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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

1680 PROPERTY TRUST, et al, Plaintiffs and Appellants, v. NEWMAN TRUST, et al., Defendants and Respondents.	B207613 (Los Angeles County Super. Ct. No. BC322141)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Terry A. Green, Judge. Affirmed in part, reversed in part, and remanded.

Law Offices of Richard A. Love, Richard A. Love, and Beth A. Shenfeld for Plaintiffs and Appellants.

The Vittal Law Firm and J. Anthony Vittal for Defendants and Respondents Ampton Investments, Inc. and Laurence N. Strenger.

Dwyer, Daly, Brotzen & Bruno, Toni Rae Bruno and Steven D. Downer for Respondent Newman Trust by and through Anne P. Newman as Trustee.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of **DISCUSSION** parts C and D.

INTRODUCTION

In the published portion of this opinion, we affirm the judgment in favor of the defendant and respondent Newman Family Trust[1] based on Code of Civil Procedure section 366.2 (section 366.2)—one-year period of limitations after death. We hold that the section 366.2 period of limitations is applicable to fraud claims based on statements of the decedent on behalf of a trust of which he was trustor and trustee, even though the action is against the successor trustee. In the unpublished portion of this opinion, we reverse the judgment in favor of other defendants.

BACKGROUND[2]

Plaintiffs and appellants 1680 Property Trust, Michael L. Epstein Trust, Stephen Ellis Gordon and Linda S. Gordon Revocable Trust, and the Lamonica Family Trust[3] (collectively plaintiffs) are limited partners of Orange Mall Development Associates (OMDA) and Shoprop Associates (Shoprop), which entities were prior owners of Mall of Orange (the Mall), a retail center located in Orange, California. Prior to October, 1995, the general partners of OMDA and Shoprop consisted of Newman Family Trust and

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1 Newman Trust originally was sued as "Newman Family Trust Established November 17, 1993." The second amended complaint was amended by interlineations to show the correct designation of Newman Trust to be "Anne Newman as successor trustee of the Newman Family Trust," whom we refer to in that capacity as Newman Trust.

2 In reviewing a motion for summary judgment, we must consider all the evidence and all of the inferences reasonably drawn therefrom, and we must view such evidence in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) We state the facts in conformity with this standard of review.

3 Ruth Ann Runnels Lamonica was substituted in as Trustee of the Lamonica Family Trust in place of Joseph B. Lamonica, deceased. Some of the individuals had assigned their interests to trusts of which they became trustees.

LeRoy H. Brettin. Harry Newman, Jr. (Newman) and Anne P. Newman were trustors of Newman Trust until Newman's death on October 19, 2001. Harry Newman and Anne P. Newman were co-trustees of Newman Trust and assigned all their rights in the partnership involved in this case to Newman Trust. After Newman's death, Anne P. Newman became the successor trustee of Newman Trust. The record does not contain the Declaration of Trust but does include an amendment to the Declaration of Trust. That amendment was pursuant to the Declaration of Trust and provides, "In the event the NEWMAN FAMILY TRUST dated November 17, 1993, is or becomes a General Partner of any partnership, then in that event HARRY NEWMAN, JR. shall be the only acting Trustee of the NEWMAN FAMILY TRUST dated November 17, 1993, for purposes of making any partnership decision." Thereafter, Harry Newman signed documents, "Harry Newman, Jr., Trustee and only Acting Trustee for purposes of making any partnership decision, the Newman Family Trust, General Partner."

In 1996, Newman Trust was a general partner in Sea-Tac Mall, a limited partnership that owned a mall near Seattle, Washington. Plaintiffs had no interest, direct or indirect, in the Sea-Tac Mall.

Defendant Laurence N. Strenger (Strenger) is a California attorney who was Newman's personal lawyer and who represented Newman in various business interests. Strenger is a shareholder of or principal in defendant Ampton Investments, Inc., a California corporation. (Strenger and Ampton are sometimes referred to as the Ampton defendants.) In October 1995, LeRoy H. Brettin assigned his interests in OMDA and Shoprop to Newman Shopping Center Developments, Inc., which became a general partner of both OMDA and Shoprop.

In 1997, Newman, on behalf of Newman Trust, informed plaintiffs of a refinancing of the Mall, with the lender being Nomura Asset Capital Corporation (Nomura). The Ampton defendants facilitated this transaction. In 2002, after Newman died and his wife, Anne P. Newman, became the trustee of Newman Trust, the Mall was sold.

In 2004, plaintiffs filed their complaint against defendants for breach of fiduciary duty and an accounting, alleging that in order to obtain their consent to the refinancing, leading ultimately to the distress sale of the Mall, defendants concealed from them vital information concerning the Nomura transaction, including that it was unnecessary; it was done to induce Nomura to refinance another mall—the Sea-Tac Mall—in which defendants, but not plaintiffs, had an interest; plaintiffs' equity interests would be diluted; Nomura was given certain buy-sell rights that jeopardized plaintiffs' interests; plaintiffs would lose certain voting rights; and the Ampton defendants were to be paid unnecessary and unreasonable fees. As a result, plaintiffs claim they lost substantial equity in the Mall, which ultimately was sold, with unfavorable consequences for plaintiffs.

Following discussions and an appeal to this court, Anne P. Newman (in her individual capacity), Shoprop, and OMDA were no longer parties to the action.[4] We held in that earlier appeal that plaintiffs did not allege facts showing that Anne P. Newman committed any breach of fiduciary duty or caused any damages. Plaintiffs proceeded against the Ampton defendants and Newman Trust on the third amended complaint for breach of fiduciary duty based on fraud. Those remaining defendants moved for summary judgment. The trial court granted summary judgment, holding that plaintiffs had no standing to challenge the alleged fiduciary breaches in 2002 and that plaintiffs' claims were barred by the statute of limitations—Code of Civil Procedure section 338, subdivision (d). The trial court did not rely upon section 366.2, which had been raised in the trial court. Plaintiffs timely appealed.

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[4] Anne P. Newman remains a party as the successor trustee of Newman Trust.

DISCUSSION

A. Standard of Review

"We review the grant of summary judgment de novo. (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19 [17 Cal.Rptr.2d 356].) We make 'an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law.' (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222 [38 Cal.Rptr.2d 35].) A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849, 853 [107 Cal.Rptr.2d 841, 24 P.3d 493].)" (*Moser v. Ratinoff* (2003) 105 Cal.App.4th 1211, 1216-1217.)

"Although resolution of a statute of limitations defense normally poses a factual question reserved to the trier of fact, summary adjudication will nonetheless be proper 'if the court can draw only one legitimate inference from uncontradicted evidence regarding the limitations question.' (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582 [35 Cal.Rptr.2d 876]; *FNB Mortgage Corp. v. Pacific General Group* (1999) 76 Cal.App.4th 1116, 1126 [90 Cal.Rptr.2d 841].)" (*Marin Health Care Dist. v. Sutter Health* (2002) 103 Cal.App.4th 861, 871.) Whether a party is barred by the one-year limitations period applicable to claims of creditors against a decedent's estate is a legal issue subject to de novo review. (*Embree v. Embree* (2004) 125 Cal.App.4th 487, 491.)

B. Section 366.2—Newman Trust

Section 366.2, subdivision (a), provides, "If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply." "'The overall intent of the Legislature in enacting Code of Civil Procedure former section 353 [(now § 366.2)] was to protect decedents' estates from creditors' stale claims. [Citations.] "[T]he drafters of former Code of Civil Procedure section 353 and current Code of Civil Procedure section 366.2 believed the limitation period the statute imposes serves 'the strong public policies of expeditious estate administration and security of title for distributees, and is consistent with the concept that a creditor has some obligation to keep informed of the status of the debtor.' (Recommendation Relating to Notice to Creditors in Estate Administration [(Dec. 1989)] 20 Cal. Law Revision Com. Rep. (1990) p. 512.)"'" (*Levine v. Levine* (2002) 102 Cal.App.4th 1256, 1263–1264, quoting *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 308 (*Rumsey*).)

Newman Trust contends that section 366.2 bars the claims against it. There is no dispute that plaintiffs' cause of action accrued more than one year prior to the filing of this action in 2004. Any claims against Anne P. Newman, as successor trustee for acts after Newman's death in 2001, are foreclosed by this court's earlier opinion concluding that plaintiffs had failed to allege facts showing any wrongdoing by Ms. Newman or damages from any of her acts. Section 366.2 imposes a one-year limitations period on claims against a decedent. Plaintiffs assert that the claims are not against Newman, but against Newman Trust, and therefore section 366.2 is inapplicable.

Although the application of section 366.2 was raised before the trial court, the trial court did not resolve that issue. Nevertheless, we may affirm the summary judgment on a ground that was not the basis of the trial court's ruling. We are not bound by the trial court's stated reasons for its summary judgment ruling. Instead, we examine the facts

before the trial court and then independently determine their legal effect. (*Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1143.)

Newman and Anne P. Newman were the trustors and trustees of Newman Trust, an inter vivos trust, denominated as a family trust, and into which they transferred their property interests. They had the power to and did amend Newman Trust to provide that Newman would be the only acting trustee of Newman Trust for purposes of decisions involving the partnerships owned by Newman Trust. Newman's communications that are the subject of this action were made as trustee of Newman Trust and on its behalf. When Newman died, Ms. Newman became the successor trustee, and the trust was then irrevocable, whether or not it had been prior to Newman's death. Anne P. Newman, as successor trustee, succeeded to all of "the rights, duties, and responsibilities of [her predecessor, Newman]." (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1131.)

"Unlike a corporation, a trust is not a legal entity. Legal title to property owned by a trust is held by the trustee . . . 'A trust . . . is simply a collection of assets and liabilities. As such, it has no capacity to sue or be sued, or to defend an action.'" (*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1343.) The trust estate can be reached for tortious acts of the trustee on behalf of the trust. (Prob. Code, § 18004 ["A claim based . . . on a tort committed in the course of administration of the trust may be asserted against the trust by proceeding against the trustee in the trustee's representative capacity, whether or not the trustee is personally liable on the claim"]; *Galdjie v. Darwish, supra,* 113 Cal.App.4th at p. 1349; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trust, § 248, p. 827; see also 4 Scott and Ascher on Trusts (5th ed. 2007) § 26.5, p. 1897.)

The California Law Revision Commission in discussing proposed Probate Code section 18004 prior to its enactment stated, "The third person should not have to be concerned with the source of the fund that will be used to pay the claim. (Fn. omitted.) The proposed law adopts this position. Hence, a third person with a claim against the trust or trustee may assert the claim against the trust by bringing an action against the trustee in the trustee's representative capacity. (Fn. omitted.) The question of ultimate liability as between the trust estate and the trustee may then be determined in proceedings

concerning the internal affairs of the trust or may be settled informally among the parties to the trust. (Fn. omitted.)" (Recommendation Proposing the Trust Law (1985) 18 Cal. Law Revision Com. Rep. p. 592.)

There is no meaningful distinction between the liability of the decedent trustee who committed a tort as trustee and the successor trustee in her capacity as trustee, except that the decedent trustee's estate might also be liable. Plaintiffs attempt to draw a distinction between the decedent trustee, on the one hand, and the trust (which, as noted, is not an entity or proper party) and successor trustee, on the other hand, for purposes of the application of section 366.2. The authorities do not support any such distinction.

In *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, the court held that a claim against the decedent's living trust for compensation for caring for the decedent before her death was untimely. The court said "there is no question the one-year limitation period applies to [plaintiff's] claim against the trust." (*Id.* at p. 256.) The court added, "As we stated in *Dobler v. Arluk Medical Center Industrial Group, Inc.* (2001) 89 Cal.App.4th 530, 535–536 [107 Cal.Rptr.2d 478], 'This uniform one-year statute of limitations applies to actions on all claims against the decedent which survive the decedent's death.' (Accord, *Levine, supra*, 102 Cal.App.4th at pp. 1261–1262; *Estate of Yool* (2007) 151 Cal.App.4th 867, 876 [60 Cal.Rptr.3d 526]; see *Bradley v. Breen* (1999) 73 Cal.App.4th 798, 800 [86 Cal.Rptr.2d 726] ['[Code of Civil Procedure section 366.2] governs causes of action against a decedent that existed at the time of death, 'whether accrued or not accrued'].)" (*Ibid.*)

One authority has stated, "There is a one-year statute of limitations for all actions against the decedent for which the statute of limitations has not run at the time of the decedent's death. (Code Civ. Proc., § 366.2.) This statute applies to claims against a living trust. (See Code Civ. Proc., § 366.2(b)(3).)" (Gaw, *Administering Single-Person Trust after Settlor's Death*, 2 Cal. Trust Admin. (CEB 2d. ed. 2009) § 13.30, p. 860; see Ross, Cal. Practice Guide: Probate (The Rutter Group 2008) ¶ 2:117.4c, pp. 2-78.8 to 2-78.9.)

In *Levine v. Levine, supra,* 102 Cal.App.4th at page 1265, the court stated, "In sum, neither the language of the statute nor the policy behind it supports appellant's argument that the one-year statute of limitations should be disregarded in suits involving trust assets where there has been no proceeding to administer the estate of the decedent and no notice to creditors. *The language is clear that the one-year statute applies to all debts of the decedent regardless of whom the claims are brought against.*" (Italics added.) Thus, the court applied section 366.2 to bar a claim against a trustee of an irrevocable trust in her representative capacity for the wrongful acts of her deceased husband in withdrawing funds from Uniform Transfer to Minors Act investment accounts for his grandchildren. In *Estate of Yool, supra,* 151 Cal.App.4th at page 872, the court stated that the California Law Revision Commission "made it clear that 'the one year statute of limitations is intended to apply to any *action on a debt of the decedent,* whether against the personal representative . . . or against another person, such as a distributee . . . a person who takes the decedent's property and is liable for the decedent's debts . . . *or a trustee.*'" (Second italics added.)

Anne P. Newman states that upon Newman's death, she became the successor trustee of an irrevocable trust. Because the Newman Trust declaration is not in the record, we cannot ascertain if the inter vivos Newman Trust was revocable or irrevocable. Plaintiffs make no suggestion that the Trust was at all times irrevocable and argue that the revocability of the Trust is of no significance in this case.[5] Plaintiffs' contention is that their claims are against Newman Trust—or really against Ms. Newman as successor trustee—for the acts of Newman and not claims directly against Newman. Plaintiffs argue the authorities cited by Newman Trust involved allegations of personal liability of the decedent and the designation of the trust to reach the assets in the trust. Plaintiffs point out that section 366.2, subdivision (a) refers to "a person whom an action

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5 "Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor." (Prob. Code, § 15400.) A revocable inter vivos trust is recognized as "a probate avoidance device." (*Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 633.)

may be brought on a liability of the person," and that this is an action against Newman Trust, not against Newman.

Had Newman been alive, any tort action arising out of the acts alleged by plaintiffs would have been against him, either individually or as trustee, or both; and trust assets as well as his personal assets might have been reached for his liability. (See Prob. Code, § 18004; *Haskett v. Villas at Desert Falls* (2001) 90 Cal.App.4th 864, 880.) It would make no sense if the statute of limitations barring claims for a decedent's tortious action could be avoided by not pursuing a claim against the estate of the decedent but rather proceeding against the successor trustee of the decedent's trust. The purpose of section 366.2 is to expedite and "facilitate the orderly administration of the decedent's estate." (*Levine v. Levine, supra,* 102 Cal.App.4th at p. 1263.)

As the court in *Levine v. Levine, supra,* 102 Cal.App.4th 1256 stated in connection with an issue regarding tolling but which equally applies to plaintiffs' argument here, extending the statute of limitations for trusts "would create a substantial loophole in the statutory scheme, and lead to confusion and delay in settling estates. Trustees . . . not knowing whether it was safe to finalize distribution, could withhold assets as a reserve against the assertion of unknown claims. This result would negate the legislative intent behind the decision to enact the special limitations statute." (*Id.* at p. 1263.)

In discussing the broad purposes of section 366.2, the Supreme Court in *Rumsey, supra,* 24 Cal.4th 301, stated, "The overall intent of the Legislature in enacting Code of Civil Procedure former section 353 [now section 366.2] was to protect decedents' estates from creditors' stale claims. [Citations.] . . . [¶] The December 1989 California Law Revision Commission recommendation on the proposed legislation amending Code of Civil Procedure former section 353 explained that 'the one year statute of limitations is intended to apply *in any action on a debt of the decedent*, whether against the personal representative under Probate Code Sections 9350 to 9354 (claim on cause of action), *or against another person, such as* a distributee under Probate Code Section 9392 (liability of distributee), *a person who takes the decedent's property and is liable for the decedent's debts* . . . or a trustee.' [Citation.] It thus appears that when the amendments

to former section 353 were enacted, they were done so with the clear understanding and intent that such provisions would govern and apply to 'any action on a debt of the decedent,' regardless of whom the action was brought against . . . ." (*Rumsey, supra,* 24 Cal.4th at p. 308.) The court further stated, "The 1992 California Law Revision Commission comments to Code of Civil Procedure section 366.2, which superseded Code of Civil Procedure former section 353, reiterate the Legislature's intent that the one-year statute of limitations applies to *all* actions against a decedent on which the statute of limitations otherwise applicable had not run at the time of death. [Citation.]" (*Id.* at p. 308, fn. 6.)

It appears that whatever its form, the substance of the claims in this case is for the personal misconduct of the settlor/trustee on behalf of and for the benefit of the trust, that was completed entirely before the settlor/trustee died, and for which the settlor/trustee could have been held personally liable. The action is one that could have been "brought on a liability of the person" (§ 366.2, subd. (a)), and is based "'on a debt of the decedent'" (*Rumsey, supra,* 24 Cal.4th at p. 308) even though brought against the successor trustee. The successor trustee is the named party defendant only to pursue trust assets for the acts of Newman. Section 366.2 was intended to impose a time limit on such claims, "regardless of whom the action was brought against . . . ." (*Rumsey, supra,* 24 Cal.4th at p. 308.) Accordingly, the claims against Newman Trust are barred by section 366.2.

C. Statute of Limitations—Ampton Defendants

We previously held that plaintiffs stated a cause of action against the Ampton defendants for aiding and abetting Newman Trust's breaches of fiduciary duty. The Ampton defendants are not affected by Code of Civil Procedure section 366.2. We now address the defenses of the Ampton defendants.

1. Additional Facts

Before March 1997, OMDA and Shoprop owned 100% of the Mall, which was in a strong financial position, with an approximate total debt obligation of $10 million. By letters dated February 10, 1997, and March 3, 1997, Newman Trust informed plaintiffs that the Mall was being refinanced in order to retire an existing 10 percent floating rate mortgage with a new $28,250,000 mortgage at a 12-year fixed interest rate of 8 percent and a 30-year amortization rate, to obtain additional capital to re-tenant and redevelop the Mall, and to enable OMDA and Shoprop to acquire the partnership interests formerly held by LeRoy H. Brettin and transferred to Newman Shopping Center Developments, Inc. The March 3, 1997, letter solicited the limited partners' approval for the transaction and disclosed that as part of the refinancing, the OMDA and Shoprop partnership agreements would be amended to assign OMDA's and Shoprop's interests in the Mall to a new partnership known as H.M.A. Enterprises – Mall of Orange, L.P. (HMA), in exchange for a corresponding percentage ownership interest in HMA, and that a new entity named N.T.L. Mall of Orange, Inc. (NTL), a Delaware corporation 100% owned by Newman Trust, would be the general partner of HMA.

The March 3, 1997, letter further stated that the proposed lender for the transaction was Nomura, which would make a $28,250,000 loan to HMA, through a combination of a first mortgage, mezzanine debt, and capital loan, and that the allocation of the loans among the three financing mechanisms was to be determined by the Mall leasing results as of August 31, 1997. The letter also disclosed that the dilution in the OMDA and Shoprop partners' ownership interests, after the financing, would result in Nomura obtaining between a 30 percent and 50 percent interest in HMA, depending on the Mall's leasing results; that Harry Newman, Jr. would remain in control of HMA; and that Nomura would have the usual powers in the event of default.

By letter dated March 21, 1997, Newman Trust informed plaintiffs that the amount of the loan would be $26,000,000, allocated as $22,025,151.72 for the senior debt/first

mortgage, $1,790,427.34 for the mezzanine loan, and $2,184,420.94 for the capital loan; and that Nomura's partnership interest would be between 40 percent to 60 percent.

Plaintiffs contend that defendants concealed from plaintiffs, inter alia, the following information concerning the Nomura transaction: the financing was unnecessary for the financial well being of the Mall; simultaneously with the refinancing of the Mall, Newman Trust, on behalf of a different limited partnership in which plaintiffs had no interest, entered into a separate transaction with Nomura to refinance the Sea-Tac mall, in which plaintiffs had no ownership interest; the refinancing of the Sea-Tac mall was to allow Newman Trust to purchase the land lease on that property and to buy out another partner, none of which purposes benefited plaintiffs; Nomura was unwilling to refinance the Sea-Tac mall unless it also made the loan to refinance the Mall; Nomura was accorded the right to convert portions of the loan balance for the Mall into an equity ownership interest in HMA, thereby diluting plaintiffs' equity interest in HMA beyond that represented, and plaintiffs' interests in HMA would be subordinate to the equity interest acquired by Nomura; Nomura was accorded a buy-sell right, exercisable after September 1, 1998, to set a price at which it could either sell its equity interest in HMA to the other partners or purchase the remaining HMA partnership interests; plaintiffs would lose certain voting rights concerning the Mall; plaintiffs interests in the Mall were more significantly diluted than disclosed and their equity interests could be potentially lost; the Ampton defendants were paid an $850,000 brokerage fee out of the proceeds of the Nomura loan for the Mall; and there were unnecessary and unreasonable transaction costs. Plaintiffs further contend that they would not have consented to the transfer of the OMDA and Shoprop interests in the Mall had this information been disclosed to them.

Plaintiffs approved necessary steps in the Nomura refinancing of the Mall and potentially the transfer of the OMDA and Shoprop property interests in the Mall to HMA, and the transaction closed on March 26, 1997. In 1999, the loan balances were reallocated and converted to partnership interests in HMA. On October 16, 2000, Nomura invoked the buy-sell provision of the 1997 refinancing transaction (that had been

undisclosed to plaintiffs), offering to sell its Class B and C units or buy the interest it did not own for $7,500,000. To prevent Nomura from obtaining ownership of the Mall through exercise of the buy-sell provision, defendants filed a lawsuit against Nomura on December 8, 2000 seeking preliminary injunctive relief to what Newman said to plaintiffs was to "forestall this undesirable result." The relief was denied and Nomura filed a cross-complaint.

By letter dated December 12, 2000, Newman, as trustee of Newman Trust, advised plaintiffs of Nomura's attempt to exercise its buy-sell right, the $7,500,000 offer price, and that a lawsuit had been filed in order to prevent Nomura from obtaining ownership of the Mall. The letter stated that if Nomura's buy-sell transaction closed, plaintiffs would receive nothing for their equity interests held by OMDA and Shoprop in HMA. The letter also stated that the Mall was believed to be worth $3,000,000 more than the $15,500,000 first mortgage.

After the death of Newman on October 19, 2001, Anne P. Newman became an unelected "de facto" general partner of OMDA and Shoprop. She became the trustee of Newman Trust, which was the general partner of those entities. The partnership agreements for those entities provided that the partnerships were to dissolve upon the death of the general partner and new partnerships would be formed in which the remaining partners would elect a new general partner.

Newman Trust and the Ampton defendants entered into a settlement agreement with Nomura, memorialized in a writing dated March 18, 2002. The terms of the settlement were as follows: By March 20, 2002, Nomura was to be paid $5,850,000 as the redemption price for certain of its equity interest in HMA; by March 20, 2002, Nomura was to be paid a $750,000 deposit (denominated as the "Sea-Tac deposit") pursuant to a loan purchase agreement enabling Newman Trust to purchase $52 million in obligations owed by Sea-Tac to Nomura for a total purchase price of $38,750,000; defendants would deliver to Nomura a grant deed to the Mall and a judgment of foreclosure in favor of Nomura in the civil action, both of which would be returned to

defendants unless there was not timely payment of the $5,850,000 redemption price and/or the $750,000 Sea-Tac deposit.

On February 25, 2002, HMA entered into an agreement to sell the Mall to a buyer for a purchase price of $24,831,164. The terms of the transaction included the buyer's assumption of the $15,172,634 first mortgage, payment to HMA of $7,800,000 in cash, payment to Ampton of $1,100,000 fee in connection with the sale of the Mall, payment of $300,000 to Newman Trust's attorneys, and payment of $459,000 to a real estate broker for Newman Trust. Upon learning of the fees to be paid to the Ampton defendants, plaintiffs objected to the fees and requested a written justification for those fees. Plaintiffs contend that Newman Trust and Ms. Newman ignored this request. In April 2002, the prospective buyer of the Mall demanded and received a $635,000 reduction in the purchase price. The sale closed by April of 2002.

Despite requests in 2002, plaintiffs did not receive certain information concerning the transaction, until after the closing. In 2003, the Sea-Tac Mall transaction was completed, but neither HMA, OMDA, nor Shoprop was repaid a $750,000 Sea-Tac deposit made out of the proceeds of the sale of the Mall. Plaintiffs allege that as a result of the "distress sale of the Mall" in excess of $30 million in equity or value of the Mall was lost to OMDA and Shoprop. The plaintiffs were informed that the services of the advisors "made this sale possible and provided a basis for some payment to the limited partners, in lieu of a loss of the asset with no distributions at all." The amount for distribution was about $1.68 million. There were various values estimated by plaintiffs at earlier times of $65 million, $35 million to $40 million and $25 million to $625 million (as late as 2002). Defendants do not deal with any lack of specificity of losses by the limited partners.

Plaintiffs contend that defendants concealed from plaintiffs the "exhorbitant" unnecessary and inappropriate fee paid to the Ampton defendants out of the rights or assets of the partnership in which plaintiffs had an interest; the lack of necessity of the Newman loan; and the use of funds to benefit Sea-Tac. They further contend that monies received from Sea-Tac should have been paid to OMDA, Shoprop, and plaintiffs and that

the Ampton defendants were not valid general partners of either OMDA or Shoprop. They also contend that the Ampton defendants were not properly licensed to receive broker's or agent's fees.

According to plaintiffs the alleged breaches involved the fraudulent conduct in 1997 in connection with the Nomura transaction and the partnership restructuring and the 2002 settlement of the Nomura litigation by which Newman Trust obtained an advantage at the expense of plaintiffs, who had limited partnership interests. Plaintiffs assert that there was a question of fact whether they were on inquiry notice for purposes of the statute of limitations and that they did not incur damages until the forced sale of the partnership in 2002, so that the statute of limitations did not apply. They also argue that the four year period of limitations is the proper one. They contend that they had a direct claim against the defendants and that the Ampton defendants forfeited their claim of lack of standing as to the 1997 transaction.

2. Applicable Standard of Review

When facts are susceptible to conflicting inferences as to whether a party had notice of circumstances to put him or her on notice of facts such that the statute of limitations begins to accrue, a question of fact arises that must be resolved by the trier of fact. (*Hobart v. Hobart Estates Co.* (1945) 26 Cal.2d 412, 440; *Tognazzini v. Tognazzini* (1954) 125 Cal.App.2d 679, 687.)

3. Applicable Statute

Defendants assert that the breach of fiduciary duty is premised on fraud in connection with the Nomura loan transaction, which took place in 1997. The complaint was not filed until September 27, 2004. Defendants argue that the three year statute of limitations applicable to fraud claims (Code Civ. Proc., § 338, subd. (d)) bars the claims.

Plaintiffs contend that the four year statute of limitations for breach of fiduciary duty (Code Civ. Proc., § 343) applies. (See *Buick v. World Savings Bank* (E.D. Cal. 2008) 565 F.Supp.2d 1152 [under California law four year statute of limitations applies

to breach of fiduciary duty claim].) Defendants counter that despite the label, the gravamen of the claim was fraud—concealment of material facts to induce plaintiffs to consent to the transaction.

"To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action. [Citations.] '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' [Citation.]" (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23, citing *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 214, and *Maguire v. Hibernia S. & L. Soc.* (1944) 23 Cal.2d 719, 733.) "What is significant for statute of limitations purposes is the primary interest invaded by defendant's wrongful conduct. [Citation.]" (*Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1207; see *Day v. Greene* (1963) 59 Cal.2d 404, 410-411 [even if a complaint may be labeled as a breach of contract action, if the gravamen of the claim is fraud, the three-year period prescribed in § 338 governs, rather than the period applicable to contracts]; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 653, p. 864 ["if fraud . . . is the basis of the legal injury (the 'ground' of the action), the section applies regardless of whether the complaint seeks legal or equitable relief or pleads a cause of action in tort or contract"].) In *Hatch v. Collins* (1990) 225 Cal.App.3d 1104, 1110, the court held that although the complaint labeled the cause of action as one for breach of fiduciary duty, the three year statute of limitations for fraud causes of action applied because the allegations were of a conspiracy based on fraud.

Here, the allegations sound in both fraud and a traditional breach of fiduciary duty. As noted, plaintiffs plead fraudulent concealment, but they also allege the diversion of assets, failure to pay monies owing on account, conflicts of interest, self dealing, and failure to comply with requirements of the partnership agreement. Plaintiffs argue, that "the breaches alleged here involve two series of actions by defendants: fraudulent conduct in 1997 in connection with the Nomura transaction and partnership restructure, and the 2002 settlement of the Nomura litigation in which the Trust/Newman secured an

advantage at the expense of the limited partners." Plaintiffs therefore concede that allegations relating to the 1997 transaction are based on "fraudulent conduct." In their complaint, they allege that the 2002 settlement and ultimate "distress sale" arose out of the fraudulent conduct in 1997. And in their opening brief, they assert that defendants' actions in 2001 constituted a continuance of concealment of facts. Indeed, plaintiffs argue that what occurred in 2002 constituted the damages that resulted from the 1997 transaction. Accordingly, based on the gravamen of the claims (see *Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 786, fn. 2), the three-year statute of limitations applicable to fraud (Code Civ. Proc., § 338, subd. (d)) claims applies.

Plaintiffs have pleaded one cause of action against all the defendants encompassing the 1997 and 2002 transactions. Although they pleaded a second cause of action for an accounting, which is an equitable claim either when a fiduciary relationship exists or the accounts are so complicated that an ordinary legal action demanding a specified amount is impractical (see 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 819, p. 236), the accounting claim is based on the first cause of action for breach of fiduciary duty. Moreover, plaintiffs do not contradict defendants' assertion on appeal that the accounting cause of action has been abandoned.

4. Accrual of the Cause of Action

Plaintiffs first contend that their claims did not arise from the 1997 transaction until they sustained damages in 2002. Plaintiffs refer to *City of Vista v. Robert Thomas Securities, Inc.* (2000) 84 Cal.App.4th 882, 886, citing *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 596-597), for the proposition that when "damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained." In *City of Vista,* the court held that there was a triable issue of fact as to when the plaintiff suffered monetary loss. There, the city brought a claim for misrepresentation concerning the markup in connection with the purchase of securities interest only strips. The city argued that it was not until the last interest payment that the city would be able to determine whether it would lose money. Under

that theory, for statute of limitations purposes, a cause of action would not accrue until the last payment established such a loss. Defendant said that the securities have lost value earlier so that the statute of limitations accrued at an earlier date. The court held there was a triable issue of fact as to when the city suffered monetary loss. It is established that "[i]f the last element of the cause of action to occur is damage, the statute of limitations begins to run on the occurrence of 'appreciable and actual harm, however uncertain in amount,' that consists of more than nominal damages." (*San Francisco Unified School Dist. v. W.R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326, citing *Davies v. Krasna* (1975) 14 Cal.3d 502, 513-514.)

Damages is an element of both the fraud and breach of fiduciary duties causes of action. (See 5 Witkin, Cal. Procedure, *supra,* Pleading, § 731, p. 150 (fraud); *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101 (fiduciary duty).) Defendants suggest that in cases involving a breach of a fiduciary relationship, actual damages are not necessary for a cause of action, citing e.g., *Werschkull v. United California Bank* (1978) 85 Cal.App.3d 981, 1004. The issue in *Werschkull* was whether an award of punitive damages could be supported by the award of actual damages when damages had been found by the jury, but the amount of damages was not ascertainable. The court held that plaintiffs suffered actual damages in an unspecified amount as a result of defendant's fraudulent act of concealment so as to provide support for the punitive damage award. Thus because *Werschkull* dealt with entitlement to punitive damages and not the accrual of a cause of action for statute of limitations purposes, it does not fully support defendants' position. And, although Witkin noted, "Several cases dispense with the showing of injury where there is constructive fraud consisting of a violation of a fiduciary relationship" (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 544, p. 672, citing *Menefee v. Oxnam* (1919) 42 Cal.App. 81, 87), that statement does not purport to state the general rule.

In *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, the Supreme Court held that a person wrongfully induced to hold stock could pursue a claim for fraud. The court did not discuss whether plaintiff adequately pleaded damages. In concurring opinions, Justice Baxter said that there can be damage if the value of stock is permanently

diminished. (*Id.* at p. 195.) Justice Kennard said in her concurring opinion that a diminution in value is sufficient damage. (*Id.* at pp. 186-187.) Thus, two justices agree that there can be damage even before the sale of a security. They disagree, however, on which circumstances are necessary for there to be such damages. We agree with these two justices that there can be damages to an investor before the sale of the equity, whether there is just a diminution of value or whether the value is permanently diminished. In cases involving tort damages to real property, a plaintiff is generally entitled to receive the lesser of diminution of property value or the cost of restoration. (See *Green v. General Petroleum Corp.* (1928) 205 Cal. 328, 336; *Ferraro v. Southern Cal. Gas Co.* (1980) 102 Cal.App.3d 33, 50; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 576.) And derivative actions can be brought for a decrease in the value of stock. (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305.) Thus, diminution of value of an asset as damages is not unprecedented.

Plaintiffs' contention here is that notwithstanding the concealment and misrepresentations that took place in 1997 and 2001, they did not sustain actual damages until the forced sale of the Mall in April of 2002 when they lost their entire interest in the Mall and sustained a loss in their investment. But defendants might be able to show that plaintiffs did incur damage in 1997 from the transaction about which they complain. Plaintiffs set forth facts that as a result of the refinancing and the payments to the Ampton defendants, they sustained a substantial diminution in the value of their partnership interests in 1997. As in *City of Vista, supra,* 84 Cal.App.4th 882, there is a question of fact as to when plaintiffs suffered pecuniary damages for purposes of determining when the statute of limitations accrued.

5. Inquiry Notice

Plaintiffs next contend that even if they suffered damages in 1997 that would suffice for purposes of accrual of the fiduciary duty cause of action, the accrual of that claim was nevertheless delayed by defendants' concealment of their cause of action. According to plaintiffs, Newman Trust and the Ampton defendants were fiduciaries; the

Ampton defendants aided and abetted a breach of fiduciary duty owed to plaintiffs;[6] and plaintiffs did not actually discover the alleged misconduct until February of 2002, when they first learned the true facts in connection with the 1997 transaction.

A cause of action for fraud is not "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).) The courts have interpreted this section to include both inquiry notice and actual notice. (See *State of California ex. rel. Metz v. CCC Information Services, Inc.* (2007) 149 Cal.App.4th 402, 415-416.) Inquiry notice means that the plaintiff has reason to discover the cause of action. "A plaintiff has reason to discover a cause of action when he or she 'has reason at least to suspect a factual basis for its elements.'" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807.)

"If the plaintiff and the defendant are in a confidential relationship, there is no duty of inquiry until the relationship is repudiated. The nature of the relationship is such as to cause the plaintiff to rely on the fiduciary, and awareness of facts that would ordinarily call for investigation does not excite suspicion under these special

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6 As stated in our earlier opinion, "plaintiffs contend their third amended complaint states a cause of action against the Ampton defendants for aiding and abetting Newman Trust's alleged breaches of fiduciary duty. To state a claim for liability based on aiding and abetting the commission of intentional tort, plaintiffs must allege that the Ampton defendants knew Newman Trust's conduct constituted a breach of duty and that they gave substantial assistance or encouragement to so act, or that the Ampton defendants gave substantial assistance to Newman Trust in accomplishing a tortious result and the Ampton defendants' own conduct, separately considered, constituted a breach of duty to plaintiffs. (See *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846; Rest.2d Torts (1979) § 876, subds. (b), (c).)

When analyzing the sufficiency of a claim for aiding and abetting a breach of fiduciary duty, a reviewing court must first "'identify precisely the breach of fiduciary duty for which [the plaintiffs] seek[] to hold [the defendants] liable.' [Citation.]" (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1149 (*Casey*).) "[U]nder California law an aider and abettor must have 'actual knowledge of the primary violation.'" (*Id.* at p. 1148, quoting *Neilson v. Union Bank of California, N.A.* (C.D. Cal. 2003) 290 F.Supp.2d 1101, 1119.)" (See also *Pierce v. Lyman, supra,* 1 Cal.App.4th at p. 1100.)

circumstances. This qualification has been applied in cases involving strict trusts and various other confidential relationships. [Citations.] [¶] . . . [¶] Once the plaintiff becomes aware of facts that would make a reasonably prudent person suspicious, the duty to investigate arises, and the plaintiff may then be charged with knowledge of facts that would have been discovered by an investigation." (3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 663, pp. 877-878.) Thus, it has been said when there is a fiduciary relationship between the parties "the same degree of diligence is not required." (*Hobart v. Hobart Estate Co., supra,* 26 Cal.2d at p. 440; see *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 855-856.) Plaintiff does, however, have a duty to investigate even where a fiduciary relationship exists when "he has notice of facts sufficient to arouse the suspicions of a reasonable man." (*Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 563; *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 131 ["The only distinction between rules of discovery in the ordinary fraud case and those in the confidential relationship category is that in the latter situation the duty to investigate may arise later by reason of the fact that the plaintiff is entitled to rely upon the assumption that his fiduciary is acting in his behalf. But, once the plaintiff becomes aware of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with the knowledge of facts which would have been discovered by such an investigation"].)

Plaintiffs allege in their third amended complaint and supporting declarations in opposition to the motions for summary judgment that Newman Trust concealed from them material terms of the Nomura transaction, including alleged conflicts of interest that existed between Newman Trust and plaintiffs; that the Nomura financing transaction was entered into so that Newman Trust could also refinance the Sea-Tac mall; that Nomura would have the right to further dilute plaintiffs' interests beyond the disclosed dilution and the right to exercise a buy-sell provision enabling Nomura to set a price at which it could either sell its equity interest or purchase the remaining equity interests in HMA; and plaintiffs would lose any voting rights concerning the Mall. Plaintiffs claim that had they known these facts, they would not have consented to the transaction. Plaintiffs

allege that the Ampton defendants "knew of, and knowingly participated in" the "omissions made by defendants in conjunction with obtaining plaintiffs' uninformed approval of the Nomura transaction"; "[t]he failure or refusal by defendants to pay what was and is owed to plaintiffs[] by virtue of their limited partnership interests in OMDA and Shoprop"; "[t]he transfer, conversion, and/or appropriation by defendants to themselves and to their benefit of the assets or property owned by or due to OMDA and Shoprop, and the self-dealing(s) by defendants to the detriment of plaintiffs"; and "[t]he waste and unreasonable disposal by defendants of assets and moneys of OMDA and Shoprop without good or valuable consideration of reasonable business basis, in bad faith and without reasonable benefit to the limited partnerships, including but not limited to, the payment and allowance of exorbitant fees to Ampton, Strenger . . . ." The third amended complaint also alleges that the Ampton defendants "provided substantial assistance and/or encouragement" by "[c]oncealing, or advising defendants to conceal, from plaintiffs the actual terms of the Nomura transaction"; "[c]oncealing, or advising defendants to conceal, from plaintiffs the information or facts omitted from the letters of February 11, 1997, March 3, 1997, and March 21, 1997; and by "[n]egotiating, and attempting to extort exorbitant fees from, re-financing attempts after March 1997. . . . "

Defendants contend that the uncontradicted facts show that in 1997 and 2000 plaintiffs had actual, as well as inquiry notice of the fraudulent conduct and breaches of fiduciary duty. They point to the following: plaintiffs knew that as part of the Nomura financing transaction in 1997 that the Mall was transferred to HMA; Strenger said that in late 1996 or early 1997, Gordon contacted him on behalf of the limited partners (plaintiffs) seeking more information about the Nomura transactions and to discuss the problems and negative consequences to them—he referred Gordon to the documents and attorneys; prior to the transaction, Newman sent a letter to plaintiffs stating that with respect to the Nomura refinancing "some partners had questions on the refinancing," and the letter outlined the "new financial arrangements with Nomura . . . ."; another letter went out showing an increase in the Nomura interest between 40 percent and 60 percent of the Mall and a decrease in plaintiffs' interests; one of the plaintiffs, Gordon, who had

been associated with Newman for years, wrote to Newman, "I have signed the agreements to proceed with the Nomura financing on Orange & Sea Tac Malls," thus evidencing knowledge that the refinancing involved the Sea Tac Mall; in December of 2000, Newman sent a letter to plaintiffs informing them that as a result of earlier transactions, under a Buy-Sell Agreement, if the exercise of that agreement closed, "the partners would not receive any funds for their interests;" Gordon wrote back, "I do not understand what the following numbers represent . . . Orange has to be worth 35-40 million which would be a nice profit for everyone;" Gordon also wrote on February 1, 2001, to Newman, "Harry, I have no idea what you did to this property!! What kind of loan did you put on the property that jeopardized our interests?" Epsteen wrote to Newman on August 27, 2001, "it would be nice if it was explained to us just as to how we did make our deal with them . . . they [Nomura] as partners/lenders are asking for us to give up additional equity as per our agreement with them, which may or may not really be a legal way of treating partners who are trapped into whatever deal we made with them. As you can see I'm not at all really understanding of the situation and therefore feel very uncomfortable in trying to understand the current dealings with them and the court, so I guess my first question is, would you please explain the situation to me . . . ."; and plaintiff Stoltenberg, a former general counsel for Newman Properties, who had worked for Newman, stated that at the time of the refinancing, he had sought information and questioned the need for it and called and "asked what the new funding of the Mall was about," and the reply was "no one knows; it was a really technical and complicated deal; and that no one understands the transaction except Lawrence Strenger and the attorneys."

Plaintiffs take the position, in effect, that while they had notice that the transaction may have been inadvisable and was not working out, they had no reason to believe that vital information had been withheld from them and misrepresented or that the transactions involved conflicts of interest and a misuse of the property. They submitted the following facts to show that there was a triable issue of fact as to inquiry notice: plaintiff Gordon declared that he had had a long association with Newman and relied up

on him to act in the best interests of the partnership; in answer to his inquiries about the Nomura refinancing, Newman explained the reasons—obtain a new mortgage on different terms, acquire the Brettin interest, and obtain additional capital to "re-tenant and redevelop the Mall"; Gordon did not receive the documentation; there was no disclosure, inter alia, that there was no necessity for the refinancing and that it was really undertaken for the benefit of Newman Trust in connection with its interest in the Sea-Tac Mall and its personal obligations; there was no disclosure of the "brokerage fee" to the Ampton defendants; Gordon was not aware of the "buy-sell" provision of the Nomura transaction that gave Nomura certain rights to purchase interests; Gordon did receive in 2000 information about that but was informed that litigation would be commenced to prevent any further action to enforce that provision; after the denial of the injunction; Gordon did complain to Newman saying, "it would seem that we have had the wrong people working on this"; plaintiff Epsteen had a similar declaration; in August of 2001, he wrote to Newman, expressing concern about what was occurring, but added, "Harry, I fully understand the amount of pressure that you are under regarding the Mall of Orange and Nomura, it is my full intention to be of assistance to you and our other partners however I am a very much out of the picture and therefore feel inadequate at my ability to help. If I was more fully educated to the whole situation I feel I could be of some assistance. Please consider my request for full information. [¶] "The subject property was once a tremendous cash flow Real Estate Holding and I can appreciate how times have changed and that three major anchored centers are in today's thinking not as popular as the four and five anchored centers; however the Real Estate our project lies on is still strategically terrific and our anchors are doing very well. I'm sure all of the partners still feel positive about the Mall of Orange and are behind you one hundred percent in working out this current problem with Nomura; I'm also sure that like myself most of us are not really understanding of the whole problem and the facts regarding such. Please see your way clear in communicating with us in a way and manner that enables us to understand the whole problem. Thank you for the time and energy in reading and replying to my letter and its requests." Stoltenberg, in a declaration, declared he had worked for Newman for

25 years; he reiterated what other partners said; and Stoltenberg acknowledged that in March of 1997 he requested information about the proposed Nomura transactions, but he said he received a response from Newman, in whom he relied to be truthful and act in the best interests of the partnership. There was also evidence that plaintiffs denied any communication with the Ampton defendants about the 1997 transaction, notwithstanding Strenger's assertions to the contrary, and deny knowledge that Strenger had a power of attorney from OMDA or Shoprop.

Whether, in light of plaintiffs' relationships with Newman, Newman Trust, and the Ampton defendants, and the inferences that can be drawn from the writings, plaintiffs were on inquiry notice prior to 2002, raises questions of material facts. In 1997, plaintiffs were made aware of the adverse consequences of the Nomura loan transaction. And in 2000, they learned of the buy-sell provision. But this may have only alerted them either to poor decisions or to the adverse consequences of what they thought was a necessary loan. And defendants notified plaintiffs that litigation had been commenced against enforcement of the provision. The information of which plaintiffs were aware did not necessarily put plaintiffs on notice that the 1997 transaction was unnecessary for the Mall and made to benefit the Sea-Tac Mall in which they had no interest, and the extent of diminution of the value of their interests. In addition, there is conflicting evidence as to whether plaintiffs should have suspected the Ampton defendants were participating in any possible wrongdoing.

As noted, whether a plaintiff has knowledge of circumstances sufficient to put a prudent person on inquiry notice ordinarily is a question of fact. (*Hobart v. Hobart Estate Co., supra,* 26 Cal.2d at p. 440.) We cannot say that the uncontradicted facts "are susceptible of only one legitimate inference." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1112.) Accordingly, that plaintiffs were on notice inquiry prior to 2002 has not been established as a matter of law. Thus, Code of Civil Procedure section 338, subdivision (b) does not as a matter of law bar the claims against the Ampton defendants.

6. Continuing Tort

The events surrounding the 2002 sale could be viewed as a continuation of the concealment that took place in 1997. There is authority that a statute of limitations can be tolled or extended for a continuing tort under certain circumstances. (See *Wyatt v. Union Mortgage Co., supra,* 24 Cal.3d 773.) Whether that would apply when there are no conspiracy allegations or economic duress or undue influence is problematic. But in view of our conclusions, we do not reach that issue.

D. Standing

Defendants contend that plaintiffs' lack of standing to sue as to the 2002 events and the so-called distress sale by HMA because the alleged wrongs were perpetrated against HMA, and they were not partners in HMA; and even if they had been, the claims would be derivative. Defendants assert that because the injury was to HMA, only OMDA and Shoprop, the limited partners of HMA, could have maintained an action and that action would have to be a derivative one. There is no dispute that plaintiffs were limited partners of OMDA and Shoprop.

Plaintiffs assert that the claims arising out of the 2002 conduct directly affected them and thus were personal as opposed to being derivative. They contend that Newman Trust obtained funds that should have been distributed among all partners in proportion to their interest, but instead were diverted to benefit Newman Trust and the Ampton defendants.

We do not have to decide whether plaintiffs would have standing to assert various claims arising out of the 2002 sale. Plaintiffs allege that the concealments and misrepresentations that took place in 1997 ultimately resulted in damages to them, inter alia, reflected by the 2002 sale.

The Ampton defendants also argue that plaintiffs lacked standing to assert claims against them for the 1997 events as well as those in 2002. This issue was not raised before the trial court and is being advanced for the first time on appeal. Accordingly, we need not deal with that contention, as the parties did not have an adequate opportunity to

address the theory in the trial court. (*California School of Culinary Arts v. Lujan* (2003) 112 Cal.App.4th 16, 22.)

We observe that plaintiffs alleged that the Ampton defendants assumed fiduciary duties to plaintiffs and breached them, and participated in the alleged wrongdoing by the other defendants. Thus, the Ampton defendants have not established as a matter of law that plaintiffs lacked standing to assert claims arising out of the 1997 events. As the court stated in *Everest Investors 8 v. McNeil Partners* (2003) 114 Ca.App.4th 411, 428, "a limited partner may suffer an injury to its interest without the occurrence of any injury to the partnership entity or to the partnership assets because the interest of a limited partner in a partnership is separate and apart from the partnership's ownership interest in its assets." Here, in some instances, plaintiffs do allege damages to the partnership—e.g. "unnecessary and unreasonable transaction costs." But plaintiffs also allege and show that at least some of their claims are based on an injury to them and not to the partnerships—e.g. equity dilution, loss of voting rights, and inappropriate or disproportionate distributions. (See *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1258-1259.) It is true that a shareholder of a corporation cannot bring a direct action against management for a decrease in the value of his or her stock. (See *Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 312.) But an individual cause of action would exist if the damages to the shareholder are not "*incidental*" to damages to the corporation. (*Id.* at p. 313.) It would seem that a reduction of a person's equity percentage or elimination of voting rights would be a wrong that can be asserted by a shareholder or partner individually. Accordingly, there is disputed, material issues of fact as to whether plaintiffs have the requisite standing—at last as to some of the claims.

DISPOSITION

The summary judgment in favor of the Newman Family Trust is affirmed. The Newman Family Trust is awarded its costs on appeal. The summary judgment in favor of Ampton Investments, Inc. and Laurence N. Strenger is reversed and the matter is remanded to the trial court for further proceedings. Plaintiffs shall recover their costs allocable to their appeal of the summary judgment in favor of Ampton Investments, Inc. and Laurence N. Strenger.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.