

Nos. 1-14-2685 & 1-14-2686 (cons.)

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAP, INC., INDIVIDUALLY, AND ON BEHALF)	Appeal from the Circuit
OF SUSHI WABI LIMITED PARTNERSHIP,)	Court of Cook County.
)	
Plaintiffs-Appellants,)	
)	
v.)	Nos. 05CH6850 &
)	05CH6855 (cons.)
TODAY'S SUSHI CORP., ANGELA HEPLER,)	
SUSAN TRAINA (OR SUSAN TRAINA THOMPSON),)	
SUSHI WABI LIMITED PARTNERSHIP, TAQUERIA)	
LIMITED PARTNERSHIP,)	The Honorable
)	Carolyn Quinn,
Defendants-Appellees.)	Judge Presiding.

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SUSAN TRAINA (OR SUSAN TRAINA THOMPSON),)
SUSHI WABI LIMITED PARTNERSHIP, TAQUERIA)
LIMITED PARTNERSHIP,) The Honorable
) Carolyn Quinn,
Defendants-Appellants.¹) Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court
Justices Fitzgerald Smith and Pucinski concurred in the judgment

ORDER

¶ 1 *Held:* The plaintiff-appellant JAP failed to develop proper arguments supported by law and facts, and its claims were legally meritless in appeal number 1-14-2685. In appeal number 1-14-2686, the defendant-appellant Today's Sushi failed to establish the trial court's determination, that it breached its fiduciary duty to the partnership, was against the manifest weight of the evidence.

¶ 2 This case involves separate appeals that have been consolidated in this court.² Each party raises contentions surrounding a limited partnership, the fiduciary relationships involved, and the alleged damages that resulted, among other things. For the reasons to follow, we affirm both appeals (Nos. 1-14-2685, 1-14-2686).

¶ 3 BACKGROUND

¶ 4 We recite only the limited facts needed for the disposition on appeal. In 1998, Today's Sushi Corp., represented by Angela Lee and Susan Thompson, entered into a limited partnership agreement with JAP, Inc., represented by Angelo Gianni (Angelo).³ Together, Today's Sushi and JAP formed the Chicago restaurant Sushi Wabi, LP. Each entity owned equal portions of almost 50 percent of Sushi Wabi, with JAP acting as the major investor (the other limited

¹ Although Today's Sushi filed its own complaint against JAP in the trial court, that complaint is not at issue in this appeal. As a result, it is not represented in the caption.

² This court previously entered a summary order dismissing the parties' prior appeals for lack of jurisdiction. See *JAP, Inc. v. Today's Sushi, Corp.*, 2013 IL App (1st) 113380-U.

³ Angela Lee is formerly known as Angela Hepler and also Angel Schlenker, while Susan Thompson is formerly known as Susan Traina.

partners owned a small percentage in the company). Today's Sushi had created the business plan for the restaurant, having previous experience running other sushi restaurants. Today's Sushi (Thompson and Lee) and JAP (Angelo) were general partners of Sushi Wabi, and the partnership agreement stated that each had "full power of management and control of the conduct and operation of the Partnership business by unanimous consent." The restaurant employed Angelo's brother, Franco, as manager and to serve as JAP's "eyes and ears" for the purposes of making decisions on behalf of JAP. Angelo would only be consulted on "major decisions." Thompson and Lee also worked at Sushi Wabi in managerial positions, apparently with some authority over Franco. After seven years in partnership, relations soured in 2005, when Thompson and Lee fired Franco from the restaurant. The parties filed complaints against each other. At issue in this appeal is JAP's third-amended complaint. JAP alleged on behalf of Sushi Wabi a derivative claim for breach of fiduciary duty against Today's Sushi, Lee, and Thompson (Count 1) and conversion (Count 2). JAP individually filed for an accounting (Count 3), judicial dissolution of the partnership (Count 4), and the wind-up of its affairs (Count 5).

¶ 5 Following protracted discovery, a bench trial ensued from January 12, 2010, to May 13, 2010. The trial court issued a detailed 26-page order on May 27, 2011, wherein it noted the parties' agreed facts. The court ruled in favor of JAP on portions of Count 1. That is, out of the 19 bases for the alleged breach of fiduciary duty, the court found in favor of JAP on three, including that Today's Sushi breached its fiduciary duty when Thompson and Lee executed an employment agreement with a sushi chef making him a limited partner absent JAP's consent and that of the limited partners; when they spent partnership funds on employee ski trips without JAP's consent and also over JAP's objection; and when they gave themselves employee bonuses over JAP's objections. The court awarded JAP \$84,799.10 in damages on the breach of fiduciary

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duty claim, although the award was later reduced to \$73,358 after the parties' respective motions to reconsider, and Today's Sushi was barred from receiving \$48,000 of that amount. While the court denied JAP's conversion claim (Count 2) and accounting request (Count 3), the court granted JAP's request for judicial dissolution of the partnership (Count 4) and wind-up (Count 5). The court charged JAP with "winding up" Sushi Wabi's "affairs," under judicial supervision, and dissolution became final on August 6, 2014.

¶ 6 Both parties have appealed the trial court's rulings, and we granted their motion to consolidate the cases. The record on appeal consists of 43 volumes, with 6 volumes of trial transcript (about 200 pages each, totaling almost 1,200 pages) and eight volumes of trial exhibits. We first address JAP's contentions on appeal and then those of Today's Sushi.

¶ 7 ANALYSIS

¶ 8 JAP first challenges the trial court's determination on the breach of fiduciary claim (Count 1). A fiduciary relationship imposes a general duty on the fiduciary to refrain from seeking a selfish benefit during the relationship. *Neade v. Portes*, 193 Ill. 2d 433, 440 (2000). To state claim for breach of fiduciary duty, it must be alleged that a fiduciary duty exists, that the fiduciary duty was breached, and that such breach proximately caused the injury of which the plaintiff complains. *Lawlor v. North American Corporation of Illinois*, 2012 IL 112530, ¶ 69.

¶ 9 In its complaint, JAP alleged 19 bases for finding Today's Sushi (and/or Thompson and Lee) had breached its fiduciary duty towards the partnership. While the court found JAP had established its claim as to three of the varying accusations (see issue nos. 7, 14, and 15 in the court's May 27 order) against Today's Sushi, the court ruled JAP failed as to the remaining 16. JAP now argues the court was incorrect and in list form points to a number of the allegations in its complaint. For example, JAP maintains among other things that Today's Sushi improperly

held the liquor and business licenses under its name (rather than in the partnership business name) (issue no. 4); denied Angelo the right to be a signatory on the partnership bank account (issue no. 5); and failed to consult with JAP in negotiating the building leases for the Sushi Wabi restaurant (issue no. 8). As to issue number 4, the trial court held JAP had "failed to demonstrate how it was harmed" by the fact that the liquor and business licenses remained in the name of Today's Sushi. Notably, Today's Sushi had obtained the building lease before the partnership decided to locate the Sushi Wabi restaurant there. The trial court also found that while the partnership indisputably paid the fees to maintain the licenses, JAP failed to introduce any "evidence of the amount of fees paid." As to issue number 5, where Angelo was denied the right to be a signatory on the partnership bank account, the trial court held "JAP has failed to prove damages caused by the breach." As to issue number 8, where JAP was excluded from the building lease consultation, the trial court held "JAP does not demonstrate how or whether [Sushi Wabi] has suffered any financial consequences as a result of these leases."

¶ 10 JAP contends that the trial court, in denying relief on its accusations, improperly held "money damages are an element of a breach of fiduciary duty claim." Relying on *Caparos v. Morton*, 364 Ill. App. 3d 159 (2006), JAP argues "[w]hether the partnership sustained a measurable loss, and whether or not the limited partners were aware of such a loss, is not the test of whether defendants breached their fiduciary duty to the partnership." *Id.* at 179.

¶ 11 As detailed below, we find this to be a patently disingenuous contention. Contrary to JAP's argument that a *de novo* standard of review should apply, the trial court's rulings related to factual matters and trial proof, which must be reviewed under the manifest weight of the

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evidence standard.⁴ See *Lawlor*, 2012 IL 112530, ¶ 70; *Levy v. Markal Sales Corporation*, 268 Ill. App. 3d 355, 364, 372 (1994). In its complaint, JAP alleged the wrongful acts by Today's Sushi resulted in lost profits and assets and asked for consequential and punitive damages, along with other equitable relief. See Black's Law Dictionary (10th ed. 2014) (defining consequential damages as losses resulting indirectly from an act). In a breach of fiduciary duty action, a wrongdoer is liable for the entire amount of the loss occasioned by his act. *International Capital Corporation Act v. Moyer*, 347 Ill. App. 3d 116, 127 (2004). However, plaintiffs must prove that a defendant's actions proximately caused their injuries before they can recover in tort, even in intentional torts where fiduciaries are involved. *Id.* at 126-27. In addition, it is well settled that a party seeking damages must provide a reasonable basis for computing them. *Levy*, 268 Ill. App. 3d at 372.

¶ 13 Even though JAP demanded consequential and punitive damages in its complaint, it failed to provide sufficient evidence that the other 16 allegations actually caused any injury or that the injury was even calculable. That is, JAP failed to establish that Today's Sushi unfairly benefitted from its bad acts to JAP's detriment in such a manner that would warrant recompense. JAP even now does not develop any specific argument to counter any of the trial court's factual findings or to establish it's entitled to damages. In fact, JAP offers virtually no analysis of the issue and cites only the trial court's order in support of its Lilliputian (1 ½ pages) argument. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (an appellant's argument must contain the contentions of the appellant and the reasons therefor, with citation to authorities and the pages of the record relied on); *Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637, 638, fn. 1 (2007) (party's failure to comply with Rule 341 is grounds for disregarding arguments on appeal based

⁴ We note that JAP insists a *de novo* standard applies to essentially all its claims on appeal. As this order reveals, JAP is quite incorrect in its assessment of the standard of review, and it's hard to comprehend how JAP could genuinely make such an argument.

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on an unreferenced statement of facts). A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented, and the appellate court is not a depository in which the appellant may dump the burden of argument and research. *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007). It is not the job of this court to scour the record, especially a voluminous one like the present, in order to make arguments for the appellants. *In re Estate of Parker*, 2011 IL App (1st) 102871, ¶ 47. Moreover, JAP failed to raise this argument in its motion to reconsider the judgment, which results in waiver. *In re Marriage of Brackett*, 309 Ill. App. 3d 329, 338 (1999) (generally, issues not objected to at trial or raised in posttrial motions are considered waived and cannot be argued for the first time on appeal). Thus, JAP's claims are not only legally meritless and ill-supported by fact and law, but subject to waiver too. *Id.*; see also *Express Valet, Inc.*, 373 Ill. App. 3d at 855.

¶ 14 For the same reasons discussed immediately above, we hold that JAP waived its contention that Lee and Thompson must be held individually liable. JAP did not raise this issue in its posttrial motion and has failed to develop an argument with appropriate citation to the record and factual support. See *In re Guardianship of Tatyanna T.*, 2012 IL App (1st) 112957, ¶¶ 17-18 (appellant's failure to rely on adequate legal and factual support provides basis to dismiss appeal). Regardless, JAP relies on facts that the trial court specifically found did not constitute a breach of fiduciary duty by Today's Sushi in order to support its claim now that these same facts underlie a breach of fiduciary duty against Thompson and Lee individually. Moreover, the partnership agreement was between JAP and Today's Sushi, and gave them equal control over partnership matters. Simply because Today's Sushi was held liable for breaching its

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fiduciary duty in certain regards does not prove that Thompson and Lee are also individually liable. See *Kehoe v. Wildman, Harrold, Allen and Dixon*, 387 Ill. App. 3d 454, 467 (2008).

¶ 15 JAP next contends the trial court should have ordered all financial compensation and distributions by Today's Sushi forfeited for the period during which they committed breach of a fiduciary duty. In declining to order forfeiture and punitive damages, the trial court relied on *In re Marriage of Pagano*, 154 Ill. 2d 174, 190 (1992), which held "when one breaches a fiduciary duty to a principal the appropriate remedy is within the equitable discretion of the court."

Pagano noted a breach might be "so egregious as to require the forfeiture of compensation by the fiduciary as a matter of public policy" but that would "not always be the case." *Id.* The court, which had noted the attorney in that case did not exert undue influence over his client to effect a breach of fiduciary duty, then stated that assuming the attorney acted in such a manner, the case still would not warrant forfeiture of his fees.⁵ *Id.* 190-91.

¶ 16 JAP argues *Pagano* conflicts with *Vendo Co. v. Stoner*, 58 Ill 2d 289, 314 (1974), a supreme court case decided almost 20 years earlier, upholding salary forfeiture during the breach of loyalty period. *Vendo*, however, did not purport to order salary forfeiture in every case and in that sense it does not conflict with *Pagano's* holding that such a remedy is within the equitable discretion of the trial court. JAP's reliance on appellate court cases that predate *Pagano* or rely on law that predated *Pagano* is similarly not persuasive. Even assuming there was a conflict in case law between *Vendo* and *Pagano*, we agree with the trial court that the older ruling must give

⁵ JAP also argues *Pagano's* alternative holding "was not essential" and is therefore "not controlling precedent." JAP appears to confuse *obiter dictum* (a remark or expression uttered as an aside without binding authority or precedent) with judicial *dictum* (an expression of opinion on a point in a case argued by counsel and deliberately passed upon by the court, which is entitled to much weight and should be followed). See *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 277-78 (2009). In *Pagano*, the court's statement was clearly judicial *dictum* and thus constitutes controlling law.

way to the court's most recent pronouncement of law. See *Bank of Tokyo-Mitsubishi, Ltd. v. Malhotra*, 131 F. Supp. 2d 959, 961 (2000) (holding same).

¶ 17 JAP has not otherwise persuaded us that the circuit court abused its discretion in declining to order salary forfeiture in this case. JAP again cites only the trial court's order, rather than the report of proceedings. JAP again relies on facts that the trial court specifically found did not constitute a breach of fiduciary duty in order to support its claim now that these facts underlie a breach of fiduciary duty warranting salary forfeiture. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). In short, JAP's claim fails. See *Tatyanna T.*, 2012 IL App (1st) 112957, ¶¶ 17-18.

¶ 18 In a similar vein, JAP also contends the trial court erred in declining to award punitive damages for the breach of a fiduciary duty by Today's Sushi. Punitive damages are permissible where a duty based on a relationship of trust is violated, the fraud is gross, or malice or willfulness are shown; such an award is not automatic. *Pagano*, 154 Ill. 2d at 190. Punitive damages are not favored in law, however, and JAP has not persuaded us that the trial court abused its discretion in denying such damages. See *ABC Trans National Transport v. Aeronautics Forwarders, Inc.*, 90 Ill. App. 3d 817, 839 (1980).

¶ 19 JAP next contends the court erroneously denied JAP's conversion claim (Count 2). JAP does not cite any law in support of its contention and has therefore waived its claim. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (an appellant's argument must contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on); *Express Valet, Inc.*, 373 Ill. App. 3d at 855.

¶ 20 JAP next contends the trial court erred in failing to bar Today's Sushi from receiving "any relief" from the partnership. In ruling on the parties' respective motions to reconsider, the trial court reduced the damages awarded for the breach of fiduciary duty by about \$10,000. The final

award was \$73,358. The court also held that "[u]pon winding up and dissolution of the partnership, Defendants will be barred from receiving \$48,000 of the damages award." Given JAP's brief on appeal, this court can only speculate about why the court amended the order in this way. Again, JAP does not cite to the record on appeal or offer this court with any meaningful way of understanding how the trial court arrived at its decision. For reasons cited above, we need not consider the matter further.

¶ 21 JAP next contends it is entitled to 5 percent prejudgment interest pursuant to the statute and also attorneys fees. JAP notes it raised these issues in its motion to reconsider the judgment, and contends the trial court overlooked them. The court held JAP's motion to reconsider was granted in part and denied in part, and adjusted the damages award. The court, however, did not specifically address prejudgment interest or attorneys fees. Clearly, however, the court implicitly held JAP was not entitled to either. JAP has not provided this court with any reason to remand the matter. Remaining consistent with the rest of its brief, JAP does not identify what statute even entitles it to 5 percent prejudgment interest and fails to elucidate the specific basis for any conclusion that the trial court abused its discretion in this regard. See *In re Estate of Wernick*, 127 Ill. 2d 61, 87 (1989) (noting such an award is an equitable matter within the trial court's discretion). Regarding the issue of attorneys fees, JAP cites only the partnership statute, which says a court "may" award the plaintiff in a derivative action reasonable expenses, including attorneys fees. Without citing the record in support or any case law, JAP then states there is "no reasonable reason" why JAP should not get attorneys fees. JAP essentially admits it did not request fees before the trial court, and even now, offers no evidence of what specific, itemized fees were incurred. JAP's argument, as before, remains unsupported and undeveloped.

¶ 22 JAP finally contends the trial court erred in granting an objection to JAP's final accounting. Today's Sushi filed an objection, asserting JAP failed to account for expenses stemming from the rental space which the partnership restaurant occupied, including \$22,776 rental liability for legal issues (2010 to 2011) and \$14,000 in security deposit. JAP argues now that Today's Sushi maintained the leases in its corporate name, and so the rental liabilities are not a responsibility of the partnership.

¶ 23 The final order of the trial court, entered August 6, 2014, reveals that the parties "entered an escrow agreement regarding any potential claims against the partnership landlord" and noted the trial court retained jurisdiction to enforce that agreement. That agreement, however, does not appear in the record on appeal, nor do the report of proceedings on those court hearings. There is no explanation of how the agreement affects the present contention. Regardless, JAP also has again not cited any law to support its contentions, resulting in waiver. Its claim as to the accounting therefore fails.

¶ 24 Having disposed of JAP's appeal, we turn next to the appeal of Today's Sushi from the trial court's orders. We first note that Today's Sushi has not provided this court with a precise and accurate basis for our jurisdiction to address its appeal, in violation of Rule 341(4)(ii) (eff. Feb. 6, 2013). Today's Sushi claims a notice of appeal filed in 2011 confers jurisdiction for this court to decide the present appeal. However, we disposed of that previous appeal in a summary order and actually dismissed the case for lack of jurisdiction. See *JAP, Inc. v. Today's Sushi, Corp.*, 2013 IL App (1st) 113380-U. The 2011 notice of appeal thus cannot confer jurisdiction on this court to consider the present case. Nonetheless, our records show a notice of appeal was timely filed from the final order entered August 6, 2014, and we thus proceed to the merits of the

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case. See Ill. S. Ct. R. 303(a)(1) (eff. Jan. 1, 2015) (a notice of appeal must be filed with within 30 days after entry of the final judgment appealed from).

¶ 25 Today's Sushi challenges the trial court's determination that it breached its fiduciary duty owed to JAP and the partnership. Our standard of review is whether the trial court's finding of breach of fiduciary duty was against the manifest weight of the evidence. *1515 North Wells, L.P. v. 1513 North Wells, L.L.C.*, 392 Ill. App. 3d 863, 874 (2009). A fiduciary relationship exists between partners and each is bound to exercise the utmost good faith in all dealings and transactions related to the partnership. *Id.* That means, fiduciaries cannot place themselves in a position where their own individual interests might interfere with the performance of their duties and cannot use their positions for their own personal gain. *Levy*, 268 Ill. App. 3d at 365. A fiduciary also cannot take advantage of business opportunities that belong to the partnership. *Id.*

¶ 25 Here, the trial court found Today's Sushi breached its fiduciary duty when it did the following. First, over JAP's objection, Thompson and Lee paid for employee ski trips from 2006 to 2011 from the partnership funds. Second, over JAP's objections, Thompson and Lee gave themselves employee bonuses from 2005 to 2010.

¶ 26 Today's Sushi (Thompson and Lee) raise objections as to the court's determination. For example, Today's Sushi notes JAP did not object to the bonuses of Thompson and Lee before 2005 and argues there was no "legitimate reason" to discontinue the bonuses thereafter. Today's Sushi argues the bonuses were merely a continuation of a "known salary structure." Today's Sushi raises a similar argument as to the ski trips. Today's Sushi argues the ski trips were for all employees to boost morale and so there was no self preference involved in taking them.

¶ 27 We observe that a judge's findings of fact are not against the manifest weight of the evidence merely because the record might support a contrary decision. *Levy*, 268 Ill. App. 3d at

368. Here, the partnership agreement provided that the partners operate the business by "unanimous consent." One general partner, Angelo, objected to expending partnership funds on expenses above and beyond the normal operation of the business, but his objection was not heeded by the other partners, thus violating the partnership agreement. Regardless of whether he had agreed to these expenses in the past, he did not agree to the expenses starting around 2005. The fact that the expenses continued in spite of his objection demonstrated a lack of fair dealing on the part of Today's Sushi. In such a case, we cannot say the trial court's determination that Today's Sushi breached its fiduciary duty was against the manifest weight of the evidence.

¶ 28

CONCLUSION

¶ 29 For the reasons stated above, we affirm the decision of the trial court.

¶ 30 Affirmed.