

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

MARTIN HABIB,)	No. 62369-9-1
)	
Respondent,)	
)	UNPUBLISHED OPINION
v.)	
)	
EMERALD COIN VENDING,)	
)	
Appellant.)	
_____)	FILED: <u>December 28, 2009</u>
—)	

Schindler, C.J. — At the conclusion of trial, the court found that Martin Habib and James Nelson formed a partnership in May 2006, and Nelson assumed responsibility to operate the vending machine business as the managing partner. The court concluded Nelson breached his fiduciary duty to Habib by failing to provide an accounting of profits and losses. The court awarded Habib \$125,000 for the value of the partnership, offset by \$65,000 for amounts owed to Nelson. The court did not award attorney fees to either party. On appeal, Nelson contends that substantial evidence does not support the finding that a partnership was formed, that he breached his fiduciary duty to the partnership, or the court's valuation of the partnership. Nelson also contends the trial court erred in entering judgment without an accounting. In his cross appeal,

Habib challenges the court's decision to offset the judgment amount and to not award attorney fees. Because substantial evidence supports the trial court's findings and conclusions and the decision to offset the judgment amount, and the court did not abuse its discretion in declining to award attorney fees to either party, we affirm.

FACTS

James Nelson owned Emerald Coin Vending. In spring of 2005, Martin Habib paid Emerald Coin \$67,500 to purchase approximately 30 vending machines located at 11 different business sites in the Puget Sound area.¹ Habib also paid Nelson a consulting fee for continuing to advise and assist him. A few months after the initial purchase from Emerald Coin, Habib purchased approximately 55 vending machines located at 25 other sites from Jack Roberts for \$83,000.²

In October, Habib told Nelson that he had accepted a new job in Olympia beginning in November, and needed Nelson's help in running his vending machine business. On November 16, Nelson agreed to assume responsibility to service 18 sites, the 11 sites Emerald Coin sold to Habib plus seven other sites.

According to Habib, a couple of weeks later, Nelson agreed to assume

¹ In accord with the practice in the industry, the purchase included a 90-day guarantee that if Habib was not satisfied with the locations of the machines, Nelson would procure alternative sites.

² The second transaction included a diesel truck. Shortly after the purchase, Habib bought a newer truck to replace it for \$7,000.

responsibility for the remaining 18 sites and split the profits. Habib told Nelson the vending machine sites generated approximately \$10,000 in gross revenue per month.

According to Nelson, Habib did not ask him to service all 36 sites until January 2006, and until then Habib tried to service the remaining 18 sites himself. Nelson also claims that when he agrees to temporarily assume responsibility to service sites for another owner, he retains all profits. In any event, the parties do not dispute that at least by early 2006, Nelson was responsible for servicing all 36 vending machine sites owned by Habib.³

Sometime in early 2006, Habib asked Nelson to make arrangements to sell the business. Nelson found a potential buyer, Mr. Lee.⁴ Lee entered into a contract to purchase the vending machine business for \$125,000. Lee agreed to pay monthly installments of \$5,000 for ten months, followed by a \$75,000 payment. Habib received installment payments totaling \$10,000 from Lee.

On April 18, Nelson informed Habib by e-mail that there were a “few hurdles” with the route and warned that Lee might back out of the purchase due to “location instability and volume issues.” Nelson listed several problems with sites where vending machines had been or would be “pulled,” sites where machines needed repairs, and other sites where changes to the machines or the

³ Although Nelson testified that there were immediate problems with the sites he took over because the customers were unhappy with the service Habib provided, there is no documentary evidence of problems until an April 18, 2006 e-mail.

⁴ Lee's first name does not appear in the transcript.

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vending machine agreements were necessary. Nelson claimed that because Habib raised prices, the “service suffered.” Nonetheless, Nelson indicated that he might be willing to assume Lee’s contract, but asked for some “flexibility” from Habib due to the “instability” of the business.

Lee rescinded his contract to purchase the business. Although Habib refused to refund the \$10,000 in payments that he received from Lee, Nelson repaid Lee. On May 7, Nelson sent an e-mail asking Habib to reimburse him for the money he paid to Lee and for Nelson’s “time and loss.” Nelson also said that he was still considering purchasing the business.

In Habib’s reply, he stated, “we have 3 options.” Habib proposed (1) Nelson “run the route” and make Habib an investor in Nelson’s company, entitled to receive monthly income generated from the business, or (2) Nelson sell the business and receive a commission for doing so, or (3) Nelson could purchase the business. In reply, Nelson said that since he had already invested \$15,000 in the route, he was “leaning towards just purchasing it” and would let Habib know in a couple of days.

On May 7, Nelson sent an e-mail message to Habib stating that they were partners and he would assume responsibility for managing the business. The e-mail states:

I guess we’re partners in this route.
I’d almost prefer the \$15,000.00 at this point that I’ve put into the company along with my time but let’s try this:

I'll run the route and split the profits with you and either one of us can be bought out at any time if the other decides to go a different direction. I've moved everything around to make it a nice tight downtown route so the profitability will be at a maximum.

Thereafter, Habib repeatedly requested monthly revenue reports from Nelson. Other than one-mail in July and another e-mail in August, Nelson did not provide any information on revenue. In a July 5 e-mail, Nelson told Habib there "is no way I can run this business and have money left over." Nelson said that he wanted to "take whatever offer and get my money out of this mess and put this behind us." On August 1, Nelson informed Habib that the July sales figures were "around three thousand dollars and expenses tight." By September, the relationship between Nelson and Habib had deteriorated, and virtually all of Habib's machines had been pulled from their original locations and were in storage.

On October 23, Habib filed a lawsuit against Emerald Coin Vending for an accounting of the partnership and entry of a judgment for his interest in the partnership. Nelson asserted a counterclaim, seeking reimbursement for the \$10,000 repaid to Lee, rent for use of the Emerald Coin machines used to replace Habib's machines, and reimbursement for storage expenses.

In late April 2008, the parties participated in mediation and entered into a Civil Rule (CR) 2A agreement resolving some, but not all, of the disputed issues.

The parties agreed:

- (a) A partnership was established on May 10, 2006;

- (b) Accounts include:
 - Profit and Loss and Revenue and Expenses by site
 - Status of equipment
 - Sites closed when and why value as of September 18, 2006
 - Sites still in existence, equipment located at sites and income
 - Partnership ended September 18, 2006, date of letter from Attorney Woodbery.
 - Value of good will if any, as of September 18, 2006
 - Liabilities
 - Tax Returns and B & O filings from May 10, 2006 to September 18, 2006
- (c) If he has any info relating to partnership – equipment under his control
- (d) All other issues reserved
- (e) Trial date continued until July 14, 2008.

Approximately two weeks after the mediation, Habib filed a motion to amend his complaint. Based on the recent discovery that Nelson sold Emerald Coin Vending, Habib sought to name Nelson as a defendant and add claims of fraud, constructive fraud, and fraudulent conveyance.

The court granted Habib's motion to amend the complaint and continued the trial to July 14. One week before trial, Nelson filed a motion to continue the trial for another 90 days. The court denied the motion to continue.

Habib and Nelson were the only witnesses in the two-day bench trial. The documentary evidence consisted primarily of the CR 2A agreement and copies of e-mail messages between Nelson and Habib. Neither party produced any tax returns, financial documents, or other financial information for the business.

Noting a remarkable "lack of documentation," the court considered

continuing the trial on its own motion and appointing a special master or forensic accountant. But the court rejected that approach as “pointless and perhaps unfruitful and expensive to both sides.” The court ruled that it had the authority to resolve the dispute in equity.

The court entered extensive written findings of fact and conclusions of law. The court found that a partnership was formed between Habib and Nelson in May 2006, and that Nelson acted as the managing partner.

After the transaction for the sale of Plaintiff’s sites with the buyer failed, a general partnership between Martin Habib and Jason Nelson personally was formed on May 10, 2006 in which Defendant Nelson agreed to continue to operate the remainder of the sites and equipment entrusted to him [sic] account for their operation and report profits and losses.

The Court finds that a partnership was formed based on the communication between them, the conduct of the parties and their agreement in the CR 2A agreement in mediation (Exhibit 5). Since Defendant Nelson was operating all aspects of the vending machine route after May 10, 2006, the Court finds he was the managing partner of the Partnership.⁵

The court also found that as the managing partner, Nelson was responsible for accounting for the revenues and expenses of the business, and the profits and losses for each site. Nelson produced no records “of any kind” and provided no explanation at trial for the absence of records.

No accounting in the form of books of account, tax returns or records of any kind were produced at trial or at any time during the term of the partnership of revenue or expenses by site under his management to show whether a profit or loss was made by the partnership.

⁵ Based on the determination that a partnership was formed, the court concluded Habib’s claims for fraud, constructive fraud, and fraudulent conveyance were moot.

The court concluded that Nelson breached the fiduciary duty he owed to the partnership by failing to provide an accounting.

A general partnership having been formed between Plaintiff and Defendant Jason Nelson as managing partner on May 10, 2006, a fiduciary duty was owed by each partner to the other which was breached by Defendant Jason Nelson in failing to provide prior to or at trial an accounting of revenue and expenses by site, profits and losses. Defendant Jason Nelson will not be heard to deny that the assets Plaintiff entrusted to him on May 10, 2006 had value.

The court determined that the value of the partnership was \$125,000.

The value of the assets entrusted to the managing partner on May 10, 2006 was \$125,000 based on a sale of the equipment, goodwill and sites for that price to the buyer Mr. Lee that was not completed.

The court ruled that Nelson was entitled to an offset of \$60,000, \$10,000 for the reimbursement to Lee, and \$50,000 in storage costs.

The court entered a judgment amount of \$65,000 in favor of Habib. The judgment also provides that Nelson is entitled to retain the physical assets of the business.⁶ The court denied Habib's request for prejudgment interest and attorney fees.

ANALYSIS

Standard of Review

We review a trial court's findings of fact and conclusions of law following a

⁶ Habib testified that he had no use for, and did not want any of the equipment returned to him.

bench trial to determine whether substantial evidence supports the findings of fact, and, if so, whether the findings support the conclusions of law. Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). We will not substitute our judgment for that of the trial court. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

Partnership

Nelson's primary argument is that substantial evidence does not support the trial court's finding that he and Habib formed a partnership. Under the Revised Uniform Partnership Act (RUPA), chapter 25.05 RCW, "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." RCW 25.05.055.

Nelson argues that a partnership did not exist because Habib remained the sole owner of the assets of the business, Habib did not share in the losses incurred by the business, and there was no mutual intent or "meeting of the minds" on the essential terms to form a partnership agreement. Nelson also argues that he was forced to consent to the partnership because Habib owed him money and refused to pay. We reject Nelson's arguments.

First, Nelson did not make any of the arguments below that he raises for the first time on appeal. At trial, when the court expressly asked about the stipulation in the CR 2A agreement regarding the existence of a partnership, Nelson confirmed that he was not challenging the stipulation, but instead contested the issues of breach and damages. Under RAP 2.5(a), this court may refuse to review a claim of error that was not raised in the trial court. Nevertheless, we conclude the CR 2A agreement and the evidence and testimony at trial support the trial court's determination that Nelson and Habib formed a partnership in May 2006.

Nelson contends that the CR 2A agreement is not binding because the agreement is incomplete, it was for "settlement purposes only and it clearly contemplated further mediation. . . ." Nelson also claims the agreement is not binding because the only parties to the litigation were Habib and Emerald Coin.⁷

CR 2A applies when (1) an agreement is made by the parties or attorneys "in respect to the proceedings in a cause," (2) "the purport of which is disputed," and is "assented to in open court on the record" CR 2A provides:

No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

⁷ While Nelson did not challenge the enforceability of the CR 2A agreement at trial, he mentioned the issue in a supplemental brief submitted post-trial.

Like a settlement agreement, a CR 2A agreement reached as a result of mediation is legally binding. Haller v. Wallis, 89 Wn.2d 539, 544, 573 P.2d 1302 (1978). Settlement agreements are governed by contract principles and are “subject to judicial interpretation in light of the language used and the circumstances surrounding their making.” Stottlemyre v. Reed, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983).

We reject Nelson’s assertion that he is not bound by the CR 2A agreement. The language of CR 2A does not preclude enforcement of an agreement because it does not resolve all of the issues in a case. See In re Patterson, 93 Wn. App. 579, 582-83, 969 P.2d 1106 (1999) (CR 2A only precludes enforcement of a disputed settlement agreement if it is not made in writing or put on the record).

The language of the CR 2A agreement also does not support Nelson’s assertion that the agreement was contingent on further mediation. In addition, Nelson does not deny that when he participated in the mediation, he was the sole owner of Emerald Coin, and that he entered into the CR 2A agreement on behalf of Emerald Coin. There is also no dispute that unbeknownst to Habib, Nelson sold Emerald Coin in May 2006. Substantial evidence supports the trial court’s finding that a partnership between Nelson and Habib was formed in May 2006.

Breach of Fiduciary Duty

Nelson also challenges the trial court’s conclusion that he breached his

fiduciary duty as the managing partner by “failing to provide prior to or at trial an accounting of revenue and expenses by site, profits and losses.” As a trustee for the partnership, the managing partner must keep records that enable him to provide “complete and accurate accounts of all the partnership business.” In re Tembreull's Estate, 37 Wn.2d 93, 102, 221 P.2d 821 (1950) (quoting Simich v. Culjak, 27 Wn.2d 403, 408, 178 P.2d 336 (1947)); Guntle v. Barnett, 73 Wn. App. 825, 835, 871 P.2d 627 (1994). If a managing partner breaches his duty to “render complete and accurate accounts of all of the partnership business,” he may be precluded from sharing in the partnership assets. Simich, 27 Wn. 2d at 408-10. In the absence of complete and accurate books and records “every presumption will be made against” the managing partner. Tembreull's Estate, 37 Wn.2d at 102 (quoting 2 Lindley, Partnership (2d Am. ed. 948)).

Although the parties did not explicitly assign Nelson the title of managing partner, the undisputed evidence established Nelson was acting as the managing partner of the business. It is also uncontroverted that Nelson produced no accounting or any other documentation of the partnership’s finances.

Even if he was the managing partner, Nelson claims he had no duty to produce partnership records because the partnership generated no profit from May to September 2006. Alternatively, Nelson contends that the e-mail messages he sent on July 5 and August 1 informing Habib of \$3,600 and \$3,000 in revenue satisfied any accounting duty. Finally, Nelson argues that the court’s

finding is erroneous because there was no evidence of undisclosed profits or self-dealing in violation of a partner's statutory duty of loyalty and duty of care under RCW 25.05.165.⁸

Nelson cites no authority in support of his argument that he was not required to maintain records because the business was operating at a loss. See RAP 10.3(a)(6). In any event, as a part of the CR 2A agreement, Nelson stipulated that "accounts" for the partnership include "Profit and Loss and Revenue and Expenses by site." The language of the CR 2A agreement also defeats Nelson's argument that the e-mail messages satisfied his accounting duty. Finally, while the court did not expressly find a breach of loyalty, this does not undermine the findings that support the conclusion that Nelson breached his fiduciary duty by failing to maintain records and provide an accounting. In sum, the trial court's determination that Nelson acted as the managing partner and breached his fiduciary duty to the partnership is supported by substantial evidence.

Valuation of the Partnership

Nelson challenges the court's valuation of the partnership. Nelson claims that the court's determination that the value was \$125,000 is not supported by the evidence. Nelson argues that the price Lee agreed to pay for the business was

⁸ RCW 25.05.165 sets forth the duties a partner owes to the partnership including a duty of care and the duty of loyalty.

not an appropriate measure of value because the sale to Lee did not close, and it only potentially represents the value of the business as of February 2006.

Nelson asserts “there is no evidence to reveal what the value of the business was as of May 10, 2006 except that we know it was substantially LESS than \$125,000.”

But where the managing partner responsible for the books does not provide an accounting, he waives his right to complain about the correctness of the court’s accounting. Cederlund v. Cederlund, 7 Wn. App. 320, 320-21, 499 P.2d 14 (1972); see also, Tembruell’s Estate, 37 Wn. 2d at 101-03 (managing partner’s failure to render complete and accurate accounts resulted in forfeit of right to share in partnership assets). Nelson possessed the only information which would have allowed the court to more precisely ascertain the value of the business and the partnership. That information was not provided to the court. Under the circumstances, the court valuation based on the price Lee agreed to pay is reasonable, and Nelson cannot complain.

Accounting

Nelson asserts that because there was no accounting, Habib’s lawsuit is “not ripe.” Nelson’s argument consists of a single sentence, and he cites no authority in support of his argument. See RAP 10.3(a)(6). “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996).

Nevertheless, Nelson's argument is without merit.

Although a partnership accounting was a precondition to an action between partners at common law, this is no longer the case under RUPA. Simpson v. Thorslund, 151 Wn. App. 276, 281-82, 211 P.3d 469 (2009) (partnership accounting not a precondition to an action between partners for misappropriation of company funds, unpaid wages, and failure to repay a loan).

RUPA grants "broad discretion to courts to fashion remedies in suits between partners." Simpson, 151 Wn. App. at 285. Principles of law and equity supplement the statutory scheme under RUPA where no specific statutory provision applies. See RCW 25.05.020(1) ("Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter."). "Although the court's equitable discretion is subject to partnership statutes, RUPA does not do away altogether with equitable considerations." Horne v. Aune, 130 Wn. App. 183, 197-98, 121 P.3d 1227 (2005).

Below, Nelson relied on pre-RUPA case law to argue that no action could be maintained prior to a full partnership accounting. However, under RCW 25.05.170(b)(iii), a partner may maintain an action against another partner "with or without an accounting" to "compel a dissolution and winding up of the partnership business under RCW 25.05.300[.]" We conclude the court did not err in resolving the partnership dispute without an accounting.⁹

⁹ Nelson also challenges several of the trial court's other factual findings, none of which implicate the issues he raises on appeal. Nevertheless, with respect to the court's findings that by

Motion to Continue

Nelson argues that the court abused its discretion in denying his motion to continue the trial. Nelson requested a 90-day continuance to enable the parties to engage in further mediation and allow him more time to conduct discovery on the claims asserted in the amended complaint. We conclude the court did not abuse its discretion in denying Nelson's motion to continue that was filed one week before trial. See Coggle v. Snow, 56 Wn. App. 499, 504, 784 P.2d 554 (1990) (this court reviews the trial court's denial of a continuance for manifest abuse of discretion).

Cross Appeal

In his cross appeal, Habib contends the trial court erred in offsetting the judgment amount for the storage costs incurred by Nelson. Contrary to Habib's argument, neither Tembruell's Estate nor Cederlund prevents the court from exercising its discretion to reduce the judgment amount. And the court's finding that Nelson paid approximately \$50,000 in storage costs is supported by the testimony undisputed at trial.

Habib also contends the trial court abused its discretion in declining to award attorney fees after finding that Nelson breached his fiduciary duty to the

early 2006, Nelson had taken over all of Habib's sites, that Lee made three payments before rescinding the contract to purchase the business, and that Nelson possessed all of the physical assets of the business, we conclude that the findings are supported by the trial testimony. Nelson assigns error to several additional findings of fact, but does not argue that those findings are not supported by substantial evidence. Absent argument, an appellant waives an assignment of error. RAP 10.3(a)(4).

partnership.¹⁰ Habib also seems to suggest that the court unreasonably declined to award him fees based on his failure to provide financial documents establishing the net income of the business before Nelson assumed responsibility for the business.

Habib relies on Guntle v. Barnett, 73 Wn. App. 825, 837, 871 P.2d 627 (1994) (declining to award fees where both partners breached fiduciary duties), and Hsu Ying Li v. Tang, 87 Wn.2d 796, 799-801, 557 P.2d 342 (1976) (awarding fees where court found that one party breached his fiduciary duties). But these cases do not require a court to award attorney fees when a partner breaches his fiduciary duty to the partnership. Guntle, 73 Wn. App. at 836. Whether to award attorney fees in a particular case is a matter addressed to the discretion of the trial court. Guntle, 73 Wn. App. at 836-37. Here, the trial court did not base its decision to deny fees on any specific conduct. Rather, in assessing the totality of the circumstances, including the offset to the judgment amount, the court concluded that fees were not appropriate. The trial court did not abuse its discretion in declining to award attorney fees and costs to Habib.¹¹

We affirm.

¹⁰ Nelson also claims he was entitled to attorney fees because he was forced to defend against Habib's accounting action and a number of claims without an evidentiary basis. But Nelson fails to assign error, designate a section of his brief to the argument about fees, or cite legal authority. See RAP 10.3. Even if we were to consider the argument, there is no basis for Nelson's contention that Habib's lawsuit was premature. And because the court found that Nelson breached his fiduciary duty and awarded judgment in favor of Habib, his argument that Habib's other claims were baseless is without merit.

¹¹ Likewise, we deny the requests for fees on appeal.

WE CONCUR:

Leach, J.

Cox, J.