Filed 3/7/08 Robins v. Roland CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROMOLA ROBINS et al.,

Plaintiffs, Cross-Defendants and Appellants,

v.

ANTON ROLAND et al.,

Defendants, Cross-Defendants and Appellants,

PHILIP VARDI,

Defendant, Cross-Complainant and Appellant.

B191659

(Super. Ct. No. LC 068574)

APPEAL from a judgment of the Superior Court of Los Angeles County. Stephen D. Petersen, Judge. Reversed.

Greines, Martin, Stein & Richland, Robin Meadow, Cynthia E. Tobisman and Jeffrey E. Raskin, for Defendants, Cross-Defendants and Appellants Anton Roland, George Roland, Cathy Roland, Roland Land Company, Roland Land Enterprises, Roland Land Investment & Development, California Resources Enterprises, Inc., Consolidated Land Associates, Roland Heights Development, Inc., Roland Universal Land Co., Inc. and C.G.M.V., Inc.

Snell & Wilmer, Richard A. Derevan; Christensen, Glaser, Fink, Jacobs, Weil & Shapiro and Caroline H. Mankey for Defendant, Cross-Complainant and Appellant Philip Vardi.

Niddrie, Fish & Buchanan, Martin N. Buchanan; Tyre, Kamins, Katz & Granof, Herman S. Palarz, Darin Robert Margules; Silver & Freedman, Darin Margules; Palarz & Williams and Herman S. Palarz for Plaintiffs, Cross-Defendants and Appellants Romola Robins, Michelle Margules, Sandra Solomon and the Robins Family Trust.

This lawsuit concerns a business that was operated by Anton Roland, Philip Vardi, and Emanuel Robins. Mr. Robins died in 1994, but the business continued to pay his distributions to his wife, Romola Robins. Some 10 years later, Mrs. Robins purported to dissociate from the partnership that operated the business, and she demanded that her interest in the partnership be bought out. Less than two months later, Vardi purported to dissociate as well. Roland refused to honor the purported dissociations, and this litigation ensued. The trial court ultimately found that the dissociations were valid, and it awarded buyout payments of $14,409,862 to Mrs. Robins and $9,872,728 to Vardi, plus certain fees and costs. Roland appeals, arguing on various grounds that Mrs. Robins and Vardi cannot dissociate, that buyout payments are therefore improper, and that the partnership must be wound up instead. We agree and reverse.

BACKGROUND

In the 1950s, Roland started a real estate development business. In the 1960s, his nephews Philip Vardi and Emanuel Robins joined the business, which was managed through a number of corporations and partnerships. The business as a whole belonged to an overarching partnership whose members were Roland, Mr. Robins, and Vardi. Roland owned a 60 percent interest in the overarching partnership, Robins owned 21 percent, and Vardi owned 19 percent.[1]

In 1993, Roland, Mr. Robins, and Vardi entered into a written agreement recognizing their entitlement to distributions in the 60-21-19 ratio from the various business entities through which the business was managed, and the agreement called, among other things, for equalizing payments to Roland and Mr. Robins to compensate for past distributions that had not conformed to the ratio. (We will join the parties in referring to this agreement as the "true-up agreement.") In addition, the trial court found that "[o]ver time, these profit-sharing percentages [i.e., the 60-21-19 ratio] became identified not just with the three men, but with their three respective family groups." That is, profits from the partnership were sometimes distributed not just to the three partners themselves but also, or instead, to their family members.

In 1991, Mr. Robins transferred "all right, title and interest in and to all [of his] property, real and personal," to himself and his wife, Romola Robins, as trustees of the Robins Family Trust. The transfer included "[a]ll partnership and corporate interests."

Mr. Robins died in 1994, leaving Mrs. Robins as the surviving trustee of the Robins Family Trust. Mr. Robins named Mrs. Robins as executrix of his estate. Thereafter, Mrs. Robins received the distributions from the overarching partnership that otherwise would have gone to Mr. Robins.

Over time, the relationship between Roland, Vardi, and Mrs. Robins soured. On November 12, 2003, Mrs. Robins and her two daughters, both individually and as trustees of certain family trusts, sent Roland and Vardi a written "Notice of Disassociation" from the overarching partnership. Pursuant to the notice, Mrs. Robins, her daughters, and the trusts withdrew from that partnership and demanded that their 21 percent interest be bought out at "the statutorily required buyout price." The notice also demanded an

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[1] Roland contended in the trial court that no such overarching partnership existed. The trial court found that the overarching partnership did exist, however, and Roland concedes on appeal that the trial court's finding is supported by substantial evidence

accounting. On January 6, 2004, Vardi sent Roland a written "Notice of Joinder in Dissociation" from the overarching partnership. Vardi too withdrew from the partnership and demanded both an accounting and "payment of the statutorily required buyout price" for his 19 percent interest. Roland allegedly responded to the notices by denying the existence of the overarching partnership, and this litigation ensued.

Mrs. Robins and her daughters filed suit against Roland, Vardi, and associated individuals and entities, alleging claims for breach of contract, breach of fiduciary duty, declaratory relief, and determination of their buyout price upon dissociation from the overarching partnership. Vardi filed a cross-complaint against all of the parties to the original action (except himself), alleging claims for breach of contract, breach of fiduciary duty, declaratory relief, determination of his buyout price upon dissociation from the overarching partnership, and accounting.[2]

The trial court bifurcated the issues and conducted a bench trial in two phases. In the first phase, the court was to determine whether an overarching partnership existed and whether the parties had the right to dissociate. Having found in favor of plaintiffs on both of those issues, the trial court proceeded in the second phase to determine the buyout price to be paid for each dissociating partner's interest, plus other related issues.

The trial court found that up to the time of Mr. Robins' death, an overarching partnership among Roland, Mr. Robins, and Vardi existed. The court also found that at the time of the purported dissociations, an overarching partnership among Roland, Mrs. Robins, and Vardi existed, though the court's basis for that finding is not entirely clear. The court further determined that Mrs. Robins and Vardi had the right to dissociate from the overarching partnership and to have the partnership buy out their interests. The court also determined that although certain alternative theories of the facts would lead to a dissolution and winding up of the partnership rather than to dissociations and buyouts, in

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[2] Because the interests of Mrs. Robins, her daughters, and Vardi are generally aligned for purposes of this appeal, we shall refer to them collectively as "plaintiffs." For similar reasons, we shall use "defendants" to refer collectively to all defendants and cross-defendants other than Mrs. Robins, her daughters, and Vardi.

this case “the end result will be the same, whether pursued as a buyout or winding-up distribution.” The court further concluded that the claim for breach of fiduciary duty was moot because the court had already “granted such compensatory relief as is due on that cause of action,” and “no imposition of punitive damages would be warranted.”

The trial court entered judgment on April 26, 2006. It awarded $14,409,862 to Mrs. Robins as the buyout price for her interest in the overarching partnership, plus $1,070,685 in “[a]ttorney’s fees, appraiser and other expert fees, and costs.” It awarded $9,872,728 to Vardi as the buyout price for his interest in the overarching partnership, plus $778,988.73 in fees and costs. The judgment also provided that Mrs. Robins and Vardi “are entitled to reasonable accountings” from defendants until the judgment is satisfied. Defendants timely appealed, and plaintiffs timely cross-appealed.

STANDARD OF REVIEW

We review the trial court’s conclusions of law de novo, and we review its findings of fact under the substantial evidence standard. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.)

DISCUSSION

I. Dissolution of the Partnership upon Mr. Robins’ Death

Defendants do not challenge the trial court’s finding that up to the time of Mr. Robins’ death, there was an overarching partnership among Roland, Mr. Robins, and Vardi. Defendants do, however, challenge the trial court’s finding that at the time of Mrs. Robins’ and Vardi’s purported dissociations, there was an overarching partnership among Roland, Mrs. Robins, and Vardi. Defendants argue that (1) the original overarching partnership dissolved by operation of law upon Mr. Robins’ death, (2) the record does not contain substantial evidence that the partnership re-formed with Mrs. Robins in place of Mr. Robins, and (3) therefore, at the time of the purported dissociations, the only overarching partnership that had ever existed had already dissolved, so dissociation was impossible. We agree.

The Revised Uniform Partnership Act (hereafter RUPA) was enacted in 1996 and "governs all partnerships" after January 1, 1999 (Corp. Code, § 16111, subd. (b)), but it "does not affect" a "right accrued before" the RUPA took effect (*id.*, § 16112). Under the Uniform Partnership Act (hereafter UPA), which was in effect in 1994 when Mr. Robins died, the partners in a dissolved partnership have the right to wind up the partnership's affairs. (Former Corp. Code, §§ 15037, 15038.) Thus, if Mr. Robins' death did cause the overarching partnership to dissolve under the UPA, then Roland and Vardi thereby acquired rights to wind up the partnership's affairs, and those rights would not be affected by the RUPA.

Plaintiffs concede that "under UPA, the original partnership dissolved upon Mr. Robins' death in 1994." The trial court did not find to the contrary, and any such finding would have been legally erroneous. The UPA provides that dissolution is caused by "the death of any partner unless otherwise provided in an agreement in writing signed by all the partners before such death[.]" (Former Corp. Code, § 15031, subd. (4).) No party contends that any such written agreement exists, so the partnership dissolved in 1994 when Mr. Robins died.

Despite their concession that the original overarching partnership dissolved in 1994, plaintiffs argue on two grounds that Mrs. Robins' and Vardi's purported dissociations in 2003 and 2004 were valid. First, they argue that as the transferee of Mr. Robins' transferable interest in the partnership, Mrs. Robins had the right to dissociate. Second, they argue that substantial evidence supports the trial court's finding that after Mr. Robins' death, the partnership re-formed with Mrs. Robins as a partner in place of Mr. Robins.

Plaintiffs' first argument fails because, assuming arguendo that a transferee of a partner's transferable interest in a partnership can have the power to dissociate, no one has the power to dissociate from a dissolved partnership. Defendants pointed this out in their opening brief. Plaintiffs implicitly conceded the point by failing to address it in either of their briefs, so we need not discuss it at length.

Given that the overarching partnership among Roland, Mr. Robins, and Vardi dissolved under the UPA when Mr. Robins died, Roland thereby acquired the right to wind up the partnership's business, applying partnership assets to satisfy creditors and then distributing the remainder to the partners. (Former Corp. Code, § 15038.) If Mrs. Robins (as transferee of Mr. Robins' transferable interest) or Vardi could dissociate and obtain a buyout after that dissolution but before the winding up, then their dissociations would affect Roland's rights—they could compel him to use partnership assets to buy them out rather than to pay creditors and distribute the remainder. But the power to dissociate was created by the RUPA; dissociation did not exist under the UPA. Thus, because the RUPA does not affect any pre-existing rights, neither Mrs. Robins nor Vardi can have the power to dissociate from the overarching partnership that dissolved when Mr. Robins died.

Moreover, the RUPA expressly prohibits dissociation within 90 days *before* dissolution. (Corp. Code, § 16701.5.) The only reasonable interpretation of that prohibition is that it also bars dissociation at any time *after* dissolution. Otherwise, any partner could easily escape the prohibition by dissociating after dissolution takes place.

For all of these reasons, we agree with defendants that no one can dissociate from a dissolved partnership. We therefore reject plaintiffs' argument that Mrs. Robins' status as the transferee of Mr. Robins' transferable interest in the original overarching partnership gave her the power to dissociate from that partnership after Mr. Robins died.[3]

Plaintiffs' second argument is that substantial evidence supports the trial court's finding that, after Mr. Robins died and the original overarching partnership dissolved, a new overarching partnership was formed among Roland, Mrs. Robins, and Vardi. The evidence that plaintiffs cite, however, does not sustain their argument.

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[3] At oral argument, Mrs. Robins' counsel expressed the concern that, without the power to dissociate, Mrs. Robins would have no means to extricate herself from the original overarching partnership. The concern is misplaced. The UPA provided that, upon dissolution, "any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court." (Former Corp. Code, § 15037.)

Before we analyze plaintiffs' evidence, it will be useful to describe the factual and legal context in which we must consider it. Before Mr. Robins died, there was an overarching partnership among Roland, Mr. Robins, and Vardi. Profits from the partnership were sometimes distributed not just to the partners themselves but also, or instead, to their family members. (In the trial court's words, "[o]ver time, these profit-sharing percentages became identified not just with the three men, but with their three respective family groups.") When Mr. Robins died, the partnership dissolved. Under the UPA, a dissolved partnership does not automatically terminate but rather "continues until the winding up of partnership affairs is completed." (Former Corp. Code, § 15030.) Thus, by default, the partnership would continue until being finally wound up and terminated. Under those circumstances, there are three independent reasons why Mrs. Robins could have received distributions from the partnership after Mr. Robins died: (1) She was the surviving trustee of the Robins Family Trust; (2) she was executrix of Mr. Robins' estate; and (3) distributions of profits that she had received as a member of the Robins "family group" when Mr. Robins was alive could have continued, as part of the continuation of the original overarching partnership.

Against that background, plaintiffs' argument will succeed only if the evidence is sufficient to support a finding that rather than merely continuing the partnership pending termination and winding up, Roland, Mrs. Robins, and Vardi formed a *new* overarching partnership. We conclude that plaintiffs' evidence does not support such a finding.

First, plaintiffs cite the parties' stipulation that the ownership of the corporations and partnerships through which the business of the overarching partnership was managed "is allocated among the three family groups as follows: 60% owned by the Roland Family Group, 21% owned by the Robins Family Group and 19% owned by the Philip Vardi Family Group." Plaintiffs contend that the stipulation "is significant" because it supports the trial court's finding that "[o]ver time, these profit-sharing percentages [i.e., the 60-21-19 ratio] became identified not just with the three men, but with their three respective family groups." Regardless of whether that contention is true, however, the stipulation has no tendency to prove that after Mr. Robins died, Roland, Mrs. Robins, and

Vardi formed a new overarching partnership. It shows only that at some time, perhaps before Mr. Robins died, the individual entities through which the original overarching partnership's business was managed came to be owned by the three "family groups" in the stated percentages.

Second, plaintiffs cite Roland's testimony that after Mr. Robins died, the business continued to pay members of the Robins family the same distributions that they had received when Mr. Robins was alive (in Roland's words, "they got whatever they got before"). In addition, plaintiffs cite evidence that, in their words, "[t]he business continued to operate as before, except that it made distributions to Mrs. Robins instead of Mr. Robins." The cited evidence has no tendency to prove that after Mr. Robins died, Roland, Mrs. Robins, and Vardi formed a new overarching partnership. By statute, the partnership did not wind up and terminate automatically when Mr. Robins died; rather, it continued. (Former Corp. Code, § 15030.) Thus, because the original overarching partnership dissolved upon Mr. Robins' death but has never been wound up, it continued to operate and to pay distributions to anyone entitled to receive them ("they got whatever they got before"). As the surviving trustee of the Robins Family Trust, the executrix of Mr. Robins' estate, and a member of the Robins "family group," Mrs. Robins was the proper recipient of distributions from the partnership. Her mere receipt of distributions, without more, has no tendency to prove that she became a partner herself.[4]

Third, plaintiffs cite evidence that Mrs. Robins "paid taxes on the income reported to her by the business." Mrs. Robins' payment of taxes on her income does not prove that she became a partner in a new overarching partnership.

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4 Plaintiffs' reliance upon the statutory presumption that "[a] person who receives a share of the profits of a business is presumed to be a partner in the business" (Corp. Code, § 16202, subd. (c)(3)) is misplaced. Application of the presumption in the manner urged by plaintiffs would mean that any transferee of a partner's transferable interest in the partnership, and the estate of any deceased partner, is presumptively a partner. But transferees are *not* partners, and under the RUPA the death of a partner causes an automatic dissociation. (*Id.*, §§ 16502, 16503, 16601, subd. (7)(A).) In any event, the presumption is rebutted in this case because Mrs. Robins, as trustee of the Robins Family Trust, executrix of Mr. Robins' estate, and a member of the Robins "family group," was entitled to receive distributions from the original overarching partnership until it was wound up.

Fourth, plaintiffs cite evidence that Mrs. Robins and her daughters “continued to receive salaries and health coverage from the business” and that Mrs. Robins continued to receive certain life insurance benefits. The cited evidence itself confirms that the salaries and health benefits were merely continuations of distributions to the three “family groups” that had taken place in the past. For example, in response to a question about the salary she received in 1996, Mrs. Robins’ daughter testified that “[a]ll of us had received salaries for years.” Again, the business’ continuing payment of such distributions has no tendency to show the formation of a *new* partnership among Roland, Mrs. Robins, and Vardi.

Fifth, plaintiffs cite evidence purportedly showing that (1) Mrs. Robins and one of her daughters attended “company board meetings,” (2) Mrs. Robins “had to sign the minutes for board meetings,” (3) Roland “had her sign consents for company actions,” and (4) she was asked to consent to a reorganization of the entities through which the business was managed. The cited evidence does show that Mrs. Robins and one of her daughters attended certain meetings with Roland, Vardi, and others, but the evidence does not identify the meetings as “company board meetings” or “board meetings.” Given that the Robins “family group” was continuing to receive distributions from the business, and given that, by stipulation, the Robins “family group” was the 21 percent owner of the entities through which the business was managed, it is hardly surprising that members of the Robins family would need to meet with Roland and Vardi from time to time.

Similarly, if the meetings were shareholder or board of directors meetings of the corporations through which the business was managed, it was entirely appropriate for members of the Robins “family group” to attend, because their “family group” was the 21 percent owner of those corporations. The attendance of Mrs. Robins and her daughter at such meetings has no tendency to prove the formation of a new overarching partnership among Roland, Mrs. Robins, and Vardi. The same analysis applies to Mrs. Robins’ signature on the minutes of such meetings and the request that she consent to the reorganization—Roland sought her consent because (by stipulation) the Robins "family group" was the 21 percent owner of the entities to be reorganized.**[5]**

Plaintiffs cite no other evidence of the formation of a new overarching partnership among Roland, Mrs. Robins, and Vardi. The trial court cited no evidence in support of its finding, saying only that "the partnership was reformed with Mrs. Robins in place of Mr. Robins as shown by the conduct of the parties which dictates that finding." For the foregoing reasons, we find the evidence cited by plaintiffs insufficient, and our own review of the record has revealed no additional supporting evidence. We therefore conclude that the trial court's finding is not supported by substantial evidence.

To summarize: The original overarching partnership dissolved when Mr. Robins died in 1994. The record does not contain substantial evidence that a new overarching partnership was formed. Therefore, even assuming that a transferee of a partner's transferable interest in a partnership can have the power to dissociate, Mrs. Robins and Vardi could not dissociate from the overarching partnership in 2003 and 2004, respectively, because no one can dissociate from a dissolved partnership. All that remains is for the original, dissolved, overarching partnership to be wound up, with whatever judicial supervision the parties request and the statutes permit.**[6]**

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5 Plaintiffs themselves recognize that Mrs. Robins *and one of her daughters* attended the meetings in question. The evidence further shows that Mrs. Robins *and that same daughter* were asked to sign the minutes, and that the letter seeking consent to the reorganization was addressed to several members of the Roland and Robins families, among others. Plaintiffs never explain how this evidence can prove that *Mrs. Robins* was a partner in a new overarching partnership without also proving that *her daughter* or perhaps *all of the addressees* on the letter concerning reorganization were partners as well. The only reasonable inference is that the evidence proves no such thing. Because the various "family groups" were continuing to receive distributions from the original overarching partnership's business, and because they were part-owners of the entities through which that business was managed, they attended meetings, signed minutes, and were asked to consent to the reorganization.

6 Insofar as the pleadings do not currently present a request for a judicially supervised winding up of the partnership, on remand the parties may seek leave to amend their pleadings in order to request such relief, should they desire it.

II. Winding Up or Buying Out

The trial court determined that in this case there would be no difference between a dissolution and winding up of the partnership, on the one hand, and dissociations and buyouts of Mrs. Robins and Vardi, on the other. If the trial court's determination were correct, then defendants' argument on appeal that the award of buyout payments should be reversed and the partnership wound up would be moot. We agree with defendants, however, that the trial court's determination was erroneous. Plaintiffs do not attempt to defend the trial court's reasoning on this point, so we need not dwell on the issue at length.

When a partnership dissolves and is wound up, its assets are first used to pay creditors, with the remainder distributed to the partners in proportion to their interests in the dissolved partnership. (Corp. Code, §§ 16801, 16807.) In general, partners are jointly and severally liable for all partnership obligations (*id.*, § 16306, subd. (a)), and nothing in the statutes governing the dissolution and winding up of partnerships eliminates or limits that liability (*id.*, §§ 16801-16807).

When a partner dissociates from a partnership, the partnership buys out the partner's interest at a price based on the proceeds that would have been generated if the partnership either had been sold as a going concern or had liquidated its assets on the date the partner dissociated. (Corp. Code, § 16701, subd. (b).) Subject to one narrow exception, a partnership must indemnify a dissociated partner "against all partnership liabilities." (*Id.*, § 16701, subd. (d).)

Thus, the valuation issue that is central to a buyout, and which the parties litigated in the second phase of the trial in this case, does not arise at all when a partnership is wound up. And whereas the liability of a dissociating partner terminates, the liability of the partners of a dissolved partnership continues.

We therefore agree with defendants that the trial court erred when it determined that there would be no difference between a dissolution and winding up of the partnership and dissociations and buyouts of Mrs. Robins and Vardi.[7]

III. The Awards of Fees and Costs

The trial court awarded "[a]ttorney's fees, appraiser and other expert fees, and costs" to both Mrs. Robins and Vardi. The sole basis for the awards was Corporations Code section 16701, subdivision (i). That statute, however, deals exclusively with dissociations and buyouts. Because we conclude that Mrs. Robins' and Vardi's purported dissociations were invalid, and because we therefore reverse the buyout awards to each of them, we must reverse the awards of fees and costs as well.

IV. The Cross-Appeal

Plaintiffs filed a cross-appeal challenging two aspects of the judgment. First, plaintiffs argue that in calculating the "amounts due in connection with the partnership accounting," the trial court erred by awarding interest on previously unpaid amounts to which Roland was entitled under the true-up agreement. The sole basis for plaintiffs' argument is Civil Code section 3287, which provides for the award, in certain circumstances, of prejudgment interest on damages recovered in a civil action. The statute is inapplicable on its face and did not form the basis for the trial court's award of interest to Roland. The trial court did not award Roland statutory prejudgment interest on damages recovered in litigation. Rather, in calculating the amounts the partnership owed to its partners upon dissolution, the court concluded that Roland was entitled to interest on the unpaid amounts due him under the true-up agreement "as both a financial custom of the [p]artnership according to the testimony of the accountants and as an applicable

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[7] Because dissociation and buyout did not exist under the UPA, our discussion of the contrast between dissociation and dissolution cites only the RUPA. For purposes of the foregoing discussion, dissolution under the UPA is not relevantly different from dissolution under the RUPA. In fact, the UPA made explicit the continuing liability of the partners after dissolution. (Former Corp. Code, § 15036.)

tenet of equity[.]" Because plaintiffs' argument is based entirely on an inapplicable statute, we reject it.

Second, plaintiffs argue that if we reverse the judgment as to the buyout payments and fee awards, we must also reverse it as to the claim for breach of fiduciary duty, which will have to be tried on remand. Defendants concede the point ("the entire claim—liability and both compensatory and punitive damages—must be litigated"), and we agree. We therefore reverse the judgment on the claim for breach of fiduciary duty.

Plaintiffs further argue that on remand they should be permitted to pursue their claim for breach of fiduciary duty on grounds they never before pleaded or otherwise advanced in the trial court. Insofar as plaintiffs seek leave to amend in order to plead those new grounds, their request should be addressed to the trial court in the first instance, so we express no opinion on it.

DISPOSITION

The judgment is reversed, and the matter is remanded for such proceedings as are necessary to carry out the views expressed in this opinion. Appellants Anton Roland, George Roland, Cathy Roland, Roland Land Company, Roland Land Enterprises, Roland Land Investment & Development, California Resources Enterprises, Inc., Consolidated Land Associates, Roland Heights Development, Inc., Roland Universal Land Co., Inc., and C.G.M.V., Inc. shall recover their costs of appeal.

<u>NOT TO BE PUBLISHED</u>.

ROTHSCHILD, J.

We concur:

MALLANO, Acting P. J.

VOGEL, J.