution of joint venture, accounting, partition and damages.

In June 2010, the parties agreed in writing to submit the dispute to binding arbitration at JAMS. The arbitration hearing took place over seven full days in Oct. and Nov. 2010.

CONTENTIONS: PLAINTIFF'S CONTENTIONS: Devore contended that Assil breached the joint venture agreement with and his fiduciary duties to Devore by not paying the expenses on the three properties, allowing waste on the properties and by refusing or otherwise blocking the sales of the three properties at a significant profit to ready, willing and able buyers. Devore would have received net profits from those sales pursuant to the agreement but for Assil's interference which not only breached the contract and the covenant of good faith and fair dealing in the contract but, his fiduciary duty to Devore as well. Devore claimed that Assil's misconduct toward Devore constituted oppression and/or fraud and entitled Devore to punitive damages. The joint venture should be dissolved and the three properties should be partitioned and sold. Devore also claimed that he did not defraud Assil or mislead him in the purchase of any of the properties.

DEFENDANT'S CONTENTIONS: Assil contended that he did not breach the contract or any duties to Devore. During post-hearing briefing, Assil argued that there was no joint venture, although Assil's cross-complaint alleges a joint venture pursuant to the contract. Assil alleged that Devore misled Assil with regard to the purchase of the Tequesquite property by indicating that the city had approved the property for building of 120 unit when in fact far fewer units could be built based on zoning and city staff. Assil claimed that Devore was not entitled to any profits because the properties were never sold and Assil's costs of acquisition and maintenance exceeded what the properties could be sold for in the current real estate market.

DAMAGES: Devore sought damages of \$3.5 million for the value of lost sales of the three properties plus prejudgment interest. Devore also sought punitive damages in an unspecified amount.

RESULT: The arbitrator, Hon. Melinda A. Johnson, retired, of JAMS awarded Devore damages for lost sale on the Tequesquite property of \$1,544,981 on the profits that Devore would have collected if the Mayans sale had closed in 2006, along with prejudgment interest through Oct. 16, 2010.

The arbitrator awarded Devore damages for lost sale on the West Hollywood property of \$516,053 as the profit that Devore would have received if the sale of that property would have been consummated in 2007 along with prejudgment interest thereon from Oct. 26, 2010.

The arbitrator also awarded Devore damages for out of pocket expenditures and for recovery under a promissory note of \$293,911, including prejudgment interest from Oct. 26, 2010, plus \$27,500 of acquisition costs that Devore paid on Tequesquite.

The total awarded by the arbitrator to Devore and against Assil was \$2,382,445, with interest to accrue at a rate of \$652.72 per day from Oct. 26, 2010.

The arbitrator awarded Devore costs of \$28,555 and limited attorney fees of \$4,748 for the costs of collecting on a \$53,000 promissory note, which included a prevailing party attorney fee clause.

The arbitrator denied punitive damages and denied damages for the Arlington property because she determined that it was speculative whether the property could have been sold at a profit.

The arbitrator also ordered the joint venture be dissolved and the properties be partitioned and sold and recommended that a receiver be appointed to sell the properties and pay the award from the proceeds of sale.

Assil was to take nothing on his cross-complaint.

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<p>OUR PRESIDENT</p>  <p>BRAD P. AVRIT, PE ASTM, ICC, NSPE, NSC Licensed Civil Engineer Safety Engineer</p>	<p>SPECIALTY GROUPS</p> <table border="0"> <tr> <td>CONSTRUCTION DEFECTS</td> <td>ACC. RECON. - PREMISES</td> </tr> <tr> <td>VEHICULAR ACCIDENTS</td> <td>PREMISES LIABILITY</td> </tr> <tr> <td>SAFETY ENGINEERING</td> <td>CONSTRUCTION DISPUTES</td> </tr> </table>	CONSTRUCTION DEFECTS	ACC. RECON. - PREMISES	VEHICULAR ACCIDENTS	PREMISES LIABILITY	SAFETY ENGINEERING	CONSTRUCTION DISPUTES	<p>FORENSIC ENGINEER</p>  <p>PHILIP ROSESCU, BSME, CXL Trips/Slips and Falls Civil Engineer</p>
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