Factual Background

This dispute relates to the parties' interest in property located at 246 South Lake Avenue, Pasadena (hereafter, Lake Property or Property), which is presently operated as a Chipotle restaurant. Stripped to its essential title history, in 1990, Leigh Layman (Layman) and her sister, Gail Titus, purchased the Lake Avenue Property from Bollinger-Field, a California limited liability partnership. (Layman Decl. ¶ 3.) Gail and Layman held the Property as Tenants in Common; Layman owned a 51% co-tenancy interest, and Gail owned a 49% co-tenancy interest. (Layman Decl. ¶ 3.) In 2006, Layman purchased Gail's interest in the Lake Property. (Layman Decl. ¶¶ 7, 10-14; Undisputed Material Fact "UMF" 1.) Thereafter, Layman held title to the Lake Property as a married woman as her sole and separate property. (Layman Decl. ¶¶ 8-9; Moving Exhibits 2 & 3.) In 2017, Leigh transferred title to the Property from herself as an individual to herself as Trustee of the Leigh Salisbury Trust dated September 7, 2005. (UMF 2; Layman Decl. ¶ 14; Exhibit 5.)

Plaintiff Steven Bollinger (plaintiff or Bollinger) and Layman were married in 1976. (Additional Undisputed Material Facts ("AUMF") No. 1.) In 1989, Layman and her sister Gail acquired the Lake Avenue Property from Bollinger-Field, an LLP in which plaintiff was the managing general partner, with a "1031 exchange."[1] (AUMF 5.) Bollinger drafted the agreement, which included an option for Layman to repurchase from Gail her 49% interest after two years. (AUMF 13.) The option was assignable, and Bollinger asserts that he was the intended assignee. (AUMF 14.) Thereafter, plaintiff and defendant were to manage the property together.

Plaintiff and defendant divorced in 1997. (AUMF 1.) In November 2005, Gail sued Layman to invalidate the option, "among other things." (See AUMF 26.) The litigation settled and Gail agreed to a new option that would expire December 31, 2006. (AUMF 41.) Plaintiff asserts that he and Layman agreed they would use this option to acquire Gail's interest in the Lake Property that thereafter they would own and operate as partners and joint venturers, and that Bollinger would have a 49% interest. (AUMF 34, 38.) Bollinger was to take the "initiative to strategically implement a plan to take out Gail's interest, find a tenant that was bankable, and obtain bank financing on a permanent basis," and "whatever initiative was required to repurpose the building under a new tenancy" with Chipotle, which he did in the 2006 time period. (AUMF 35.)

[1] This is an exchange of like real property pursuant to IRC Section 1031, and generally is utilized in order to defer capital gains tax.

Before the option was set to expire on December 31, 2006, plaintiff obtained an increase in her HELOC as a temporary source of funds to pay off Gail. (AUMF 46.) On December 20, 2006, Layman succeeded to title to the Lake Property. (Layman Decl. ¶¶ 8-9; Moving Exhibits 2 & 3.) Bollinger negotiated a lease with Chipotle as a tenant for the Lake Property and with this long-term lease, plaintiff was able to secure a loan from Citizen Business Bank to pay off the HELOC. (AUMF 47-48.) Bollinger states that he and Layman agreed that the loan payments would be made from the 49% of the rents from the property, and when the loan was repaid, plaintiff would begin to receive 49% of the rents. (AUMF 34, 36.) Plaintiff asserts this established an equitable interest in the real property.

Currently, after the CBB loan has been paid off, Layman insists she is the sole and exclusive owner of the real property, has refused to recognize plaintiff's 49% interest in the Lake Property, and is now collecting all rents. Plaintiff's second amended complaint alleges the following causes of action: (1) Breach of Joint Venture; (2) Breach of Partnership; (3) Breach of Fiduciary Duty; (4) Constructive Fraud; (5) Fraud – Intentional Misrepresentation; (6) Fraud – Concealment; (7) Promissory Fraud; (8) Negligent Misrepresentation; (9) Breach of Contract; (10) Promissory Estoppel; (11) Financial Elder Abuse; (12) Common Count – Services Rendered (Quantum Meruit); (13) Good Faith Improver – CCP § 871.1 et seq; (14) Accounting and (15) Declaratory Relief.

Layman moves for summary judgment of the entire action and/or adjudication of issues. She asserts that each of the causes of action are time barred; that Bollinger cannot sue for financial elder abuse (11th cause of action) because he is an Arizona resident; that Bollinger was not a good faith improver (13th cause of action) because he knew he was not an owner; and that Bollinger's claims fail based on lack of a promise or agreement by Layman to give him an interest in the Lake Property.

Summary Judgment/Adjudication Standards

A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. (Code Civ. Proc., § 437c, subd. (f)(1).)

The defendant moving for summary judgment/adjudication has the burden of persuasion that "one or more elements" of the "cause of action cannot be

established" or that there is a "complete defense," and the burden of production to make a prima facie showing of no triable issues of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) Once the defendant has met this burden, the burden shifts to plaintiff to show that a triable issue of material fact exists as to that cause of action or defense. (Code Civ. Proc., § 437c subd. (p)(2).)

Evidentiary Issues

"In granting or denying a motion for summary judgment or summary adjudication, the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review." (Code Civ. Proc., § 437c, subd. (q).)

No evidentiary objections were filed. (Calif. Rules Court, rule 3.1354(b)—"All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion.") As observed in the Reply, much of the evidence is comprised of quotes from the parties' email communications and the recorded documents. "The emails are there, in black and white, for the Court to read for itself." (Reply, p. 5, l. 1.)

Statute of Limitations

The applicable statutory period is an issue of law for the trial judge. But whether plaintiff was diligent in discovering the essential facts is normally an issue for the trier of fact. Where the essential facts are undisputed, the issue may be determined on a motion for summary judgment, or on demurrer or motion for judgment on the pleadings. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 C4th 797, 810; *Kernan v. Regents of Univ. of Calif.* (2022) 83 Cal.App.5th 675, 684—triable issues as to whether plaintiff suspected wrongdoing and whether she was aware of facts triggering a duty to investigate; *Brewer v. Remington* (2020) 46 Cal.App.5th 14, 28-29—triable issues existed as to whether persistence of symptoms constituted appreciable manifestation of harm, and whether plaintiff should have linked symptoms to wrongdoing by defendant.)

Thus, "[w]hen a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if the evidence [ ] can support only one reasonable conclusion." (*Stella v. Asset Mgmt. Consultants, Inc.* (2017) 8 Cal.App.5th 181, 193.)

Here, the applicable statute of limitations for each cause of action ranges from one to four years. The complaint was filed July 1, 2022. Layman's theory is that the cause of action accrued in 2018, after Bollinger presented a document titled

"Family Planning and Chipotle Reset" to her stating: "I want to take over Gail's, now CBB's position as we originally agreed in 2006." (UMF 3.) Layman responded by email on May 3, 2018: ""I'm still trying to absorb the comments you made in your 'proposal' and needless to say, I strongly disagree with your comments and reject your proposal." (UMF 4.) Layman characterizes this as "flatly, unequivocally" rejecting the notion that Bollinger had any interest to claim in the Lake Property. Under this theory, the July 1, 2022 complaint was untimely as to the four-year statute of limitations as well as any successively shorter limitation. Layman follows this up with evidence that she emailed Bollinger on May 22, 2019 stating: "I have the sole interest in the Lake Avenue property ... [I]n no way am I willing to give up any ownership interest of Lake Avenue." (UMF No. 5.) On June 15, 2029, Layman emailed Bollinger: "I never agreed to having you replace Gail as my partner. . . .I did not ever agreed (sic) to anything like that nor would I ever." (UMF 6.) Both these statements came more than three years before the complaint was filed. On August 5, 2019, more than two years before the complaint was filed, Layman emailed Bollinger and stated: "I have felt from the tone of your past emails, you have been posturing yourself in wanting a percent of the ownership in Lake Avenue. While I certainly don't deny your past help and valuable involvement, I want to be very clear about my sole ownership ... now and in the foreseeable future." (UMF 7.) Layman's position is that these emails are very clear with no other available inference, and therefore Bollinger was on notice as early as May 3, 2018.

Bollinger argues under the "last element" accrual rule that none of his causes of action accrued until he was to begin to receive 49% of the rents upon maturity of the CBB loan in March 2022. He asserts that since his complaint was filed within one year of March 2022, all claims are timely.

1. Accrual

In 2013, the Cal. Supreme Court neatly laid out the general rule of accrual—the so-called "last element" accrual rule–as well as the exceptions and modifications to that rule as follows:

> "The limitations period, the period in which a plaintiff must bring suit or be barred, runs from the moment a claim accrues. (See Code Civ. Proc., § 312 [an action must "be commenced within the periods prescribed in this title, after the cause of action shall have accrued"]; *Pooshs v. Philip Morris USA, Inc*., supra, 51 Cal.4th at p. 797, 123 Cal.Rptr.3d 578, 250 P.3d 181; *Fox v. Ethicon Endo–Surgery, Inc.,* supra, 35 Cal.4th at p. 806, 27 Cal.Rptr.3d 661, 110 P.3d 914; *Norgart v. Upjohn Co., supra*, 21 Cal.4th at p. 397, 87 Cal.Rptr.2d 453, 981 P.2d 79.) Traditionally at common law, a "cause of action accrues 'when [it] is complete with all of its elements'—those elements being wrongdoing, harm, and causation." (*Pooshs*, at p. 797, 123 Cal.Rptr.3d 578, 250 P.3d 181, quoting *Norgart*, at p. 397, 87 Cal.Rptr.2d 453, 981 P.2d 79.) This is the "last element"

accrual rule: ordinarily, the statute of limitations runs from "the occurrence of the last element essential to the cause of action." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187, 98 Cal.Rptr. 837, 491 P.2d 421; accord, *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 815, 107 Cal.Rptr.2d 369, 23 P.3d 601; *Buttram v. Owens–Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 531, fn. 4, 66 Cal.Rptr.2d 438, 941 P.2d 71.)

To align the actual application of the limitations defense more closely with the policy goals animating it, the courts and the Legislature have over time developed a handful of equitable exceptions to and modifications of the usual rules governing limitations periods. These doctrines may alter the rules governing either the initial accrual of a claim, the subsequent running of the limitations period, or both. The " 'most important' " of these doctrines, the discovery rule, where applicable, "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Norgart v. Upjohn Co., supra*, 21 Cal.4th at p. 397, 87 Cal.Rptr.2d 453, 981 P.2d 79; accord, *Fox v. Ethicon Endo–Surgery, Inc., supra*, 35 Cal.4th at p. 807, 27 Cal.Rptr.3d 661, 110 P.3d 914.) Equitable tolling, in turn, may suspend or extend the statute of limitations when a plaintiff has reasonably and in good faith chosen to pursue one among several remedies and the statute of limitations' notice function has been served. (*McDonald v. Antelope Valley Community College Dist*. (2008) 45 Cal.4th 88, 99–100, 84 Cal.Rptr.3d 734, 194 P.3d 1026.) The doctrine of fraudulent concealment tolls the statute of limitations where a defendant, through deceptive conduct, has caused a claim to grow stale. (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 533, 85 Cal.Rptr.2d 257, 976 P.2d 808.) The continuing violation doctrine aggregates a series of wrongs or injuries for purposes of the statute of limitations, treating the limitations period as accruing for all of them upon commission or sufferance of the last of them. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 811–818, 111 Cal.Rptr.2d 87, 29 P.3d 175; see also *National Railroad Passenger Corporation v. Morgan* (2002) 536 U.S. 101, 118, 122 S.Ct. 2061, 153 L.Ed.2d 106.) Finally, under the theory of continuous accrual, a series of wrongs or injuries may be viewed as each triggering its own limitations period, such that a suit for relief may be partially time-barred as to older events but timely as to those within the applicable limitations period. (*Howard Jarvis Taxpayers Assn. v. City of La Habra, supra*, 25 Cal.4th at pp. 818–822, 107 Cal.Rptr.2d 369, 23 P.3d 601.)"

(*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.)

The "last element" accrual rule is not applicable to all causes of action. "An action for fraud thus does not accrue when the damage is "complete." The action accrues when a plaintiff first learns that a fraud may have occurred, so long as he or she could have confirmed the fraud through further investigation." (*Hacker v.*

Homeward Residential, Inc. (2018) 26 Cal.App.5th 270, 282—fraud cause of action accrued in August 2012 when party learned that there were questionable title documents related to the August 21, 2008 assignment, not when the July 2016 foreclosure sale took place; see also Code Civ. Proc., § 338, subd. (d)—"An action for relief on the ground of fraud ... is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud.")

Similarly, the general rule also does not apply when the putative defendant is in a fiduciary relationship with the putative plaintiff; in that situation, the statute of limitations does not begin to tick until "the [putative plaintiff] has knowledge or notice of the act constituting a breach of fidelity. (*Eisenbaum v. Western Energy Resources, Inc.* (1990) 218 Cal.App.3d 314, 325.) An elder abuse cause of action accrues when "the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse." (Welf. & Inst. Code, § 15657.7.)

Thus, the "last element" argument is inapplicable as to the 3rd (Breach of Fiduciary Duty), 4th (Constructive Fraud), 5th (Fraud – Intentional Misrepresentation), 6th (Fraud – Concealment), 7th (Promissory Fraud), 8th (Negligent Misrepresentation) and the 11th (Financial Elder Abuse) cause of action (Tort Causes of Action).

The "last element" argument is applicable to the 1st (breach of joint venture), 2nd (breach of partnership), 9th (breach of contract), 10th (promissory estoppel), 12th (common count—services rendered), 14th (accounting) and 15th (declaratory relief) causes of action (Contract Causes of Action). A breach of contract claim does not accrue until there has been a breach of the contract. (*Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1583.) The California Supreme Court accordingly has held that where the primary purpose of an equitable cause of action is to recover money under a contract, the statute of limitations applicable to contract actions governs the equitable claim. (*Jefferson v. J. E. French Co.* (1960) 54 Cal.2d 717, 718–719 [accounting action was subject to the two-year statute of limitations of section 339 because "the primary purpose of the action [was] to recover money under the oral contract" and the "accounting [was] merely ancillary to the perfection of plaintiff's right under the oral contract"].) Likewise, the statute of limitations for promissory estoppel based on oral promises is two years. (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1224.) Presumably, both causes of action also accrue when there has been a breach of contract.

The court will now examine the application of the accrual rules to these causes of action.

2. Triable Issues of Material Fact Exist as to When the Tort Causes of Action Accrued

As to the tort causes of action, Bollinger argues there is an issue of fact as to date of discovery because Layman intentionally led him to believe she "ultimately" would honor their agreement until at least July 2021 despite the emails recounted above in which she disavowed he had any interest in the Lake Property.

Under the "delayed discovery rule,"[2] the accrual date of a cause of action is delayed until the plaintiff is aware of his or her injury and its cause. The plaintiff is charged with this awareness as of the date he or she suspects or should suspect that the injury was caused by someone's wrongful act. The period of limitations, therefore, will begin to run when the plaintiff has a "suspicion of wrongdoing"; in other words, when he or she has notice of information of circumstances to put a reasonable person on inquiry. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109–1111.) The delayed discovery rule is effectively codified in Code of Civil Procedure section 338 subdivision (d) in connection with fraud cause of actions. Thus, the date of discovery in fraud causes of action is the date the complaining party learns, or at least is put on notice, that a representation was false. (*Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 35.)

Here, Bollinger argues that he did not have any suspicion of wrongdoing until July 2021. This argument relies on over 60 separate *undisputed* facts identified in his AUMF submission. (AUMF 59a - 122.) There is evidence that in 2016, during the signing of the loan documents, an agent of CBB observed "I sure hope Steve is participating in this," to which Layman responded "down the road." (AUMF 40.) Bollinger points out that despite Layman's declarations that he had no interest in Lake Property, she also concluded her emails with a desire to talk more about the matter (AUMF 61, 69, 73) or defer the matter (AUMF 66). Specifically, in August 2019, Layman wanted Bollinger's help in negotiating the Chipotle lease renewal as a paid consultant. (AUMF 77.) He rejected that idea but agreed to assist based on his assertion he had a vested interest. Both agreed to defer the conversation so they could focus on the lease modification. (AUMF 81.) Layman subsequently used words describing their joint interest when discussing the negotiation, such as "we" and "our" when communicating with Bollinger, as did Bollinger. (AUMF 84, 93.) Layman agreed that as of January 2020, she and Bollinger were still having a conversation about whether he had an interest in the Lake Property. (AUMF 106.) Bollinger again raised the discussions regarding his vested interest via email on

[2] Although one tolling doctrine, last overt act, might not apply to save the action here, another tolling doctrine, delayed discovery, can also apply. (*Aaroe v. First American Title Ins. Co.* (1990) 222 Cal.App.3d 124, 128-- Any other rule would simply repeal the three-year discovery rule of section 338(d), which is applicable in fraud and conspiracy to defraud cases, and replace it with a straight three-year statute measured from the last fraudulent act."; *Livett v. F.C. Financial Associates* (1981) 124 Cal.App.3d 413, 421 [reversing summary judgment in a conspiracy to defraud case under last overt act doctrine, and recognizing the action could also be timely because of "reasonable failure to discover facts...."].)

May 12, 2021. (AUMF 113-116.) On July 2, 2021, Layman told Bollinger it would be best for him not to have any involvement with the Lake Property because of their disagreement over whether he is entitled to an interest in the Lake Property. (AUMF 116.) Communication was severed in January 2022. (AUMF 122.)

The content of the conversations can be debated, as well as the meaning of or intention behind the words used. For example, Layman admitted that when she got defensive, she says things she does not mean. (AUMF 72.) Motivations can also be questioned. Layman maintains that Bollinger's continued contribution to the Lake Property was "for the kids" (UMF 5) while Bollinger maintains his contributions satisfied his obligations under the agreement.

In ruling on the motion, the court must consider not only the direct evidence presented, but also reasonable inferences to be drawn therefrom. (Code Civ. Proc., § 437c subd. (c); see *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36 (overruled on other grounds by *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 543); *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840; *Clark v. Baxter Healthcare Corp.* (2000) 83 Cal.App.4th 1048, 1059, 1060.) For these reasons, and in light of the policy to construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party, the court cannot conclude that the essential facts are undisputed and that the claim accrued as of May 2018, or any subsequent date. Consequently, the motion for summary judgment based on the statute of limitations as to the tort causes of action are denied.

3. Triable Issues of Material Fact Exist as to When the Contract Causes of Action Accrued

The "last element" argument is applicable to the 1st (breach of joint venture), 2nd (breach of partnership), 9th (breach of contract), 10th (promissory estoppel), 12th (common count—services rendered), 14th (accounting) and 15th (declaratory relief) causes of action (Contract Causes of Action). Thus, these claims do not accrue until there has been a breach of the contract. (*Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1583.) Here, Bollinger asserts that the agreement was that he would begin to receive 49% of the rents upon maturity of the CBB loan in March 2022. (AUMF 36-38.) His complaint, he argues, was filed July 1, 2022, comfortably within the two-year limitation period. All the contract actions are based on an oral agreement.

Layman argues that her emails clearly repudiated any oral agreement. "In a suit to enforce an oral agreement, the statute of limitations in Code of Civil Procedure section 339(1) begins to run when the oral contract is repudiated." (*Parker v. Walker* (1992) 5 Cal.App.4th 1173, 1190; *Svistunoff v. Svistunoff* (1949) 94 Cal.App.2d 651, 653.) But if the evidence shows that the plaintiff was lulled into delaying the

presentation of the claim by a continuous course of misleading conduct on the part of the defendant, such as promises to pay a debt, estoppel will prevent the defendant from using the statute of limitations to claim that the action is untimely. (*Gaglione v. Coolidge* (1955) 134 Cal.App.2d 518, 527.) Where the facts are undisputed, the accrual date of the statute of limitations may be determined as a matter of law. (*International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611.) However, where the evidence is in conflict regarding the terms of the oral contract and the date of the breach, the question is properly submitted to the jury as a mixed question of fact and law. (*Mitchell v. Towne* (1939) 31 Cal.App.2d 259, 262; *San Francisco Unified School Dist. v. W.R. Grace & Co*. (1995) 37 Cal.App.4th 1318, 1325-1326.)

For the same reasons recited above, the court finds the evidence is in conflict regarding whether the contract was repudiated. The motion for summary adjudication of these causes of action based on the statute of limitations is denied.

Financial Elder Abuse (11th) Cause of Action

Bollinger's Eleventh Cause of Action for Financial Elder Abuse is asserted under the Elder Abuse and Dependent Adult Civil Protection Act (hereinafter, "Elder Abuse Act"). "'Elder' means any person *residing in this state*, 65 years of age or older." (Welf. & Inst. Code, § 15610.27 [emphasis added].)

In his response to Form Interrogatory 2.5[3], Bollinger stated that his residence address for approximately the past five years was in Chino Valley, Arizona. (Layman's Evidence, Exh. 21.) As of June 3, 2019, Bollinger indicated he was living in Arizona "permanently now." (Layman's Evidence, Exh. 12.) Since the form interrogatories were dated May 17, 2023, there is sufficient evidence to establish that as of May 17, 2018, Bollinger was a resident of Arizona.[4]

Bollinger argues that by May 3, 2018, Layman was engaged in defrauding him by concealment. (See AMF 61—Layman rejects Bollinger's proposal regarding profits from Lake Property but offers to discuss it with him.)[5] Thus, his argument is that his residency in this state on May 3, 2018 when the fraud by concealment began is sufficient for support his claim for elder financial abuse, even though he resided in Arizona as of approximately May 17, 2018.

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[3] The copy of the responses contained in Exhibit 21 was not accompanied by a verification. However, there was no objection to the evidence and the point seems to be conceded in opposition.

[4] In response UMF 18, which states "Steve has been a resident of Arizona since at least 2018" Bollinger asserts that his deposition testimony clarifies that he was "transitioning" to Arizona at least as late as May 2018. However, the relevant pages from the deposition cited in support were missing from Bollinger's appendix of evidence.

[5] The court acknowledges the dissonance created by this argument—Bollinger asserts that fraud commenced on May 3, 2018 while he also denies that is the date of discovery for purposes of statute of limitations. The continuing violation doctrine neatly addresses this.

None of the cases cited by either party directly address whether the elder must remain a resident of this state for the duration of the fraud. "Rule 3.1113 rests on a policy-based allocation of resources, preventing the trial court from being cast as a tacit advocate for the moving party's theories by freeing it from any obligation to comb the record and the law for factual and legal support that a party has failed to identify or provide." (*Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.*, (2011) 197 Cal. App. 4th 927, 934.) As such, Layman has failed in her burden to establish that "one or more elements" of the "cause of action cannot be established."

Good Faith Improver (13th) Cause of Action

"A 'good faith improver' is defined as one who makes an improvement to land in good faith and under a mistaken belief of law or fact that he is the landowner." (Gilardi v. Hallam (1981) 30 Cal.3d 317, 325.) Layman argues that Bollinger could not have believed in good faith that he was an owner of Lake Property since he knew he was not on title to the property. To the same extent there remains an issue of fact regarding the fraud and contract claims, there remains an issue of fact here. The motion as to this cause of action is denied.

Breach of Joint Venture (1st), Breach of Partnership (2nd), Declaratory Relief (15th) Causes of Action

Layman argues that Bollinger cannot establish the essential elements of the First Cause of Action for Breach of Joint Venture, Second Cause of Action for Breach of Partnership, and Fifteenth Cause of Action for Declaratory Relief fail because the undisputed evidence shows there was no agreement between Bollinger and Layman, no sharing of the profits and losses, and no right to joint control.

The elements necessary to prove a joint venture are: "(1) joint interest in a common business; (2) with an understanding to share profits and losses; and (3) a right to joint control." (*April Enterprises, Inc. v. KTTV* (1983) 147 Cal.App.3d 805, 819.) A partnership and joint venture "are the same in all essential respects." (*Chambers v. Kay* (2002) 29 Cal.4th 142, 151.) Bollinger's claim for declaratory relief is based on the alleged partnership or joint venture.

"[A] partnership need not be evidenced by writing," and "intent may be implied from their acts." (*Eng v. Brown* (2018) 21 Cal.App.5th 675, 694.) It is well-settled that the existence of a partnership is a question of fact. (See *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141, 1157; *Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445 [existence of partnership required a fact-intensive analysis].) Likewise, the existence or nonexistence of a joint venture is a fact question for resolution by the jury. (*Kaljian v. Menezes* (1995) 36 Cal.App.4th 573, 586.)

The same facts that raise an issue as to the statute of limitations also raise an issue regarding these causes of action (e.g., whether Layman meant what she said or whether the entire course of conduct suggested differently). The motion for summary adjudication is denied.

Intentional Misrepresentation (5th), Seventh Cause of Action for Promissory Fraud (6th), Negligent Misrepresentation (8th), Breach of Contract (9th), and Promissory Estoppel (10th) Causes of Action

Layman argues that these causes of action fail because the undisputed evidence shows that Layman never made any promise, agreement, or representation to Bollinger that he had or would receive an interest in the Property. The same facts that raise an issue as to the statute of limitations also raise an issue re these causes of action (e.g., whether Layman meant what she said or whether the entire course of conduct suggested differently). The motion for summary adjudication is denied.

Breach of Fiduciary Duty 3rd), Constructive Fraud (4th), and Concealment (6th) and Accounting (14th) Causes of Action

Layman argues that these causes of action fail because the undisputed evidence shows there was no relationship between Bollinger and Layman giving rise to a fiduciary duty or duty to disclose, in particular that "the undisputed facts show that there was no relationship between Steve and Leigh giving rise to a fiduciary duty or duty to disclose any withheld facts. As explained above, the undisputed facts show that there was no partnership or joint venture, no contract, and no promise or representation from Leigh about Steve having an interest in the Property." As the court has not resolved the partnership, joint venture or contractual issues in Layman's favor, this issue remains unresolved, as does the accounting issue. The motion for summary adjudication is denied.

Conclusion

For the foregoing reasons, the court denies the present motion for summary judgment or adjudication of issues.