No. A109590

In the Court of Appeal

Of the State of California

First Appellate District

Division 5

JOSEPH MONASTIERO,

Plaintiff and Appellant,

v.

INTERVIDEO, INC. and STEVE RO,

Defendants and Respondents.

APPELLANT S OPENING BRIEF

Appeal from
Alameda County Superior Court Case No. RG03128788
The Honorable Steven A. Brick

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES, RULES & CONSTITUTION:

STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment that disposes of all issues between the parties and is

appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a).

STATEMENT OF THE CASE

On November 24, 2003, plaintiff Joseph Monastiero filed suit against defendants InterVideo, Inc. and Steve Ro for breach of oral and written contract, and fraud. (Appellant s Appendix (AA) 1.) Intervideo and Mr. Ro answered (AA 10-15), and moved for summary judgment/summary adjudication on the grounds that the statute of limitations barred all causes of action. (AA 16-206.) Mr. Monastiero opposed the motion (AA 207-253), and the trial court took the matter under submission after a hearing on October 18, 2004. (AA 272; Reporter s Transcript on Appeal (RT) 15-16.)

On November 29, 2004, the trial court issued its Order Granting Defendant s Motion for Summary Judgment, based on the statute of limitations. (Order, AA 273-82.) After a judgment was filed in favor of Intervideo and Mr. Ro on January 7, 2005 (AA 283), Mr. Monastiero timely appealed. (AA 287.)

STATEMENT OF FACTS

In the spring of 1998, Steven Ro was trying to

launch a new DVD-software company called InterVideo. (Deposition of Sencuo Ro (Ro Dep) 9-11, 13-14, 20, AA 144-50; Deposition of Joseph Monastiero (Monastiero Dep) 21-22, AA 61-62.) Mr. Ro knew Joseph Monastiero, the Director of Marketing for a semiconductor and DVD-software company named Zoran Corporation, and approached him about joining InterVideo when they met at a trade show in Taiwan. (Ro Dep. 10, 13, AA 145, 147; Monastiero Dep. 19, 21-24, AA 60-64; Plaintiff Joseph Monastiero s Declaration ... (Monastiero Dec.) ¶ 1, 3-4, AA 223.)

At Mr. Ro s suggestion the two men met again when they returned to Northern California, and Mr. Ro told Mr. Monastiero that if he left Zoran to join the new company, Mr. Ro would provide Mr. Monastiero with an annual salary of $150,000, a signing bonus, full benefits, an annual bonus of $100,000 and 5% ownership of the company. (Monastiero Dep. 27-29, AA 68-69; Monastiero Dec. ¶ 5, AA 223.) Several days later Mr. Monastiero accepted the offer and resigned his position with Zoran. (Monastiero Dep. 31, 33-34, AA 71, 73-74; Monastiero Dec. ¶ 6, AA 223.)

At the direction of Mr. Ro, Mr. Monastiero drafted a written agreement to memorialize the terms of the

employment. (Monastiero Dep. 70-71, AA 103-04; Monastiero Dec. ¶ 7; AA 223-24.) After Mr. Ro made some revisions, both men signed a Letter of Agreement Employment Offer (the Letter Agreement) on June 25, 1998. (Monastiero Dep. 45-46, AA 83-84; Monastiero Dec. ¶ 7; AA 223-224.)

The Letter Agreement (AA 122, 230), confirmed that Mr. Monastiero was being hired as InterVideo s Vice-President of Sales and Marketing at an annual salary of $150,000, provided for a signing bonus and a bonus in 1999, and stated:

> Mr. Monastiero will also receive 275,000 shares of InterVideo stock.

(Undisputed Fact 1, AA 37, 220; Monastiero Dep. 70-71 and Exhibit 2, AA 103-04, 122; Monastiero Dec. ¶¶ 7-8 and Exhibit A, AA 223-24, 230.)

The number of shares was originally 300,000 5% of the 6,000,000 shares of InterVideo stock then outstanding but Mr. Monastiero agreed to the slightly lower percentage at Mr. Ro s request. (Monastiero Dep. 51-53, AA 89-91; Ro Dep. 29-30, AA 245-46.)

Mr. Monastiero understood that the promise of stock was unconditional, and that he would receive it without paying any money to InterVideo. (Undisputed Fact 2, AA 37, 220; Monastiero Dep. 32-33, 51-52 AA 72-73, 89-90;

Monastiero Dec. ¶ 9, AA 224.) The custom and practice in the industry was to routinely give key personnel such unconditional grants of stock to guarantee that the personnel have a stake in the performance of the business, and the knowledge that he owned part of InterVideo helped motivate Mr. Monastiero in the performance of his duties there. (Monastiero Dec. ¶ 13, 20, AA 225-27.)

Over the next 6-10 months, Mr. Monastiero twice asked Mr. Ro about his stock, and on each occasion Mr. Ro said not to worry and provided a reasonable explanation for the delay initially that the board had to meet to authorize issuance of the stock, and later that the stock would be issued to him after a contemplated stock split. (Undisputed Fact 3, AA 37, 220; Monastiero Dep. 49-50, 54-56, AA 87-88, 93-94; Monastiero Dec. ¶ 15, AA 225-26.) He did not make further requests or otherwise push the matter, believing he could rely on the Letter Agreement. (Monastiero Dep. 58-59, AA 96-97.)

In the spring of 1999, InterVideo presented Mr. Monastiero with a stock option plan (the Option Agreement), under which Mr. Monastiero had the right to ultimately purchase up to 550,000 shares of stock.

(Undisputed Facts 4-5, AA 37, 200; Monastiero Dep. 36-37, 59-60, 79-85, 88-89 and Exhibit 6, AA 76-77, 97-98, 107-12, 115-16, 124-132; Monastiero Dec. ¶ 15, AA 22-226.) The stock options were contingent on a vesting schedule and were subject to restrictive terms and conditions; the Option Agreement contained an integration clause. (Option Agreement ¶¶ 4, 8 10 and 12, AA 124-130.)

At the time that the Option Agreement was presented to him, Mr. Monastiero asked Mr. Ro when he would receive the stock promised to him in the Letter Agreement, and Mr. Ro said words to the effect of, don t worry about it, it will be taken care of. (Monastiero Dep. 54-56, AA 92-94; Monastiero Dec. ¶ 15, AA 225-26; Ro Dep. 48, AA 153.)

Neither Mr. Ro nor anyone else associated with InterVideo advised Mr. Monastiero that the Option Agreement would affect his right to receive the shares promised to him in the Letter Agreement. (Monastiero Dec. ¶¶ 10-16, AA 224-26.) Mr. Monastiero understood that the Option Agreement addressed a different subject; *i.e.*, the right to buy shares of stock, as opposed to the unconditional transfer of stock promised in the Letter Agreement. (Monastiero Dec. ¶¶ 10-16, AA 224-

26.) Mr. Monastiero did not object to the Option Agreement, and believed that it was designed to relieve tension that had built up due to the failure to issue the stock due under the Letter Agreement. (Monastiero Dep. 59-60, AA 97-98.)

Neither Mr. Monastiero nor Mr. Ro believed that Mr. Monastiero had signed any document giving up his right to receive the 275,000 shares of stock. (Monastiero Dec. ¶ 22, AA 228; Ro Dep. 43-44, AA 250-51.)

InterVideo terminated Mr. Monastiero s employment on June 13, 2001. (Undisputed Fact 6, AA 37, 221.) Prior to that time, he had no reason to believe that InterVideo and Mr. Ro would fail to honor the Letter Agreement, or would refuse to issue the 275,000 shares of stock that had been promised to him. (Monastiero Dep. 60, AA 98; Monastiero Dec. ¶¶ 10-20, AA 224-227.)

During the time of Mr. Monastiero s employment at InterVideo the company stock was not publicly traded, so there was no public market for the stock and no ready method of selling them. (Monastiero Dec. ¶ 17, AA 226.)

On or about September 4, 2003, Mr. Monastiero demanded that the stock be issued to him. (Disputed Facts 7-8, AA 37-38, 221; Monastiero Dep, 40, 56-58, AA 80, 94-96; Monastiero Dec. ¶¶ 19, 24, AA 226, 228-29; Ro

Dec. ¶ 4 and Exhibit A, AA 201-204; Michaelson Dec. ¶ 4 and Exhibit C, AA 44, 158-59.) In a September 17, 2003 letter written by its attorney, InterVideo advised Mr. Monastiero for the first time that the Option Agreement had superceded the Letter Agreement. (Monastiero Dec. ¶ 19, AA 158, 226.) Mr. Monastiero filed suit two months later. (Disputed Fact 8, AA 37-38, 221; AA 1.)

The trial court held that Mr. Monastiero s claims for breach of oral and written contract were barred due to his failure to demand performance within four years after he signed the Option Agreement, relying on *Stafford v. The Oil Tool Corp.* (1955) 133 Cal.App.2d 763. (Order, AA 278-79.)

The court further determined that the claim for promissory fraud was barred because, as a matter of law, plaintiff s failure to make a demand for performance within the statutory period for a breach of a written contract claim also bars any claim based on promissory fraud. (Order, AA 279.) Alternatively, the court found that as a matter of law the Option Agreement put Mr. Monastiero on inquiry notice as to whether defendants intended to supercede the Letter Agreement. (Order, AA 279.) Based on its rulings, the court declined to determine whether the Option Agreement

superceded the Letter Agreement. (Order, AA 280.)

ARGUMENT

A. STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

In reviewing a grant of summary judgment, this court applies the same standard used by trial courts. (*Johnson v. Lewis* (2004) 120 Cal.App.4th 443, 451.) The court does not decide on any findings of fact but simply determines what any evidence or inference *could show or imply to a reasonable trier of fact.* (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 856 (emphasis in original).) The court liberally construes the evidence in favor of the party opposing the motion while strictly construing the moving party s evidentiary showing, and resolving any evidentiary doubts or ambiguities in plaintiff s favor. (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-68.)

Statute of limitation issues normally raise questions of fact that are not appropriate for resolution by summary judgment. In such cases, summary judgment is improper unless the uncontradicted facts are capable of only one legitimate inference. (*Jolly v. Eli Lilly and Co.* (1988) 44 Cal.3d 1103, 1112.) The inferences must be indisputable in order to affirm summary judgment. (*Binder v. Aetna Life Insurance Company* (1999) 75 Cal.App.4th 832, 838.)

The trial court erred in granting summary judgment against Mr. Monastiero because he presented triable issues of material fact regarding his causes of action for both fraud and breach of written contract.

At the outset, there is simply no legal support for the trial court s conclusion that Mr. Monastiero s failure to demand performance of the Letter Agreement somehow barred his claim for fraud. Fraud claims are governed by a separate statute of limitations that specifically tolls accrual until discovery. (Code Civ. Proc. § 338, subd. (4).)

A factfinder could legitimately conclude that Mr. Monastiero did not have sufficient knowledge in 1999 to make a reasonably prudent person suspect that InterVideo and Mr. Ro were defrauding him. (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 298.) No one advised Mr. Monastiero that they were reneging on the stock promised in the Letter Agreement, and he understood the Option Agreement to be addressing a different subject. Under the rule of discovery governing fraud claims, the statute of limitations did not accrue until termination.

But respondents were not merely silent about their intentions Mr. Ro repeatedly assured Mr. Monastiero

that there was no need to worry about the promised stock. These misrepresentations bring into play the rule of fraudulent concealment to further toll the statute of limitations. (*Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, 931.)

Respondents misrepresentations operated to toll the statute on the breach of contract claims, as well as the fraud claim. *Stafford v. The Oil Tool Corp.* (1955) 133 Cal.App.2d 763, the sole authority cited by the court in support of its ruling, has no bearing here because a demand was not an integral part of the claim in this case. In addition, Mr. Monastiero s ongoing employment and Mr. Ro s repeated reassurances constituted peculiar circumstances such that the general rule cited in *Stafford* would not apply.

Given Mr. Ro s repeated reassurances that Mr. Monastiero need not worry about getting his stock, there was more than one legitimate inference that a factfinder could draw, and the grant of summary judgment was improper. (*Jolly,* 44 Cal.3d at 1112.)

B. BOTH THE RULE OF DISCOVERY AND THE RULE OF FRAUDULENT CONCEALMENT TOLLED THE STATUTE OF LIMITATIONS ON MR. MONASTIERO S FRAUD CLAIM

The fundamental purpose of statutes of limitations is to protect potential defendants by affording them an opportunity to gather evidence while facts are still fresh. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 512.) Traditionally, most tort and contract causes of action have accrued when a wrongful act was done or a wrongful result occurred. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) Over the years, however, the rule of discovery has developed as the most important exception to the general rule of accrual, postponing accrual in certain cases until a plaintiff discovers, or has reason to discover, the cause of action. (*Norgart*, 21 Cal.4th at 397; *Hebrew Academy of San Francisco v. Goldman* (2005) 129 Cal.App.4th 391, 404.)

The rule of discovery is not a recent development in cases involving fraud or mistake. For well over 100 years, Code of Civil Procedure section 338, subdivision (d), has provided that in such cases the claim is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. (Code Civ. Proc. § 338, subd. (d);*Shain v.*

Sresovich (1894) 104 Cal. 402, 405.)[1]

If the rule of discovery applies, the cause of action does not accrue until the plaintiff at least suspects ... that someone has done something wrong to him. *Norgart*, 21 Cal.4th at 397.) The plaintiff must have sufficient notice or information of circumstances to put a reasonable person *on inquiry.* (*Norgart*, 21 Cal.4th at 398.)

> The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission.

(*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, 298 n.15, quoting *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 438.)

There was no circumstance in this case that provided notice to Mr. Monastiero that he had a duty to determine whether InterVideo and Mr. Ro were defrauding him. The Option Agreement did not put Mr. Monastiero on

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[1] Without citation to any authority, the trial court held that Mr. Monastiero s fraud claim was governed by the rule in *Stafford v. The Oil Tool Corp.* (1955) 133 Cal.App.2d 763, which applies only to contract claims. (AA 279.) Appellant s counsel has found no precedent for applying *Stafford* to fraud claims, which are governed solely by section 338, subdivision (4), and the trial court erred on this issue as a matter of law.
The trial court went on to determine that the Option Agreement put Mr. Monastiero on inquiry notice, (AA 279), and this section responds to that determination, which was also erroneous.

inquiry notice, because he reasonably believed that the two agreements pertained to different subjects and, to the extent they were connected, he saw the Option Agreement as a means of placating him until respondents complied with the Letter Agreement. (Monastiero Dep. 59-60, AA 97-98; Monastiero Dec. ¶¶ 10-16, AA 224-26.) No one advised Mr. Monastiero that the Option Agreement would affect his right to the stock promised him in the Letter Agreement until September 2003. (Monastiero Dec. ¶¶ 10-16, 19, AA 224-26.)

Liberally construing these facts in favor of Mr. Monastiero, (*Saelzer v. Advanced Group 400* (2001) 25 Cal.4th 763, 767-68), a reasonable factfinder could conclude that the Option Agreement did not alert Mr. Monastiero of their efforts to defraud him. As in *Vega*, 121 Cal.App.4th at 297-98, where the knowledge of a $10,000,000 financing did not put the plaintiff on inquiry notice of defendants fraud, Mr. Monastiero s knowledge of the Option Agreement did not alert him to the respondents fraudulent motives, and the statute did not begin to run.

Even assuming, as the trial court did (AA 279), that the Option Agreement put Mr. Monastiero on some type of notice, he *did* once again ask Mr. Ro about the

stock promised in the Letter Agreement, and Mr. Ro once again reassured him that he should not worry because the stock would be taken care of. (Monastiero Dep. 49-50, 54-56, AA 87-88, 92-94; Monastiero Dec. ¶ 15, AA 225-26; Ro Dep. 48, AA 153.)

By actively misleading Mr. Monastiero about the need to file suit, Mr. Ro fraudulently concealed the cause of action against him and InterVideo, further tolling the statute. (*Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, 931.) Under the:

> well accepted principle of fraudulent concealment ... the culpable defendant [is] estopped from profiting by his own wrong to the extent that it hindered an otherwise diligent plaintiff in discovering his cause of action.

(*Bernson*, 7 Cal.4th at 931.)

In *Parsons v. Tickner* (1995) 31 Cal.App.4th 1513, for example, the court allowed an action for fraud and other claims to go forward on behalf the estate of a musician who had been dead for almost 20 years, largely because the defendants had misrepresented the facts when questioned by the heirs about the matter.

Parsons noted that [f]raudulent concealment of the facts is a good answer to the defense of the statute

of limitations. (*Parsons*, 31 Cal.App.4th at 1528.) The defendants could not expect relief from their own deceit merely because the heirs did not discover the lies earlier, and the heirs failure to discover the true facts was excusable and reasonable (*Parsons*, 31 Cal.App.4th at 1529.) There is no reward for being slick. (*Parsons*, 31 Cal.App.4th at 1529.)

The trial court erroneously ignored the effect of the misrepresentations by Mr. Ro, which further tolled the statute of limitations until Mr. Monastiero s termination on June 13, 2001. A reasonable factfinder could conclude that, after convincing Mr. Monastiero that he had nothing to worry about, respondents must not be allowed to profit from their misrepresentations. (*Saelzer*, 25 Cal.4th at 767-68.)

A suit filed on November 24, 2003 was well within the three year statute of limitations provided by section 338, subdivision (d), and this court should reverse the summary judgment as to the fraud cause of action.

C. STATUTE OF LIMITATIONS ALSO DID NOT BEGIN TO RUN ON THE BREACH OF CONTRACT CLAIMS UNTIL RESPONDENTS TERMINATED MR MONASTIERO

Unlike the claim for fraud, Mr. Monastiero s cause

of action for breach of contract is governed by the four-year limitation period provided by Code of Civil Procedure section 337, subdivision (1). Although it is normally quite simple to determine when a contract has been breached and the statute begins to run, both the rule of discovery and the rule of fraudulent concealment can toll the statute in certain contract actions.

April Enterprises, Inc. v. KTTV (1983) 147 Cal.App.3d 805, 828-33, held that the rule of discovery applied to contract actions where the breach is hidden and the defendant had reason to believe the plaintiff remained ignorant he had been wronged.... [O]ften this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree s ignorance. (*April Enterprises*, 147 Cal.App.3d at 831.)

In this case, Mr. Ro and InterVideo knew that Mr. Monastiero was unaware of the breach of contract, because Mr. Ro had specifically told Mr. Monastiero not to worry about the stock he had been promised. (Monastiero Dep. 54-56, AA 92-94; Monastiero Dec. ¶ 15, AA 225-26; Ro Dep. 48, AA 153.) In such cases, the recipient of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might

have ascertained the falsity of the representation had he undertaken an investigation. *El Pollo Loco, Inc. v. Hashim* (9th Cir. 2003) 316 F.3d 1032, 1040.)

In *El Pollo Loco*, the court found that the defendant s misrepresentations to the plaintiff hindered discovery of the contractual breach and tolled the statute of limitations. (*El Pollo Loco*, 316 F.3d at 1038-40.) Similarly, *Weatherly v. Universal Music Publishing Group* (2004) 125 Cal.App.4th 913, 919-20, held that a plaintiff who claimed to have been misled by confusing royalty statements had been hindered in discovering his claim for breach of contract, and his claim was therefore not barred even though he could have demanded an audit.

There is no more reason to allow respondents to profit from their fraudulent concealment by avoiding a breach of contract claim than by avoiding the fraud claim. (*Bernson v. Browning-Ferris Industries of California, Inc.* (1994) 7 Cal.4th 926, 931.) A reasonable trier of fact could determine that Mr. Ro s false reassurances hindered Mr. Monastiero in discovering that respondents were going to breach the Letter Agreement, and under the circumstances the grant of summary judgment was error.

D. *STAFFORD* RULE REGARDING THE REASONABLE TIME FOR MAKING A DEMAND HAD NO BEARING ON THIS CASE

The trial court relied solely on *Stafford v. The Oil Tool Corp.* (1955) 133 Cal.App.2d 763, 765-66 for its conclusion that Mr. Monastiero s claim for breach of the Letter Agreement was barred by the four-year limitation period provided by Code of Civil Procedure section 337, subdivision (1), without any analysis as to whether the *Stafford* rule regarding the reasonable time for demand had any bearing on this case. (AA 278-79.)

Quite simply, *Stafford* had nothing to do with this case. *Stafford* makes it clear that the rule applies only where a demand is an integral part of a cause of action. *Stafford*, 133 Cal.App.2d at 765.) In such cases:

> the statute of limitations does not run until the demand is made. The plaintiff cannot, however, indefinitely suspend the running of the statute by delaying to make a demand. The general rule is that where demand is necessary to perfect a cause of action and no time therefor is specified in the contract, the demand must be made within a reasonable time after it can lawfully be made.... [I]n the absence of peculiar circumstances, a time coincident with the running of the statute will be deemed reasonable,...

(*Stafford*, 133 Cal.App.2d at 765-66.)

A demand was not an integral part of Mr.

Monastiero s claim for breach of the Letter Agreement, which was unconditional and did not contain a demand clause. (Undisputed Fact 2, AA 37, 220; Monastiero Dep. 32-33, 51-52, AA 72-73, 89-90; Monastiero Dec. ¶ 9, AA 224; Letter Agreement, AA 122, 230.) While the rule cited in *Stafford* is designed to prevent a plaintiff from indefinitely suspend[ing] the running of the statute by delaying to make a demand, *Stafford*, 133 Cal.App.2d at 765), Mr. Monastiero could not do that, because Mr. Ro and InterVideo at all times had the power to terminate Mr. Monastiero and start the clock running on the statute of limitations.

Even if the *Stafford* rule did apply in this case, the misrepresentations of Mr. Ro regarding the status of Mr. Monastiero s stock would certainly constitute the type of peculiar circumstances envisioned in *Stafford* and *Bass v. Hueter* (1928) 205 Cal. 284, 287. If respondents wanted the statute of limitations to accrue, they could have responded honestly to Mr. Monastiero s inquiries, instead of misleading him into believing they intended to keep their promise.

The trial court erred in applying the *Stafford* rule to the breach of contract claim, and had no basis whatsoever for applying it to the fraud claim.

CONCLUSION

For all the above reasons, this court should reverse the grant of summary judgment, and allow Mr. Monastiero to pursue his claims.

DATED: March 22, 2007 LAW OFFICES OF PAUL KLEVEN

By:_____
PAUL KLEVEN

CERTIFICATE OF COUNSEL

I certify that this Appellant s Opening Brief contains 3834 words, as calculated by my WordPerfect 11 word processing program.

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